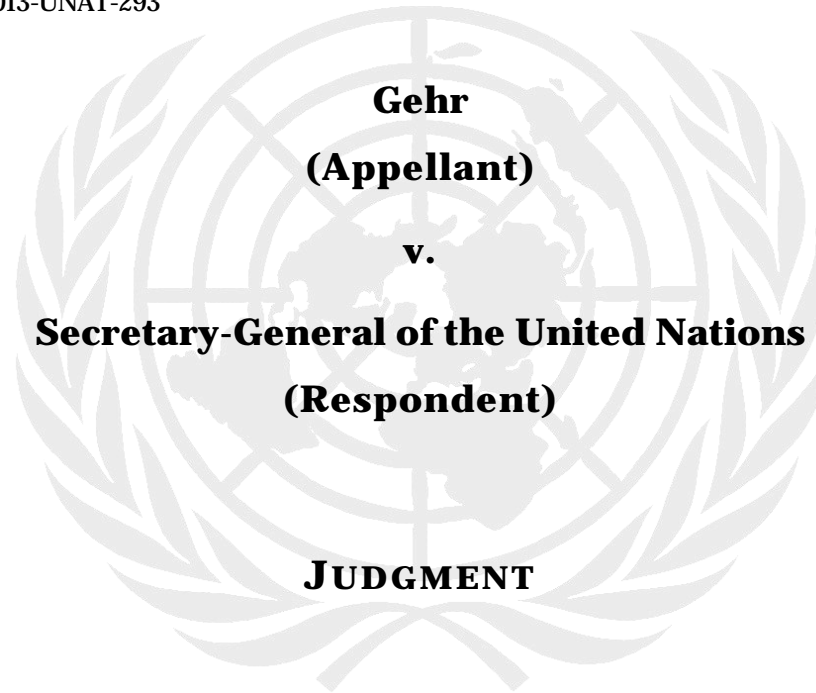




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2013-UNAT-293



Before:	Judge Mary Faherty, Presiding Judge Richard Lussick Judge Rosalyn Chapman
Case No.:	2012-324
Date:	28 March 2013
Registrar:	Weicheng Lin

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Stéphanie Cartier

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Walter Gehr against Judgment No. UNDT/2012/070, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 10 May 2012 in the case of *Gehr v. Secretary-General of the United Nations*. Mr. Gehr appealed on 14 May 2012, and the Secretary-General answered on 16 July 2012.

Facts and Procedure

2. Mr. Gehr joined the United Nations Office on Drugs and Crime (UNODC) in Vienna in 2002. With effect from 1 November 2007, he was appointed under a fixed-term appointment to the post of Senior Terrorism Prevention Officer at the P-5 level in the Terrorism Prevention Branch (TPB) within the Division of Treaty Affairs (DTA).

3. After the reorganization of TPB was announced in the fall of 2009 and Mr. Gehr was informed of the abolition of his post and his reassignment to the Office of the Chief of TPB, the relationship between Mr. Gehr and the UNODC Administration deteriorated and Mr. Gehr filed a series of informal and formal complaints.

4. On 28 November 2011, Mr. Gehr filed with the Assistant Secretary-General for Human Resources Management (ASG/OHRM) a complaint against the UNODC Executive Director and the Officer-in-Charge of DTA (OIC/DTA), alleging that the Executive Director had asked an official of the Austrian Government to re-employ Mr. Gehr so that he could be removed from UNODC and that, the OIC/DTA had failed to respond to his requests regarding the renewal of his appointment beyond 31 December 2011.

5. On 29 November 2011, the OIC/DTA informed Mr. Gehr of the decision not to renew his appointment beyond 31 December 2011.

6. On 14 December 2011, the ASG/OHRM responded to Mr. Gehr's 28 November 2011 complaint, stating that, in her view, there were not sufficient grounds to warrant a formal investigation given that Mr. Gehr had not produced any evidence in support of his allegation against the UNODC Executive Director and that, he had received notification of the decision not to renew his appointment.

7. Mr. Gehr was separated from service effective 31 December 2011 upon the expiry of his fixed-term appointment.

8. On 5 January 2012, Mr. Gehr filed an application with the Dispute Tribunal against the ASG/OHRM's decision not to open an investigation into his allegations. He did not request management evaluation before he applied to the UNDT. On 18 April 2012, the UNDT held a directions hearing, which Mr. Gehr and Counsel for the Secretary-General attended by videoconference.

9. In Judgment No. UNDT/2012/070, the Dispute Tribunal rejected Mr. Gehr's application as not receivable, as he had failed to submit the contested decision for management evaluation, prior to filing before the UNDT. The Dispute Tribunal concluded that the procedural requirement of submission for management evaluation equally applied to both serving staff members and former staff members such as Mr. Gehr. The Dispute Tribunal opined that, even assuming that Staff Rule 11.2(a) contradicted the provisions of the UNDT Statute, the Dispute Tribunal must assess the admissibility of Mr. Gehr's application in light of its own Statute.

Submissions

Mr. Gehr's Appeal

10. The UNDT erred in law and failed to exercise the jurisdiction vested in it in rejecting his application on the ground that he had not requested management evaluation. Mr. Gehr maintains that, as a former staff member, he was not required to request management evaluation. In his view, Staff Rule 11.2(a) only requires a staff member, not a former staff member, to submit a request for management evaluation.

11. Mr. Gehr also maintains that during the directions hearing on 18 April 2012, the UNDT Judge acknowledged that his interpretation of Staff Rule 11.2(a) was "entirely correct". By interpreting the words "staff members" to include former staff members, the UNDT Judge made a legal error.

Secretary-General's Answer

12. The Secretary-General submits that the UNDT correctly concluded that the UNDT Statute required current as well as former staff members to request management evaluation prior to filing an application with the Dispute Tribunal and that, as Mr. Gehr had not requested management evaluation, his application with the UNDT was not receivable.

13. The Secretary-General maintains that the UNDT correctly found that the UNDT Statute prevailed over the Staff Rules in case of conflict. In his view, even if there was ambiguity in the wording of Staff Rule 11.2(a) on whether former staff members are required to request management evaluation, the UNDT Statute prevails according to the hierarchy of the Organization's internal legislation.

14. The Secretary-General also submits that it would be inconsistent if the Administration could correct its own mistakes through the process of management evaluation with respect to current staff members, but could not do so with respect to former staff members. In the opinion of the Secretary-General, the expiration of Mr. Gehr's appointment did not extinguish his obligation to file a request for management evaluation as a mandatory first step of his appeal. The Secretary-General notes that the practice of former staff members has been to request management evaluation prior to filing an application with the Dispute Tribunal.

15. The Secretary-General maintains that, contrary to Mr. Gehr's assertions, the UNDT Judge disagreed with Mr. Gehr's literal interpretation of Staff Rule 11.2(a). It is clear from the verbatim statement of the UNDT Judge during the 18 April 2012 directions hearing that he believed that former staff members were required to undergo management evaluation in the same manner as current staff members.

Considerations

16. Mr. Gehr contends that he was not required to submit a request for management evaluation of the ASG/OHRM's decision not to conduct a formal investigation into his complaint, by reason, he claims, of his status as a *former* staff member. Thus, Mr. Gehr requests this Tribunal to hold that the UNDT erred in law when it rejected his application as not receivable.

17. Before considering Mr. Gehr's legal arguments, it is useful to set out the factual backdrop against which he claims to be exempt from the requirement of management evaluation.

18. On 28 November 2011, the date of his complaint to the ASG/OHRM, Mr. Gehr was a staff member pursuant to a fixed-term contract. On 29 November 2011, he was advised that his fixed-term contract would not be renewed beyond its expiry date of 31 December 2011. His request for an investigation into the matters complained of in his 28 November 2011 complaint was responded to on 14 December 2011 by the ASG/OHRM to the effect that there

were not sufficient grounds to warrant a formal fact-finding investigation. At the time he received this communication, Mr. Gehr was still a staff member, albeit on notice since 29 November 2011 that his contract was not being renewed. By 5 January 2012, the date of his application to the UNDT, Mr. Gehr's status was indeed that of a former staff member.

19. In his submission to this Tribunal, Mr. Gehr acknowledges the requirement set out in Article 8(1) of the UNDT Statute: "An application [to the UNDT] shall be receivable if ... (c) An applicant has previously submitted the contested administrative decision for management evaluation, where required."

20. However, Mr. Gehr disputes that he is bound by the provisions of Staff Rule 11.2(a), which read as follows:

A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

21. Moreover, Mr. Gehr maintains that Staff Rule 11.2(a), formulated with specific reference only to staff members, renders him, as a former staff member who has an entitlement to recourse to the Dispute Tribunal pursuant to Article 3(1)(b) of the UNDT Statute, free of the requirement for management evaluation.

22. In effect, Mr. Gehr contends that the requirement for management evaluation provided for in Article 8(1)(c) of the UNDT Statute is applicable only to *staff members*, and that a literal reading of the Staff Rules 11.2(a) and (b)¹ leads to the conclusion that former staff members are not bound by the requirement for management evaluation under Article 8(1)(c) of the UNDT Statute.

¹ Staff Rule 11.2(b) reads: "A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation."

23. The Dispute Tribunal rejected Mr. Gehr's argument and concluded that the import of Articles 2(1), 3(1) and 8(1)(c) of the UNDT Statute was that

for the purposes of admissibility, the procedural requirement of submission for management evaluation equally applies to staff members and former staff members. Therefore, under these provisions, irrespective of whether an applicant is a current or a former staff member of the United Nations, he or she must request a management evaluation prior to filing his or her application with the Dispute Tribunal.

24. Addressing Mr. Gehr's argument that the interpretation of Staff Rule 11.2 exempted former staff members from the requirement for management evaluation prior to filing with the UNDT, the Dispute Tribunal Judge stated: "[E]ven assuming that staff rule 11.2(a), insofar as it is silent on whether a former staff member must request a management evaluation prior to filing an application with the [Dispute] Tribunal, contradicts the provisions of the [Dispute] Tribunal's Statute, the [Dispute] Tribunal is to assess the admissibility of the application only in light of its own Statute."

25. In the first instance, we are satisfied that the Dispute Tribunal correctly concluded that the import of Articles 2(1), 3(1) and 8(1)(c) of the UNDT Statute is that applications to the UNDT, be they from serving or former staff members, are only receivable if the applicant "has previously submitted the contested administrative decision for management evaluation".

26. The approach of the Dispute Tribunal in the present case is consistent with the jurisprudence of this Tribunal on this issue.²

27. With regard to the emphasis Mr. Gehr places on the words "where required", as contained in Article 8(1)(c) of the UNDT Statute, and his claim that the parameters of Staff Rule 11.2(a) (where there is reference only to staff members) exempt him from the requirement for management evaluation, we find no merit in this argument. The overarching intention of Article 8(1)(c) is that management evaluation is a mandatory first step, prior to invoking the jurisdiction of the Dispute Tribunal to receive an application under its competency.

² *Planas v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-049; *Crichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035.

28. Moreover, we note the very limited circumstances set out in Staff Rule 11.2(b) where a request for management evaluation is not required. The very specific reference to the two exemptions (which relate to certain types of administrative decisions and not to the status of staff members), in our view, reinforces the statutory requirement in all other circumstances that management evaluation be requested prior to a staff member making an application to the Dispute Tribunal.

29. Were Mr. Gehr's interpretation of Staff Rule 11.2(a) to be accepted, thereby giving him an exemption from the requirement to request management evaluation, his approach would, of necessity, also have to be adopted with regard to Staff Regulation 11.1(a), which provides: "The United Nations Dispute Tribunal shall, under conditions prescribed in its statute and rules, hear and render judgment on an application from a *staff member* alleging non-compliance with his or her terms of appointment or the contract of employment, including all pertinent regulations and rules." (Emphasis added).

30. If Mr. Gehr's logic were to be adopted by this Tribunal, Mr. Gehr, as a *former* staff member, would, under Staff Regulation 11.1, be debarred from accessing the Dispute Tribunal. Similarly, the type of literal interpretation advocated by Mr. Gehr would also put him beyond the scope of Staff Rule 11.4, which refers only to the entitlement of a *staff member* to file an application with the UNDT within certain time limits. However, it goes without saying that the reference to "staff member" in Staff Regulation 11.1 and Staff Rule 11.4 includes former staff members, as any contrary interpretation would deprive individuals who have been separated from service of access to the Dispute Tribunal.

31. In all of those circumstances, we uphold as correct in law the Dispute Tribunal's determination that Articles 2(1), 3(1) and 8(1)(c) of its Statute include former staff members as subject to the requirement for management evaluation.

32. Furthermore, we uphold, on the basis of the jurisprudence of the Appeals Tribunal in *Abu-Hawaila*,³ the UNDT's consideration that in the event of any ambiguity or contradiction between the UNDT Statute and the Staff Rules (or for that matter, Staff Regulations or the UNDT Rules of Procedure), the former must prevail over the latter.

³ *Abu-Hawaila v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-118.

33. Having regard to all of the foregoing, we are satisfied that the UNDT was correct in law in rejecting Mr. Gehr's application as not receivable by reason of his not having sought management evaluation of the administrative decision of 14 December 2011. His appeal is dismissed in its entirety.

Judgment

34. The Judgment No. UNDT/2012/070 is affirmed.

Original and Authoritative Version: English

Dated this 28th day of March 2013 in New York, United States.

(Signed)

Judge Faherty, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Chapman

Entered in the Register on this 24th day of May 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar