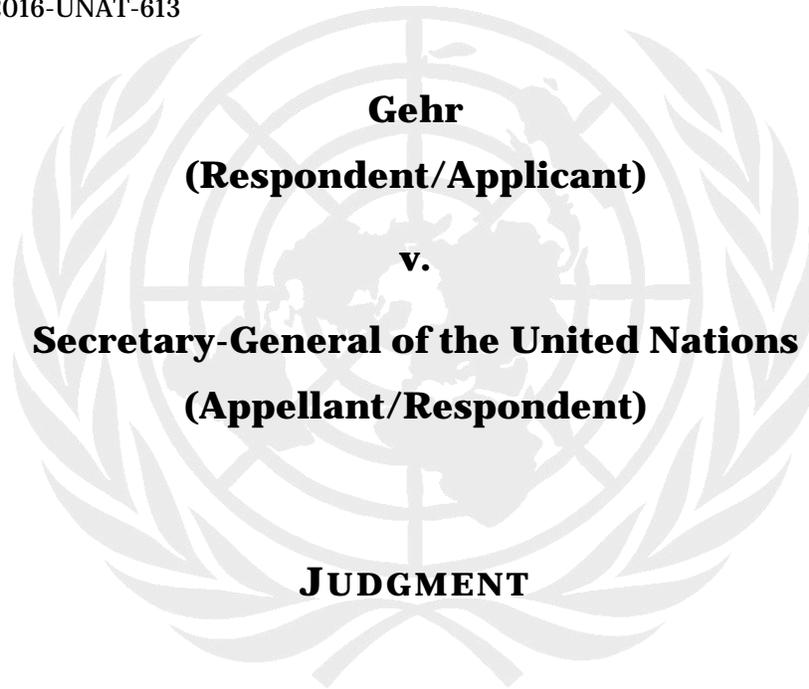




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2016-UNAT-613



**Gehr
(Respondent/Applicant)**

v.

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

JUDGMENT

Before:	Judge Rosalyn Chapman, Presiding Judge Sophia Adinyira Judge Luis María Simón
Case No.:	2015-709
Date:	24 March 2016
Registrar:	Weicheng Lin

Counsel for Mr. Gehr:	Not represented
Counsel for Secretary-General:	Nathalie Defrasne

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2015/019, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 20 February 2015, in the case of *Gehr v. Secretary-General of the United Nations*. On 17 April 2015, the Secretary-General filed his appeal. However, Mr. Walter Gehr did not file an answer.

Facts and Procedure

2. The Appeals Tribunal, in *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-299, made the following factual findings which are relevant to the pending appeal:¹

... 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).

... In the fall of 2009, the Chief of TPB and the Officer-in-Charge of DTA informed Mr. Gehr that, in connection with the reorganization of TPB, his post would be abolished and he would be reassigned to the position of Senior Legal Advisor, which would be created within the Office of the Chief of TPB. From then on, the relation between Mr. Gehr and the UNODC Administration deteriorated.

3. In the present case, the Dispute Tribunal made the following additional findings:²

... On 29 November 2011, the Applicant was advised that his fixed-term appointment would not be renewed beyond 31 December 2011.

... On 5 December 2011, the Applicant's supervisor advised the Applicant that, in conjunction with the end of his contract, it was necessary to finalise his last performance appraisal and, to that end, invited him to give comments in writing on the self-assessment of his work by 16 December 2011. The Applicant did not provide his self-assessment.

... On 12 December 2011, the Applicant requested his supervisor not to proceed in accordance with ST/AI/2010/5, as he disagreed with his supervisor's understanding of the instruction. The supervisor replied on 14 December 2011 that he

¹ *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-299, paras. 2 and 3.

² Impugned Judgment, paras. 15-20 and 29-36.

intended to proceed, based on the Management Evaluation Unit and the Tribunal's finding that ST/AI/2010/5 was applicable.

... On 31 December 2011, the Applicant was separated from service.

... On 3 January 2012, the Applicant's supervisor transmitted to the Applicant his completed PAS for the period 1 April to 31 December 2011, giving an overall rating of "partially meets performance expectations". The supervisor signed the document on 3 January 2012; he signed it twice, as he was acting as first as well as second reporting officer. The Applicant signed the PAS on the same date, with no comments.

... On 15 January 2012, the Applicant submitted to the Director, Division for Management, UNODC, a rebuttal statement in relation to his performance appraisal for the period 1 April to 31 December 2011.

...

... On 17 April 2013, [the Human Resources Management Service (HRMS)] informed the Applicant that a new rebuttal panel list ("the new list") had been issued upon expiry of the term of the previous one and that another panellist would be promoted to the D-2 level effective 1 May 2013. The new list was attached. The next day, the Applicant wrote back asking HRMS to elaborate on what he should do to rebut his 2011 PAS in compliance with the applicable rules, and to identify the legal basis for its advice.

... On 22 April 2013, HRMS recalled its previous advice and stated that the Applicant could choose the three panel members from the new list. [...]

... On 25 May 2013, after receiving the aforementioned UNAT Judgment, the Applicant selected three staff members from the new list to sit on his panel, and requested that his interview be conducted in French.

... After the nominated panellists confirmed their availability, on 30 May 2013, the rebuttal statement was officially transmitted to the reporting officer for reply; he submitted it on the same day explaining that he had prepared the reply—dated 27 January 2012—upon first receiving the rebuttal statement ... On 31 May 2013, HRMS transmitted the written reply and related documentation to the panel and to the Applicant.

... The panel met on 18 June 2013. It interviewed the Applicant on 20 June 2013, in French, and requested additional documentation from HRMS. On 21 June 2013, the first (and also second) reporting officer was interviewed, in English.

... In response to an HRMS inquiry on the progress made, the Chairman of the panel provided reasons, on 21 August 2013, for the time taken to finalise the review, assuring that the case had taken a great deal of attention on the part of the panel.

... After further deliberations in written form, the panel drafted its final report, dated 22 September 2013, and transmitted it to HRMS and the Director, Division for Management, UNOV/UNODC, on 6 October 2013. HRMS transmitted the report to the Applicant on 7 October 2013.

... The Applicant filed [an] application [with the UNDT] on 5 November 2013 and the Respondent filed his reply on 9 December 2013.

4. On 20 February 2015, the UNDT issued Judgment No. UNDT/2015/019, in which it determined that Mr. Gehr's application challenging his performance evaluation for the period of 1 April through 31 December 2011, was receivable despite Mr. Gehr's failure to seek management evaluation. The UNDT rescinded Mr. Gehr's performance appraisal for the period of 1 April 2011, to 31 December 2011, and ordered that its Judgment be placed in his Official Status File.

5. On 17 April 2015, the Secretary-General appealed the Judgment to the Appeals Tribunal. On the same date, the Registry served the appeal on Mr. Gehr, at his e-mail address of record, and advised him that he had 60 days to file an answer. Mr. Gehr did not file an answer.

Submissions

The Secretary-General's Appeal

6. The UNDT erred in examining the merits of Mr. Gehr's application challenging his 2011 performance evaluation. The application was not receivable as Mr. Gehr had not requested management evaluation. Despite acknowledging that a rebuttal panel is not a technical body, and did not fall within an exception to the management evaluation requirement, the UNDT examined the merits of the application "on the basis that [Mr. Gehr] could have relied on the UNDT's position [in a prior case] that the rebuttal panel was a technical body for the purpose of the exception to the prerequisite of a management evaluation request".

7. The UNDT Judgment is contrary to Staff Rule 11.2(a), and the UNDT does not have the competence to set aside the mandatory prerequisite of seeking management evaluation and to receive an application without a prior management evaluation request having been submitted.

8. The staff member's ignorance of the law cannot be invoked by the UNDT as an excuse to disregard the fundamental management evaluation step in the appeal process. Moreover, even if the UNDT had previously ruled that a rebuttal panel is a technical body, Mr. Gehr was well-aware that the UNDT judgment to that effect was not final and could be appealed; the UNDT is not the final tribunal.

9. The Secretary-General requests that the Judgment be vacated on the ground that the application was not receivable *ratione materiae*.

Considerations

10. Article 8(1)(c) of the UNDT Statute provides that an application shall be receivable if “[a]n applicant has previously submitted the contested administrative decision for management evaluation, where required”. “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.”³ The mandatory nature of management evaluation is supported by Article 8(3) of the UNDT Statute, which specifically prohibits the Dispute Tribunal from “suspend[ing], waiv[ing] or extend[ing] the deadlines for management evaluation”.

11. Staff Rule 11.2 requires a staff member who desires to appeal an administrative decision to request management evaluation, with certain exceptions, as follows:

- (a) A staff member wishing to formally contest an administrative decision ... shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.
- (b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, ... is not required to request a management evaluation.
- (c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. ...

³ *Gehr v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-293, para. 27.

12. “Management evaluation is to afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review of the administrative decision is not necessary.”⁴ The Appeals Tribunal has reiterated this view repeatedly over the years, emphasizing that in order for management evaluation to serve its worthwhile purpose, a request for management evaluation of a claim raised in an application must be submitted by the staff member prior to bringing an application before the Dispute Tribunal.⁵

13. The Dispute Tribunal, however, found the application to be receivable despite Mr. Gehr’s failure to seek management evaluation, stating:⁶

... [The Appeals Tribunal] has clearly determined in its recent ruling *Gehr* 2014-UNAT-479 that a rebuttal panel is not ... a technical body. Therefore, this Tribunal cannot but follow [the Appeals Tribunal’s] clear-cut determination and conclude, accordingly, that the application at hand does not fall within the [technical body] exception to the management evaluation requirement. Pursuant to this jurisprudence, the present application should be irreceivable *ratione materiae*.

... Notwithstanding the above, the Tribunal is mindful that the Applicant, in omitting the request for management evaluation, could have relied on the Dispute Tribunal’s position that a rebuttal panel was a technical body for the purpose of the exception laid down in staff rule 11.2(b). ...

Based on the foregoing analysis, the UNDT then examined the merits of the application.

14. The Dispute Tribunal made several errors of law when it received Mr. Gehr’s application. First, the Dispute Tribunal does not have authority to disregard the Appeals Tribunal’s jurisprudence, which is *stare decisis* and must be followed.⁷ Despite acknowledging that under the Appeals Tribunal’s jurisprudence, a rebuttal panel is not a technical body, the Dispute Tribunal declined to follow our jurisprudence. This is clearly erroneous.

⁴ *Pirnea v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-311, para. 42, quoting General Assembly resolution A/RES/62/228. See also *Amany v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-521, para. 17.

⁵ *Servas v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-349, para. 22.

⁶ Impugned Judgment, paras. 44 and 45.

⁷ *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-410, para. 24.

15. Second, the Dispute Tribunal also erred by waiving the management evaluation requirement.⁸ Even if Mr. Gehr mistakenly believed, for whatever reason, that he was not required to seek management evaluation of the claims raised in his application, that is not a reason for the Dispute Tribunal to refuse to apply Staff Rule 11.2(a).⁹ As we have stated many times, “[i]t is the staff member’s responsibility to ensure that he or she is aware of the applicable procedure in the context of the administration of justice at the United Nations. Ignorance cannot be invoked as an excuse.”¹⁰

16. Accordingly, the Dispute Tribunal exceeded its jurisdiction or competence, and made an error of law, when it received Mr. Gehr’s application, which was not receivable *ratione materiae*.¹¹ “Since [Mr. Gehr’s] application was not receivable *ratione materiae*, the UNDT had no jurisdiction or competence to address the merits of the claims in the application ...”¹² In other words, “it was legally impermissible for the Dispute Tribunal to rule on the merits of the matter”.¹³ Thus, the UNDT Judgment should be vacated in its entirety.

Judgment

17. The appeal is granted and Judgment No. UNDT/2015/019 is vacated in its entirety.

⁸ *Cooke v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-275, para. 35.

⁹ *Wu v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-306/Corr.1, para.26.

¹⁰ *Amany v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-521, para. 18 (footnote omitted); see also *Servas v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-349, para. 22.

¹¹ *Awan v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-588, para. 20; *Terragnolo v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-566, paras. 28-33; *Mosha v. Secretary-General of the United Nations*, Judgment, 2014-UNAT-446, para. 17.

¹² *Wu v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-306/Corr.1, para.27.

¹³ *Saffir v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-565, para. 27.

Dated this 24th day of March 2016 in New York, United States.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Simón

Entered in the Register on this 13th day of May 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar