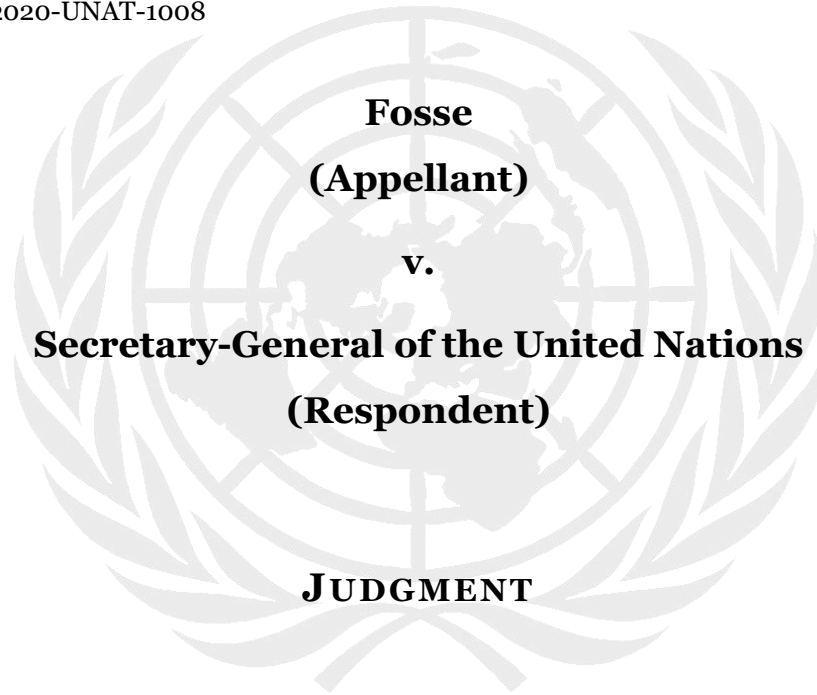




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2020-UNAT-1008



**Fosse  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Dimitrios Raikos, Presiding Judge Sabine Knierim Judge Graeme Colgan
Case No.:	2019-1323
Date:	27 March 2020
Registrar:	Weicheng Lin

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Counsel for Ms. Fosse:	Aleksandra Jurkiewicz, OSLA
Counsel for Secretary-General:	Maryam Kamali

**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 her original responsibilities or her reassignment to a vacant position at the same level within the Department of Management in New York. While her case was pending before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), Ms. Fosse accepted a job offer from the International Civil Aviation Organization (ICAO) in Montreal, Canada, and was transferred to ICAO. Ms. Fosse then filed a motion for leave to amend her UNDT application to reflect that since she was no longer a staff member of the United Nations, she no longer sought reassignment; rather she demanded compensation instead. She also claimed that the refusal to return her to her original functions left her in a position without tangible responsibilities for ten months and forced her to accept a position offered by ICAO, and that amounted to constructive dismissal. The Dispute Tribunal rejected Ms. Fosse's application. In its view, the Administration had discretion to reassign all staff members, whether as reassignment or as temporary assignment. The UNDT considered Ms. Fosse's claim of constructive dismissal not receivable *ratione materiae*, because it had been raised for the first time in her UNDT application, but not in her request for management evaluation. For reasons set forth below, we affirm the UNDT decision, by majority opinion, with Judge Colgan dissenting.

**Facts and Procedure**

2. Ms. Fosse joined the Organization in June 1989 as an Associate Coordination Officer at the P-2 level with the United Nations Office at Geneva, having passed the national competitive examination. In October 1993, she was transferred to the Headquarters in New York to work as, first, an administrative officer, and then, a finance officer.

3. On 1 May 2009, Ms. Fosse was selected as a Special Assistant at the P-5 level to the first Assistant Secretary-General for the Office of Information and Communications Technology or Chief Information Technology Officer (ASG/OICT or CITO) to assist with the establishment of the new office of OICT in the areas of administrative, financial and human resources management while managing the Operations Support Section (OSS), OICT. After the first ASG/OICT departed in August 2012, Ms. Fosse took up the functions of Chief of OSS, under the supervision of, first, the acting ASG/OICT, and then, the new ASG/OICT.

4. On 27 February 2014, the new ASG/OICT asked Ms. Fosse to assume a new function of leading the effort of setting up the “Global Help Desk” in connection with the implementation of UMOJA.<sup>1</sup> The ASG/OICT believed that Ms. Fosse’s great knowledge and tremendous experience “[could] help OICT establish and sustain this key function”. She clarified that Ms. Fosse “would move to this role over the next two-three months as we search to backfill [her] previous role” of the Chief of OSS. Ms. Fosse agreed to that arrangement. No personnel action form was issued to reflect the change of Ms. Fosse’s function.

5. On 14 March 2014, OICT announced a temporary job opening (TJO) for the Senior Officer with OSS at the P-5 level that Ms. Fosse had encumbered before she moved to the Global Help Desk. In a memorandum dated 14 July 2014, the ASG/OICT announced her selection decision for this TJO, noting that this TJO position was “against the blocked P-5 post for Ms. Fosse during her temporary assignment with the Global Service Desk”<sup>2</sup> and was “available for this recruitment for 11 months with possibility of extension”. According to Ms. Fosse, the post of Chief of OSS was reclassified as Senior Administrative Officer at the P-5 level, and the candidate selected for the TJO was placed on the reclassified post as of 1 September 2015.

6. In October 2016, Ms. Fosse took on a new role as the Coordinator of the Digital Blue Helmets (DBH) program in OICT. Again, no personnel action form was issued to record the change of Ms. Fosse’s function.

7. On 1 June 2017, Ms. Fosse wrote to the ASG/OICT requesting that personnel action forms be issued to record her temporary assignments as the Coordinator of the Unite Service Desk and the Coordinator of the DBH program, and that she be returned to her previous position of the Chief of OSS. Her request and the follow-up e-mails in June and July 2017 remained unanswered.

8. On 28 July 2017, Ms. Fosse submitted a request for management evaluation of the decisions not to issue her personnel action forms to record her assignments and the decision not to return her to the post of Chief of OSS.

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<sup>1</sup> UMOJA is an IT application that the United Nations Secretariat uses to manage its administration, with the Enterprise Resource Planning software at its center. UMOJA is the Swahili word for “unity”.

<sup>2</sup> The Global Help Desk was renamed the Global Service Desk and subsequently the Unite Service Desk.

9. In a letter dated 24 November 2017, the Under-Secretary-General for Management (USG/M) informed Ms. Fosse of the outcome of the management evaluation, upholding the decision not to return her to the position of Chief of OSS on the grounds, *inter alia*, that there was no evidence that she had a lien on that post, or that she had ever challenged her reassignment from the post of the Special Assistant to CITO to the Coordinator of the Global Help Desk. The USG/M maintained that the Administration had broad discretion to make such an assignment permanent. In the view of the Management Evaluation Unit (MEU), which conducted the management evaluation, the CITO did not convey a message in her e-mail of 27 February 2014 that Ms. Fosse's assignment to the Global Help Desk would be temporary, as she instructed Ms. Fosse to "establish and sustain" the Global Help Desk in her "new role". The USG/M advised Ms. Fosse that as per the MEU's recommendation personnel action forms would be issued to record her assignments.

10. On 22 February 2018, Ms. Fosse filed an application with the Dispute Tribunal to contest a) the decision not to return her to her original functions as the Chief of OSS following her temporary change of responsibilities as she was assigned together with her post to the two IT projects; and b) the implicit decision not to recognize her two temporary assignments during the 2014-2017 period in her official status file. In respect of a), Ms. Fosse stated that, despite the decision of the USG/M on 24 November 2017, no personnel action forms had been issued. Regarding b), Ms. Fosse contended that the failure to return her to the post of Chief of OSS was tantamount to "constructive dismissal", since her responsibilities for launching the two IT projects had been successfully completed and she was left on the position of coordinator of a highly technical team of IT experts for which she did not have the skills or qualifications to lead and for which the Administration had not provided any training or pathway for her to adequately perform the new responsibilities.

11. On 28 February 2018, Ms. Fosse was informed that two personnel action forms had been processed to reflect her assignments. Her two assignments in 2014 and 2016 had been recorded as "reassignment".

12. On 1 March 2018, Ms. Fosse was offered, and accepted, a position as Chief of Section, Programme Budget at the P-5 level with the Secretariat of the Convention on Biological Diversity (SCBD) in Montreal, Canada. Effective 16 April 2018, she was released by the United Nations to the SCBD on transfer in accordance with the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations

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, a case against that decision becomes moot and is not receivable.

19. Even assuming that the matter was not considered moot, Ms. Fosse's claim has no merit because the Administration has at all times discretion to reassign staff members. In the present case, the Administration did not abuse its discretion by considering Ms. Fosse's two assignments as reassignments instead of temporary assignments.

20. The UNDT correctly concluded that Ms. Fosse's claim with respect to constructive dismissal was not receivable, since it was raised for the first time in her UNDT application. This finding is consistent with Staff Rule 11.2(a) and the jurisprudence of the Appeals Tribunal. Ms. Fosse added the claim of constructive dismissal in order to make compensation a viable remedy. Otherwise, she would have no cause of action.

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 which it is asserted that the Dispute Tribunal has: (a) exceeded its jurisdiction or competence; (b) failed to exercise the jurisdiction vested in it; (c) erred on a question of law; (d) committed an error of procedure, such as to affect the decision of the case; or (e) erred on a question of fact, resulting in a manifestly unreasonable decision.

23. The Appeals Tribunal emphasizes that the appeals procedure is of a corrective nature and, thus, is not an opportunity for a dissatisfied party to reargue his or her case. A party cannot merely repeat on appeal arguments that did not succeed before the lower court. The function of the Appeals Tribunal is to determine if the Dispute Tribunal made errors of fact or law, exceeded its jurisdiction or competence, or failed to exercise its jurisdiction, as prescribed in Article 2(1) of the Appeals Tribunal Statute. An appellant has the burden of satisfying the Appeals Tribunal that the judgment he or she seeks to challenge is defective. It follows that an appellant must identify the alleged defects in the impugned judgment and state the grounds relied upon in asserting that the judgment is defective.<sup>3</sup> Both elements are determinative of the subject-matter of the appellate proceedings and the jurisdiction of the Appeals Tribunal.

24. At the outset, we note that Ms. Fosse' grounds of appeal are focused solely on the UNDT's legal conclusion that her claim that she was constructively dismissed, for which she sought to amend her application and requested compensation in lieu of specific performance, was not receivable *ratione materiae*, because she had failed to submit a request for management evaluation. This is the only issue for the Appeals Tribunal to address. Ms. Fosse does not put forth any specific grounds of appeal with reference to the UNDT's findings that her claims regarding the Personnel Action forms and the rescission of the administrative decision not to return her to her original functions as the Chief of OSS were

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<sup>3</sup> *Abu Salah v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-974, para. 33; *Kule Kongba v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-849, para. 19.

moot and hence this part of her application was not receivable. Ms. Fosse contends that the UNDT erred in law and in fact when it found that her claim of constructive dismissal had been raised for the first time in her application and was not receivable *ratione materiae*. For the reasons which follow, we find that this ground of appeal is entirely without merit.

25. The UNDT's conclusion on the question of receivability is set out in the following paragraph of its Judgment:<sup>4</sup>

The Tribunal notes that the Applicant also raises a claim that she was constructively dismissed, and in response to the Respondent's argument on the receivability issue, she requests that she be allowed to amend her initial request to seek compensation in lieu of specific performance with regard to her claim of constructive dismissal. The Tribunal notes that this claim has been raised for the first time in the present application and was not subject to management evaluation, which is mandatory under art. 8.1(c) of the Dispute Tribunal's Statute read together with staff rule 11.2. Since the Applicant did not submit her claim of constructive dismissal for management evaluation, this claim is not receivable *ratione materiae*.

26. Ms. Fosse argues that the UNDT erred in its holding, as this aspect of her claim should have been deemed receivable because it was not a new claim. Rather, she maintains that she only submitted a new legal qualification of the previously correctly identified administrative decision. In other words, she contends that she sought to correctly qualify the challenged decision not to return her to her previous functions as constructive dismissal. Further, Ms. Fosse claims that the qualification of constructive dismissal is not a new claim as far as it is directed towards the same purposes of demonstrating the illegal character of the same administrative decision.

27. The Appeals Tribunal does not find merit in these submissions. Under the specific circumstances of the present case, we agree with, and affirm, the UNDT's final legal conclusion that Ms. Fosse's claim of constructive dismissal was not receivable.

28. We are satisfied, from a review of both the request for management evaluation and the UNDT Judgment, that the UNDT was cognizant of the case being made by Ms. Fosse when it rejected her claim that she was constructively dismissed as non-receivable. The UNDT properly considered that Ms. Fosse raised this claim for the first time in her application. Having regard to the provisions of Article 8(1)(c) of the UNDT Statute, the

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<sup>4</sup> Impugned Judgment, para. 24.



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> *Vukasović 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

Dated this 27<sup>th</sup> day of March 2020.

*(Signed)*

Judge Raikos, Presiding  
Athens, Greece

*(Signed)*

Judge Knierim  
Hamburg, Germany

Entered in the Register on this 19<sup>th</sup> day of June 2020 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar

**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 is an important administrative significance affecting Ms. Fosse's employment depending on which of these two expressions represents correctly the position. Ms. Fosse then initiated her proceedings in the UNDT challenging the propriety of the Organisation's acts and omissions.

4. After doing so and while awaiting a hearing before the Dispute Tribunal, Ms. Fosse took on another position, on "transfer" from the Organisation to a United Nations-associated entity in Canada. She says she did so out of frustration at the Organisation's actions (and inactions) illustrated by the outcome of the management evaluation exercise. She then sought to amend her original pleadings and to challenge again the assignment/reassignment conundrum. In relation to the Organisation's refusal to return her to her original role for

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 which she requested, that is accurate information. Neither we nor the UNDT can or could, without investigating them, determine whether the classifications assigned were accurate. However, the UNDT extinguished prematurely Ms. Fosse's legitimate right to challenge a matter affecting her employment status. In my conclusion, it did so erroneously.

8. As to Ms. Fosse's entitlement to amend her pleadings before the UNDT to allege constructive dismissal and seek damages therefor, I respectfully disagree with the majority's reasoning for upholding the UNDT's Judgment. This question turns on what is required of

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 administrative decision that is for evaluation, not a staff member's legal causes of action. Management evaluation is a process whereby an independent arm of the Organization (the MEU) considers, with new eyes, the correctness of an administrative decision and may recommend that this be affirmed, reversed or amended. It is a process that is intended to ensure that obvious administrative errors are weeded out and corrected before they get to the UNDT. So, the UNDT Statute requires, in cases such as Ms. Fosse's, there to have been a management evaluation before an applicant can file in the UNDT.

10. The UNDT Statute does not, however, say anything about the minimum requirements of a submission to the MEU, let alone that a grievant must frame his or her complaint as a cause of action known to law, or that unless he or she does so, the staffer is prohibited from framing a legal cause or causes of action for the UNDT other than precisely that put to the MEU. To do so would require, in effect, pleadings to be formulated and submitted to the MEU which is not a judicial body but rather an administrative review one. Why should not a staff member identify the administrative decision the subject of the complaint, say what he or she thinks is wrong about it and wait until a negative result is achieved, before getting legal advice and assistance to formulate a claim for the UNDT with potentially multiple causes of action arising from the same set of facts? Such an interpretation of the process would still preserve the valuable filtering and correction mechanism that is management evaluation.

11. I would conclude that Article 8 of the UNDT Statute and Staff Rule 11.2 are satisfied if the staff member identifies for management evaluation the administrative decision objected to, states his or her view about what is wrong with it, and indicates the desired outcome to the complaint. It is not only unnecessary, but inappropriate in the scheme of management evaluation, that such a staff member must also then formulate and state all legal causes of action that might attach to that complaint and as might subsequently be

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 review. However, the reality of the situation was otherwise. The correctness of the administrative decision that had led to that claim and which would no doubt constitute the Organisation's defence to it, had been submitted to management review and assessed.

13. I would allow the appeal and remit the proceeding to the Dispute Tribunal to allow Ms. Fosse's pleading amendments, to determine her claims on the assignment/reassignment question, to determine whether she was dismissed constructively and unlawfully and, if so, her claims to damages. I consider that this Tribunal should not too readily shut its doors to litigants having access to merits-based justice by too narrowly interpreting and applying gatekeeping rules which have been fulfilled in letter and spirit.

14. I add the observation, finally, that I consider the Organisation treated Ms. Fosse shabbily by failing or refusing to respond repeatedly to her requests for documentation to which she was entitled about her role changes. It did not even apparently acknowledge her requests, let alone to explain why it may not have been able to deal with them if that had been the reason for inaction. Such an attitude risks losing the respect of the Organisation's staff and the trust they place in the objective and fair resolution of disputes through the management evaluation system.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of March 2020.

*(Signed)*

Judge Colgan  
Auckland, New Zealand

Entered in the Register on this 19<sup>th</sup> day of June 2020 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar