

APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Case No. 2012-285

Gehr
(Appellant)

v.

Counsel for A for

JUDGE MARY FAHERTY , Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by Mr. Walter Gehr on 12 January 2012 against Judgment No. UNDT/2011/211, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 14 December 2011. The Secretary-General filed his answer on 27 February 2012.

Synopsis

2. On the question of the Administration's extension of Mr. Gehr's performance appraisal beyond 31 March 2010, the Appeals Tribunal does not regard as manifestly unreasonable the approach adopted by the UNDT in determining, in the absence of any evidence tendered as to how the complaint of irregularity was continuing to affect Mr. Gehr, that his claim for compensation in that regard was moot.

3. Neither was the UNDT manifestly unreasonable in rejecting as moot Mr. Gehr's

6. This Tribunal finds no merit in Mr. Gehr's contention that the Dispute Tribunal "dodged" its obligation to determine the single appraisal issue. As set out in the UNDT Judgment, and indeed as conceded by the Respondent at paragraphs 20 to 24 of its submissions, once the appraisal process is completed, it remains open to Mr. Gehr to file an application to the UNDT challenging his performance appraisal for 2009-2010, including the basis for, and parameters of,

outside of ST/AI/2002/3, an employee has a fundamental right to put his/her case, in response to an employer's assessment of his/her performance.

11. The denial to the Appellant on 24 November 2010 of the right to rebut his performance appraisal, in the view of this Tribunal, offended a basic tenet of justice, namely the principle *audi alteram partem*.

12. This Tribunal is of the view that that denial, of itself, was of sufficient seriousness to warrant consideration by the UNDT Judge as to whether an award of compensation was merited. Thus, in failing to give consideration to this issue, the UNDT Judge erred. Mr. Gehr's appeal on this issue is thus allowed.

13. Having regard to the circumstances of the instant case, this Tribunal deems, as just and equitable, for the period Mr. Gehr was denied his right of rebuttal, compensation in the sum of one month's net base salary, to be computed on the basis of his salary as of November 2010.

Facts and Procedure

14. The facts as set out in paragraphs 3 to 30 of the UNDT Judgment are as follows: (1) Cad(T) of 2009/487 (2) 8/2009/487

reassigned, at the same level, to the position of Senior Legal Adviser which was to be created within the Office of the Chief of TPB.

7. On 18 January 2010, the Officer-in-Charge of 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.

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

Applicant replied on the following day, noting that he had not received any response to his query of 6 May 2010 concerning the applicable provisions.

14. By an email of 19 November 2010, the Officer-in-Charge of DTA transmitted to the Applicant a written appraisal of his 2009-2010 performance and invited him to submit his comments, if any, in written form by 30 November, after which the appraisal together with his comments would be placed in his official status file.

15. On 24 November 2010, the Applicant enquired with the Officer-in-Charge of 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 of 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

from 1 April 2009 to 31 March 2010. Further, in view of the explanations provided by the Administration of UNODC in January, the Secretary-General considered that the decision to refer in the appraisal to matters post-dating the 2009-2010 performance cycle and the decision to deny the Applicant an opportunity to rebut the appraisal had become moot.

22. Shortly thereafter, the Applicant was provided with a revised written performance appraisal which bore the date of 7 February 2011, and he was invited to provide his comments, after which the documents would be placed in his official status file. He was also informed that after signing this appraisal, he would be entitled to rebut it.

23. On 9 February 2011, the Applicant was provided with another version of his revised written appraisal and, on 10 February 2011, the Officer-in-Charge of DTA asked him to provide his comments by 21 February 2011.

24. On 11 February 2011, the Chief of TPB wrote to the Applicant, explaining that she had prepared yet another version of his revised written appraisal, asking him to collect it and inviting him to a meeting to discuss his performance.

25. On 23 February 2011, a hearing was held, to which the Applicant and Counsel for the Respondent participated by videoconference.

26. By Order No. 19 (GVA/2011), the Tribunal instructed the Respondent, *inter alia*, to confirm whether a new written appraisal had been finalised and provided to the Applicant, and whether he had been invited to rebut it. Responding to the Tribunal's instructions, the Respondent submitted on 9 March 2011 copies of a revised written appraisal which both the Applicant's first and second reporting officers had signed off on 2 March 2011, giving the Applicant an overall rating of "Fully successful performance". The Respondent also submitted the email sent on the same day to the Applicant advising him that, in accordance with section 15 of ST/AI/2002/3, he could submit a written rebuttal statement in case he disagreed with the final rating given in the appraisal.

27. By an email of 15 March 2011 to the Director of the Division for Management at UNODC, the Applicant submitted a written rebuttal statement of his 2009-2010 performance appraisal. In his email, he noted however that, in his view, the procedural conditions for a proper rebuttal [were] not met owing to the composition of the rebuttal panel.

28. The Chief of HRMS informed the Applicant on 24 March that a new rebuttal panel would be constituted by 1 April 2011.

29. By a "Message of the day" of 21 April 2011, the Director of the Division for Management distributed to staff a list of the rebuttal panel members who had been appointed with effect from 1

30. On 12 May 2011, the Applicant transmitted to the Director of the Division for

Submissions

Mr. Gehr's Appeal

22. Mr. Gehr submits that the UNDT committed several errors in fact, in particular:

- The UNDT erred in finding that Mr. Gehr's claims of bad faith, abuse of authority, harassment and retaliation were solely based on performance appraisals, when he in fact had also relied on allegations outside of the performance appraisal process.
- The UNDT erred in finding that the performance appraisals given to Mr. Gehr had been superseded. The performance appraisals which are currently under consideration by a rebuttal panel are the same as those which existed at the time Mr. Gehr lodged his application. It is only a different version of the same appraisal, only the part referring to the events which post-date the end of the 2009-2010 e-PAS cycle having been removed.
- The above errors led to a judgment which omitted major arguments presented by Mr. Gehr and which was therefore unreasonable as it did not take into account all relevant facts. In this regard, Mr. Gehr points out that the rebuttal panel has not yet issued any final appraisal, 22 months after the end of the 2009-2010 e-PAS cycle and 8 months after Mr. Gehr had chosen the members of the rebuttal panel.

23. Mr. Gehr submits that the UNDT committed several errors in law, in particular:

- The UNDT erred in excluding the possibility that the performance appraisals and the denial of a rebuttal were acts of abuse of authority and harassment.
- The UNDT erred in limiting its exam to the conduct of the appraisal process, when Mr. Gehr's application was concerned with administrative decisions tainted with improper motivations.

24. Mr. Gehr submits that the UNDT failed to exercise jurisdiction vested in it:

- The UNDT failed to address several of his allegations, including "abuse of authority, bad faith, ill will, unfair dealings, humiliation by his supervisors", "lack

of respect for the dignity of the Appellant”, “failure by the Administration to guarantee a healthy environment”, and “lack of integrity of the management evaluation process”.

- The UNDT failed to address the allegations made by Mr. Gehr’s supervisor that Mr. Gehr had jeopardized the relationship between UNODC and the Dutch Government. These allegations were not reflected in the 2009-2010 performance appraisal which has not been finalized yet.
- The UNDT failed to address elements associated with retaliation which were present in Mr. Gehr’s case prior to the contested decision. The UNDT ignored and did not even mention the supporting evidence.
- The UNDT failed to find that the contested administrative decisions constituted harassment under ST/SGB/2008/5, individually as well as collectively as parts of a series of incidents.
- The UNDT failed to find that the contested decisions violated paragraph 3.2 of ST/SGB/2008/5 according to which “[m]anagers and supervisors have the duty to take all appropriate measures to promote a harmonious work environment, free of intimidation, hostility, offence and any form of prohibited conduct”.
- The UNDT failed to award compensation despite the fact that the UNDT itself reminded counsel for the Administration a month before the hearing of 23 February 2011 of its duties under ST/SGB/2008/5; and despite the fact that Mr. Gehr’s allegations of misconduct had not been addressed by the Administration.
- The UNDT failed to declare the denial of the Appellant’s right to a rebuttal to be “irrational, erroneous and inconsistent”.

25. Mr. Gehr submits that the UNDT committed several errors of procedure affecting the outcome of the case:

- The UNDT failed to find that the Secretary-General violated Mr. Gehr's rights by failing to communicate to him the outcome of the management evaluation within 45 days.
- The UNDT erred in finding that the Administration can correct its mistakes "until the second before the UNDT issues its judgment", thereby unlawfully extending the 45-day time limit for management evaluation. The UNDT thereby also erred in finding that in such cases, the applicant's claim becomes moot, regardless of the period of time that lapsed since the unlawful decision had been taken.
- The UNDT erred in assessing Mr. Gehr's case not on the date on which the contested administrative decision was taken; but only once the Administration had already rectified the decision.
- The UNDT erred in rejecting, by Order No. 139 (GVA/2011), two documents proffered by Mr. Gehr, on the grounds that the documents were prima facie irrelevant; that the documents post-dated the contested decisions; and that the information was privileged as it had been obtained during an informal conflict-resolution process. The evidence demonstrated that the Administration had offered Mr. Gehr a letter of recommendation and the deletion of his bad performance appraisals in exchange for dropping all pending cases before the UNDT, thereby violating the Regulations and Rules.
- The UNDT failed to hold its proceedings in public. The hearing announced as "case management hearing" in fact dealt with substantive issues which was misleading to the public which might have wanted to attend the substantive hearing. The UNDT also erred in rejecting Mr. Gehr's request to allow full access to the public both inside and outside the Vienna International Centre, to the single videoconference room from which both counsel for the Secretary-General and Mr. Gehr were connected to the UNDT in Geneva.
- The UNDT failed to grant Mr. Gehr's request to include in the minutes of the hearing the decision pronounced by the UNDT Judge regarding the access of the public to the oral hearing.

- The UNDT's approach to trial recordings was inconsistent. In Order No. 198 (GVA/2011), the UNDT instructed Mr. Gehr to provide the UNDT with a copy of the recording he had made; while it subsequently rejected these recordings stating that the UNDT could not rely on any other recordings than its own. Upon the UNDT's request, Mr. Gehr did submit an explanation as to how he recorded the oral hearing, but the UNDT noted with concern that Mr. Gehr had failed to do so.

- The UNDT was biased or appeared biased in taking the impugned decisions and in its conduct of the proceedings.

Secretary-General's Answer

26. The Secretary-General submits that the UNDT correctly concluded that two of Mr. Gehr's claims were moot and correctly declined to award damages. The UNDT noted that in cases where the Administration rescinds the contested decision during the proceedings before the Tribunal, an applicant's allegations may become moot. The UNDT then considered the decision to take into account events post-dating 31 March 2010 as well as the decision that Mr. Gehr would not be entitled to rebut his performance appraisal. The UNDT found that, contrary to Mr. Gehr's contention, Mr. Gehr was provided on 9 March 2011 with a revised performance appraisal that no longer included matters post-dating 31 March 2010; and that he had been informed that he would be able to submit a rebuttal statement. The UNDT concluded that the claims were moot and that Mr. Gehr had failed to show how his rights had been affected.

27. The Secretary-General contends that the UNDT correctly concluded that Mr. Gehr's application against the contested decision to ca

19 November 2010 had since been rescinded by the Administration and the operative appraisal

Did the UNDT err in concluding that the Administration's decision, to take into consideration in the context of his 2009-2010 performance appraisal events post-dating 31 March 2010, was superseded by the Administration's subsequent change of approach? Did the UNDT err in its determination that Mr. Gehr's claims in this regard, as made to the UNDT, were moot?

The extension of the performance appraisal beyond 31 March 2010 and the subsequent reversal of that decision

33. Mr. Gehr submits that the UNDT erred in fact and law in concluding that the Administration's insistence on an appraisal period which extended beyond 31 March 2010 had been superseded by the approach taken by the Administration in January 2011, and reaffirmed to the Appellant on 1 February 2011.

34. The Appeals Tribunal notes that the Administration reversed its decision to conduct a performance appraisal which went beyond March 2010 during the course of the management evaluation process. The Administration's about-face in this regard was apparently indicated to the Appellant in January 2011 and was again duly communicated to him by letter of 1 February 2011 wherein he was advised, inter alia, as follows:

[I]t is noted that you also requested management evaluation of the decision to "... evaluate your performance for events that occurred after 31 March 2010" in the written performance evaluation report, and to deny you a full right of rebuttal. In its response to the [Management Evaluation Unit (MEU)]'s request for comments, dated 4 January 2011, the Administration stated that it was not possible to evaluate your performance for events that occurred after 31 March 2010. It is noted that you also requested management evaluation of the decision to "... evaluate your performance for events that occurred after 31 March 2010" in the written performance evaluation report, and to deny you a full right of rebuttal. In its response to the [Management Evaluation Unit (MEU)]'s request for comments, dated 4 January 2011, the Administration stated that it was not possible to evaluate your performance for events that occurred after 31 March 2010.

36. At the time of the receipt of the letter of 1 February 2011, Mr. Gehr had (on 25 January 2011) filed his application to the UNDT and had done so in the context of his having been given (on 19 November 2010) a written appraisal of his 2009-2010 performance – an appraisal which extended beyond the end date (31 March 2010) which would have applied in the case of an e-PAS.

37. It is not in dispute but that subsequent to this letter Mr. Gehr was the recipient of a performance appraisal dated 2 March 2011 for the period 1 April 2009 to the 31 March 2010 only. Indeed it is not disputed that in the period from 19 November 2010 to 9 March 2011, the Appellant was the due recipient of five different versions of his performance appraisal, a sequence of events commented on by the UNDT Judge in his Judgment as something which “highlights the lack of rigour and diligence displayed by the Administration in the appraisal process”.

38. Mr. Gehr’s argument is that, insofar as the Administration removed performance appraisals from his record, it did so only in relation to events which post-dated 31 March 2010. Mr. Gehr further contends that the performance appraisal which was in existence when he lodged his application with the UNDT is the same (save for the portion post 31 March 2011 which has been excised) as that currently under consideration by the rebuttal panel.

39. In the present appeal, the Respondent does not dispute that there were five different versions of the Appellant’s 2009-2010 performance appraisal, but he maintains that each one of these versions provided to Mr. Gehr in the period from 19 November 2010 to 9 March 2011 superseded the other and the Respondent contends that the only operative appraisal is the one dated 2 March 2011, provided to the Appellant on 9 March 2011 and which is the subject of a rebuttal process initiated by him. The Respondent thus maintains that the Appellant’s claim that there continues to exist five versions of his performance appraisal is without merit. The Respondent further contends that even if the five different versions were pending before the rebuttal panel, the fact that a final determination has yet to be made on the Appellant’s rating vis-à-vis his 2009-2010 performance appraisal would still render any decision concerning that appraisal as premature.

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performance appraisal beyond 31 March 2010. In the circumstances of the present case, the UNDT was not manifestly unreasonable in determining, in the absence of any evidence tendered as to how the complaint of irregularity was continuing to affect Mr. Gehr, that his claim in that regard was moot. Thus, having regard to the nature and duration of the irregularity adopted by the Administration, we do not find any error or want of jurisdiction on the part of the UNDT in not awarding compensation to Mr. Gehr for this irregularity. His appeal on this issue is thus dismissed.

46. Mr. Gehr also submits that

[b]y unduly considering the performance appraisals the Appellant had submitted to the UNDT to be superseded and the Appellant's claims of harassment, arbitrariness, abuse of authority etc. based on these appraisals to be moot, the Tribunal dodged the consideration of these matters (...) This in turn led to a decision which eclipsed major arguments of the Appellant, hence to a unreasonable decision which did not take into account all relevant facts.

47. With regard to the above submission however, the Appeals Tribunal notes that while the UNDT Judge considered the Appellant's arguments on the issue of the extension of the performance appraisal beyond 31 March 2010 to be wholly moot in view of the Administration's subsequent about turn, the UNDT Judge did not, contrary to the Appellant's claims, "dodge" its consideration of the Appellant's claims of "harassment, arbitrariness, abuse of authority etc".

48. In his Judgment, the Dispute Tribunal Judge stated as follows:

48. In alleging bad faith, abuse of authority, harassment and retaliation on the part of his reporting officers, the Applicant refers to the comments made in the 2009-2010 written performance appraisal he received on 19 November 2010 following his mid-point review. He also refers to the contrast between the individual ratings – in particular the rating given for the core value "professionalism" – and the overall rating he received in the 19 November 2010 appraisal. Additionally, in a submission dated 10 February 2011, the Applicant makes mention of the fact that he was only informed on that day that he could provide comments on the 9 February 2011 performance appraisal.

49. The Tribunal first notes that these claims are based on performance appraisals which have now been superseded. They are therefore moot.

49.

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The MEU considered that the absence of provisions in ST/AI/2002/3 governing your refusal to use the e-PAS mechanism did not absolve the Administration of its primary obligation under Staff Regulation 1.3 to evaluate your performance.

In this regard, the MEU considered that ST/AI/2002/3 does not require that the evaluation process must be conducted electronically, nor does it prescribe that the

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performance outside of the statutory e-PAS process, it did not then however take on board its substantive obligation to ensure that that process could be meaningfully enjoyed by Mr. Gehr, as the 19 November 2010 appraisal denied him an opportunity to rebut.

61. This Tribunal notes that up to the point (25 March 2010) when Mr. Gehr himself challenged the applicability of ST/AI/2002/3, there was every indication that he would have enjoyed the right provided for in paragraph 15 of ST/AI/2002/3. It is only post Mr. Gehr's challenge to the applicability of ST/AI/2002/3 that the rebuttal process was denied to him.

62. The denial to the Appellant on 24 November 2010 of the right to rebut his performance appraisal, in the view of this Tribunal, offended a basic tenet of justice, namely the principle *audi alteram partem*.

63. Mr. Gehr suffered the denial of this right for a period of weeks and during those weeks was therefore destined to be involved in an appraisal process in which he would have no right to rebut. This Tribunal is of the view that that denial, of itself, was of sufficient seriousness to warrant consideration by the UNDT Judge as to whether an award of compensation was merited. Thus, in failing to give consideration to this issue, the UNDT Judge erred. Mr. Gehr's appeal on this issue is thus allowed to the extent set forth herein.

64. It therefore falls to this Tribunal, being satisfied that the Appellant, for a period of time, was exposed to a breach of a fundamental procedural right warranting a compensatory award, to assess such compensation. Because the Administration, by January/ February 2011 had changed its position on the issue, the duration of Mr. Gehr's injury was limited and this therefore must be a major factor in assessing the quantum of any compensation award. Having regard to the circumstances of the instant case, this Tribunal deems, as just and equitable, for the p TD .0196.7lequio(g)

duration. His argument, in effect, was that ST/AI /2002/3 was not applicable to him as he held an appointment of less than a year, by reason of the changes that had taken place on 1 November 2009 with regard to his fixed-term appointments.

66. In the course of its consideration of the Appellant's challenge to the Administration's

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abuse of authority, ill will, harassment and retaliation being made by Mr. Gehr. In the context of the Appellant's submissions with regard to th

- not to inform me which procedure promulgated by the Secretary-General would apply in accordance with applicable Staff Rules;
- to deny me the possibility of rebuttal and not to inform me about the procedure which justifies such a measure.

78. While we note that in his request for management evaluation - document Mr. Gehr, under the heading "Purpose of Your Request", made reference, inter alia, to "[t]he right to be protected against unfair dealings in the course of my employment" and "the right to be treated with dignity and respect and not to be subjected to arbitrariness, harassment, abuse of authority, bias or ill-will", he did not per se challenge, by way of request for management evaluation, any specific course of conduct on the part of an individual or individuals.

79.

85. By Order No. 139 (GVA/2011), the UNDT rejected the Appellant's filing of the above documents on the grounds that "the proposed evidence is not prima facie relevant to the matter at hand", noting, inter alia, that "both conversations postdate the contested decisions in [case] UNDT/GVA/2011/004" (the subject of the present appeal).

86. The Dispute Tribunal Judge stated that "the Applicant has not explained how the proposed evidence could corroborate his allegations".

87. Moreover, the UNDT considered that in "reporting to the Tribunal the alleged content of a discussion he had with Regional Ombudsman", the Appellant contravened Article 15(7) of the Dispute Tribunal's Rules of Procedure.

88. The Appellant contends that the UNDT's rejection of the telephone excerpts constitutes "a serious procedural flaw which has unduly influenced the outcome of the proceedings to the Appellant". Other than making this assertion in the course of his submissions to this Tribunal, Mr. Gehr has not sought to substantiate how the UNDT's rejection of the evidence ia-3.9(e UI)6.5()g /004"

Judgment No. UNDT/2011/142 and Judgment No. UNDT/2011/150. This Tribunal's decision on the issue is set out in Judgment No. 2012-UNAT-234 and Judgment No. 2012-UNAT-236.

90. We have considered the other submissions made by Mr. Gehr (at paragraphs 48 to 58 of his appeal brief) which relate to the issue of public hearings and the extent to which, Mr. Gehr contends, the public ought to be apprised of the subject matter and/or the precise nature of the public hearings of the Dispute Tribunal in advance of such public hearings. Mr. Gehr cites an excerpt of paragraph 4 from UNDT Judgment Dumornay (Judgment No. UNDT/2010/004):

[J]ustice must not only be done, it must be seen to be done, [...] there should be a public hearing at least sufficient to demonstrate the workings of the Tribunal and the way in which the issues in any particular case are being approached.

91. In the opinion of this Tribunal there is nothing in the arguments made by Mr. Gehr at paragraphs 48, 49, 50 and 51 of his submissions to persuade us that the UNDT, in the instant case, did not respect the principle (quoted above) as enunciated in paragraph 4 of Judgment Dumornay No. UNDT 2010/004. The entirety of Mr. Gehr's pleas on this issue is thus rejected.

Mr. Gehr's general allegations of bias on the part of the UNDT

92. Having considered Mr. Gehr's submissions in this regard, the Appeals Tribunal finds same to be entirely without merit.

Judgment

93. The Appeals Tribunal allows Mr. Gehr's appeal on the rebuttal issue to the extent set out above. Accordingly, we order that the Secretary-General pay Mr. Gehr monetary compensation equivalent to one month of his net base salary as of November 2010. This sum shall be paid within sixty days from the date the Judgment is issued to the parties, during which period interest at the US Prime Rate applicable as at that date shall apply. If the sum is not paid within the sixty-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

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