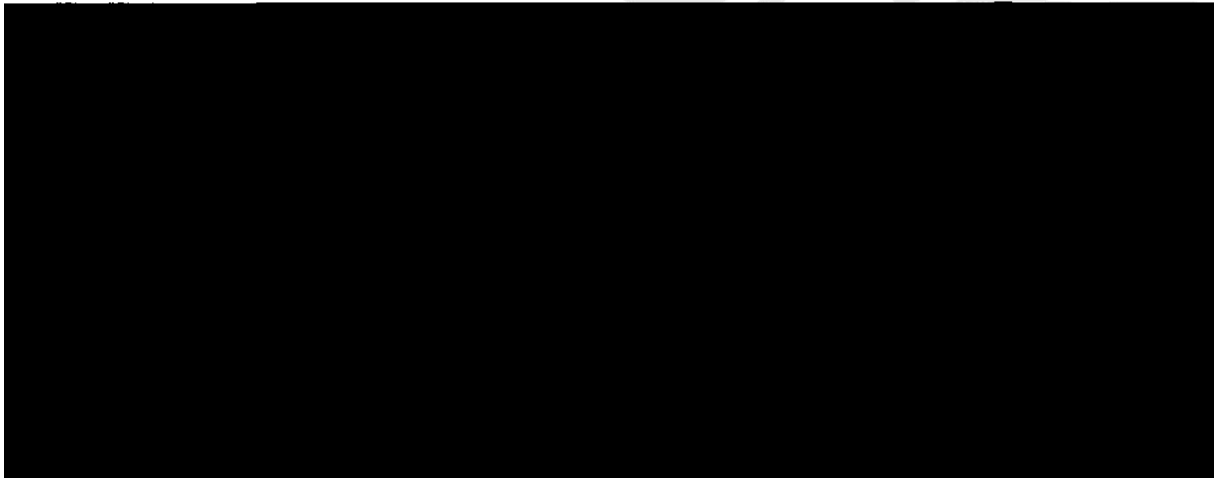


Judgment No. 2014-UNAT-479



Counsel for Mr. Gehr:

Self-represented

JUDGE MARY FAHERTY , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/135, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 31 October 2013, in the case of *Gehr v. Secretary-General of the United Nations*. The Secretary-General appealed on 6 January 2014 and Mr. Walter Gehr answered on 9 January 2014.¹

Facts

2. The facts set out in the Dispute Tribunal Judgment, and which are not disputed, are as follows:²

... The Applicant joined the [United Nations Office on Drugs and Crime (UNODC)] in Vienna in 2002 and, in 2007, was appointed as a Crime Prevention and Criminal Justice Officer at the Terrorism Prevention Branch (“TPB”), Division of Treaty Affairs (“DTA”). His fixed-term appointment was extended several times until 31 December 2011, when he was separated from service.

... In the fall of 2009, the Chief, TPB, and the Officer-in-Charge, DTA, announced to TPB staff that the Branch was to be reorganised. In early November 2009, the Chief, TPB, and the Officer-in-Charge, DTA, were the Applicant’s First and Second Reporting Officers respectively (“FRO” and “SRO”).

... On 3 November 2009, the Applicant’s supervisors signed off the mid-point review for the performance cycle period of 1 April 2009 to 31 March 2010 (“2009-2010 performance appraisal”).

...

... On 18 January 2010, the Officer-in-Charge, DTA, requested the Applicant to take action in order to finalise his mid-point performance review. Responding to this request, the Applicant pointed out that he had encountered technical problems with the electronic performance appraisal system (“e-PAS”) and that his e-PAS report contained some inaccuracies.

¹ The Secretary-General filed his appeal during the 2013-2014 judicial winter recess. The appeal was therefore registered as timely received on 6 January 2014.

² Impugned Judgment, paras. 3-5, 28-42, 49-59, 8, 10, 11, 1.

... By "Special Message" dated 1 March 2010, the Chief, Human Resources Management Service ("HRMS"), UNODC, informed staff that, in view of the fact that the 2009-2010 performance appraisal was to end on 31 March 2010, end-of-cycle appraisals ought to be completed by 16 April 2010.

... On 25 March 2010, the Chief, TPB, enquired as to the Applicant's availability to discuss his performance with a view to finalising his 2009-2010 e-PAS report. In an email sent on the same day to the Chief, HRMS, the Applicant objected to the decision to proceed with his performance appraisal, emphasising that the e-PAS only applied to staff members whose appointments were of at least one year and that the Officer-in-Charge, DTA, had not been designated as his reporting officer though he had taken part in the appraisal.

... On 15 April 2010, the Officer-in-Charge, HRMS, responded to the Applicant's email of 25 March 2010, explaining that, though the policy governing the e-PAS process as set out in administrative instruction ST/AI/2002/3 [(Performance Appraisal System)] applied to staff holding an appointment of at least one year, the length of the Applicant's consecutive appointments amounted to one year and covered the performance cycle. He also recommended that a meeting be convened with the Applicant and his FRO in order to finalise his e-PAS report.

... An exchange of emails ensued between the Applicant and the Officer-in-Charge, HRMS, in which the former argued that ST/AI/2002/3 was not applicable to staff members who held an appointment of less than a year at the beginning of the new performance cycle or at the time of their mid-point performance review.

... By email of 5 May 2010, the Officer-in-Charge, HRMS, advised the Applicant that, in the event he insisted to be evaluated separately for each period corresponding to extensions of his appointment, his reporting officers would proceed with his performance appraisal outside the e-PAS. In response to this email on 6 May 2010, the Applicant objected to the proposed course of action and asked to be provided with the provisions according to which such appraisal would be conducted.

... On 12 October 2010, the Chief, TPB, wrote to the Applicant, stating that, in case he persisted not to take action to finalise his e-PAS report, she and his SRO would prepare a written appraisal of his 2009-2010 performance; the document would then be shared with the Applicant and placed in his [Official Status File (OSF)]. The

... On 24 November 2010, the Applicant enquired with the Officer-in-Charge, DTA, whether a rebuttal would be possible since his performance appraisal had been prepared outside of the framework of ST/AI/2002/3. The Officer-in-Charge, DTA, responded on the same day that, since the Applicant had declined to use the e-PAS, his performance appraisal had indeed been prepared outside of that system and the possibility of a rebuttal did not apply.

... By email of 26 November 2010 to the Chief, TPB, the Officer-in-Charge, DTA, and the Chief, HRMS, the Applicant proposed that his performance be appraised using the e-PAS only for the period from 1 April to 31 October 2009. He further asked which provisions would apply in the event that the proposed option was rejected.

... On 1 December 2010, the Applicant submitted a request for management evaluation, in which he challenged a series of "decisions" taken in relation to his 2009-2010 performance appraisal, namely the decision to carry out a single appraisal, the decision to take into consideration events which post-dated 31 March 2010, the failure to answer his queries concerning the applicable provisions and the decision not to allow him to rebut his appraisal.

... By email of 1 December 2010, the Officer-in-Charge, DTA, informed the Applicant that the option proposed in his email of 26 November 2010 had been rejected. He stated that ST/AI/2002/3 was applicable to the 2009-2010 performance cycle, that despite many requests and instructions the Applicant had repeatedly refused to use the e-PAS and that it had accordingly been decided to proceed with the written performance appraisal outside the e-PAS system. He also stated that the deadline for the Applicant to submit his comments had been extended to 10 December 2010.

... In the course of the management evaluation, the Administration of UNODC indicated in January 2011 that it would remove the written performance appraisal from the Applicant's OSF. It added that it would prepare a revised version, which would not refer to matters pertaining to the 2010-2011 reporting cycle and which the Applicant would be entitled to rebut in accordance with sec. 15 of ST/AI/2002/3.

... Meanwhile, the Applicant, on 25 January 2011, filed an application which was assigned case No. UNDT/GVA/2011/004, challenging the same matters which he had submitted for management evaluation, because he had not received a response from the MEU.

... By letter dated 1 February 2011, the Applicant was notified of the Secretary-General's decision to uphold the decision to carry out a single appraisal for the period from 1 April 2009 to 31 March 2010. Further, in view of the explanations provided by the Administration of UNODC in January 2011, the Secretary-General considered that the decision to take into consideration in the appraisal matters post-dating the 2009-2010 performance cycle and the decision to deny the Applicant an opportunity to rebut the appraisal had become moot.

... On the same date, HRMS wrote and told the proposed individual that since he was the only person at the Director level left in the panel, he had to take up the assignment.

... On 17 August 2011, the proposed individual took up the role of Chair and was provided with the relevant materials regarding the Applicant's rebuttal. On 14 October 2011, the panel proposed to the Applicant possible dates for an interview, alternatively between 1-8 November 2011 or 28-15 December 2011.

... The Applicant indicated his availability for 13-15 December 2011 and his interview took place on 13 December 2011, while the SRO was interviewed on 31 January 2012.

...

... [O]n 23 March 2012, the rebuttal report was issued.

... On 28 March 2012, the Applicant filed [a]n application contesting the process taken by the Administration in establishing the rebuttal panel and the report of the rebuttal panel. The application was served on the Respondent on 29 March 2012 and a Reply was filed on 30 April 2012.

... On 2 April 2012, the Applicant received a revised rebuttal report.

... [Before the UNDT, the Applicant contested] the decision to finalize his performance appraisal for the performance cycle 1 April 2009 to 31 March 2010 two years after the end of the cycle. He also contest[ed] the decision to have the rebuttal of his 2009-2010 performance appraisal report conducted by rebuttal panel members from a list which had not been established in accordance with sec. 14.1 of ST/AI/2002/3 ...

The UNDT Judgment

3. While the issue of receivability of Mr. Gehr's application was not raised by the Secretary-General, the Dispute Tribunal nevertheless considered this issue, in circumstances where Mr. Gehr had not sought management evaluation concerning certain aspects of the rebuttal panel report before filing his application with the UNDT.

4. The Dispute Tribunal found that as a rebuttal panel should be considered a technical body, as provided for in Staff Rule 11.2(b), Mr. Gehr was not required to seek management evaluation of the rebuttal panel report. Accordingly, it found his application receivable.

5. On the merits, the Dispute Tribunal found that the delays in presenting Mr. Gehr firstly, with his performance appraisal, and later with the rebuttal panel report were attributable to the Administration. Moreover, the Dispute Tribunal found that the rebuttal process was conducted by a panel which was not competent to do the review. Finding the above to be violations of Mr. Gehr's rights, the UNDT awarded compensation of USD 5,000 for breach of procedural rights and the inordinate delay in issuing the performance appraisal and the rebuttal report. The UNDT also ordered that the UNDT Judgment be placed in Mr. Gehr's OSF.

Parties' Submissions

The Secretary-General's Appeal

6. The UNDT erred in concluding that Mr. Gehr's application, insofar as it related to the decision to conclude the rebuttal process only two years after his contract expired, was receivable, since he had failed to request management evaluation prior to filing his application with the UNDT.

7. The Secretary-General submits that the Dispute Tribunal erred in concluding that Mr. Gehr could benefit from the exemption in Staff Rule 11.2(b) and argues that the present case did not meet the "very limited circumstances" under Staff Rule 11.2(b) where a request for management evaluation is not required, as articulated by the Appeals Tribunal in Judgment No. 2013-UNAT-293 in the case of *Gehr v. Secretary-General of the United Nations*.

8.

11. First, regarding the fourteen-week delay (November 2010 to March 2011) in issuing

14. Lastly, the Secretary-General submits that the UNDT is precluded by the doctrine of *res judicata* from awarding compensation to Mr. Gehr on the basis of his having suffered emotional stress and anxiety arising from the inclusion in his 2009-2010 performance appraisal of matters which did not occur during the reporting period in question. In Judgment No. UNDT/2011/211, the UNDT declined to award compensation on that basis, a ruling upheld by the Appeals Tribunal in Judgment 2012-UNAT-253.

Mr. Gehr's Answer

15. Mr. Gehr requests the Appeals Tribunal to confirm the Dispute Tribunal Judgment.

16. On the receivability issue, if the Appeals Tribunal were to find that he should have requested management evaluation before making the application that led to the Dispute Tribunal Judgment, Mr. Gehr submits that the applicable Staff Rules regarding management evaluation were drafted so badly that even a Judge of the Dispute Tribunal could misunderstand them and advise that management evaluation was not required. The Administration is thus bound by the badly formulated Staff Rules and their operation should not work to Mr. Gehr's detriment.

17. If the Appeals Tribunal were to find that the rebuttal panel was not incompetent to hear his appeal of his performance appraisal, Mr. Gehr submits that the rebuttal process suffered from other procedural irregularities as set out in his applications before the Dispute Tribunal, under cases UNDT/GVA/2012/24 and UNDT/GVA/2011/28. Those procedural irregularities made the rebuttal process null and void.

Considerations

18. At the outset, it falls to the Appeals Tribunal to determine whether the UNDT erred in law in admitting Mr. Gehr's complaint concerning delays in the rebuttal process.

19. Mr. Gehr's application to the Dispute Tribunal dated 28 March 2012 detailed two decisions in respect of which he made complaint, namely (i) the decision to finalize his performance appraisal for the year ending 31 March 2010 some two years after his contract had expired, and (ii) the decision to conduct the rebuttal process with rebuttal panel members from a list which had not been established in accordance with Section 14.1 of ST/AI/2002/3.

20. In Part VI of his application, Mr. Gehr confirmed that he sought management evaluation only in respect of the latter decision, on 5 May 2011, which was responded to on 17 June 2011.

21. In his submissions before this Tribunal, the Secretary-General acknowledges that Mr. Gehr requested management evaluation of the conduct of the rebuttal process. However, he submits that the Dispute Tribunal erred in law in receiving the complaint concerning

26. In the absence of such designation and having regard to the specific provisions of Staff Rule 11.2(b) and the overarching import of Staff Rule 11.2(a) (especially when read together with Article 8(1)(c) of the Dispute Tribunal Statute), the Appeals Tribunal finds that the UNDT had no legal or evidential basis to justify its determination that a rebuttal panel constituted a technical body, thus exempting Mr. Gehr from the mandatory first step of management evaluation. Moreover, even absent any designation process by the Secretary-General, the particular requirements set out in Section 14.1 of ST/AI/2010/5 do not persuade the Appeals Tribunal that the Secretary-General intended that a rebuttal panel should be considered as a technical body.

27. In circumstances, therefore, where Mr. Gehr, as he acknowledged in his application to the Dispute Tribunal, did not seek management evaluation of the decision to complete his performance appraisal only by March 2012, the complaint pertaining to delay was not receivable and the UNDT erred in law in finding otherwise.

28. Consequently, it follows that the substantive findings of the Dispute Tribunal regarding delay have no legal basis and the Appeals Tribunal does not find it necessary to further address the Secretary-General's arguments on this issue.

The rebuttal process

29. By virtue of Mr. Gehr having requested management evaluation of the rebuttal process not having been in accordance with Section 14 of ST/AI/2002/3, the Dispute Tribunal was seized of jurisdiction with regard to that issue.

30. The Secretary-General contends that the Dispute Tribunal committed an error in awarding compensation to Mr. Gehr for, *inter alia*, the fact of his having his rebuttal process conducted by a rebuttal panel established in 2007 which "was no longer competent to conduct legally valid rebuttal processes" since the panel members' membership had expired under ST/AI/2002/3.

31. Pursuant to ST/AI/2002/3, a rebuttal panel had been established on 16 March 2007 with a two-year mandate. During the hearing before the UNDT, the Secretary-General conceded that that rebuttal panel's term expired on 16 March 2009 but explained that after its expiry it continued *de facto*.

specific harm or prejudice arising therefrom. In the instant case the breach of itself was not of sufficient seriousness to merit a compensatory award.⁴

44. Accordingly, the UNDT's award of compensation was not merited.

Judgment

45. The Judgment of the Dispute Tribunal is vacated in its entirety.

⁴ See *Asariotis v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-309, para. 36.

