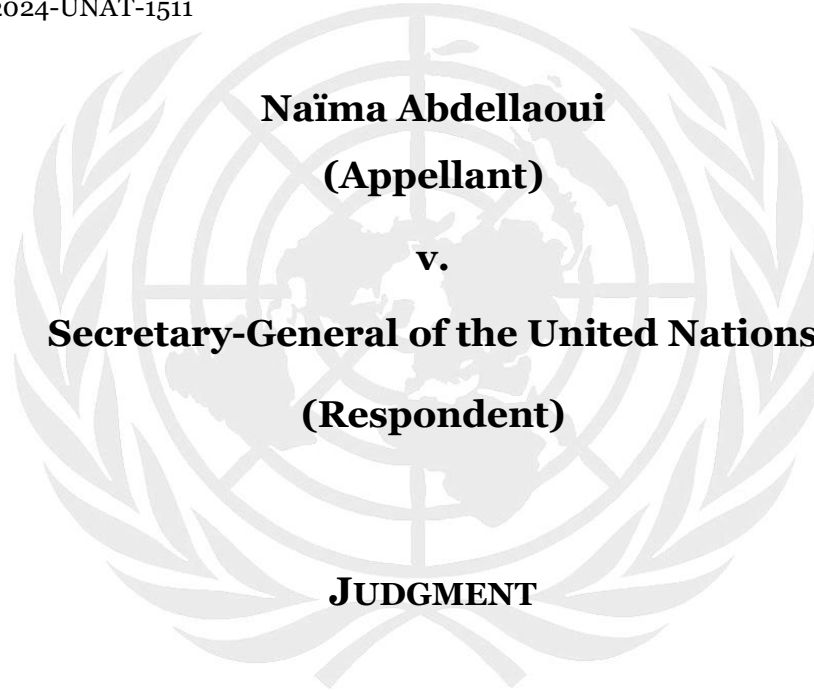




UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1511



Naima Abdellaoui

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Nassib G. Ziadé, Presiding Judge Gao Xiaoli Judge Kanwaldeep Sandhu
Case No.:	2023-1872
Date of Decision:	25 October 2024
Date of Publication:	30 December 2024
Registrar:	Juliet E. Johnson

Counsel for Appellant: Self-represented

Counsel for Respondent: Agnieszka Martin

JUDGE NASSIB G. ZIADÉ, PRESIDING.

1. Ms. Naïma Abdellaoui, a P-4 Reviser with the Arabic Translation Section, Languages Service, Division of Conference Management, United Nations Office at Geneva (UNOG), sought rescission of certain comments that her Second Reporting Officer (SRO) made in her 2021-2022 Performance Document (ePas).
2. By Judgment No. UNDT/2023/113 dated 10 October 2023 (impugned Judgment), the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) dismissed the application as not receivable *ratione materiae*.
3. Ms. Abdellaoui lodged an appeal of the impugned Judgment with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT).
4. For the reasons set out below, the Appeals Tribunal dismisses the appeal and affirms the impugned Judgment.

Facts and Procedure

5. Ms. Abdellaoui is a P-4 Reviser with the Arabic Translation Section, Languages Service, Division of Conference Management, UNOG.¹
6. In September 2020, Ms. Abdellaoui became a member of the Staff Council of the UNOG Staff Union. In 2022, she headed a new list of UNOG staff representatives (UNison/UNissons) and gained a seat as a member of the Executive Bureau of the UNOG Staff Union. In this capacity, she was critical of the representation provided by another group of UNOG staff representatives, the “Hope Team”.²
7. On 1 May 2022, Ms. Abdellaoui received an automated Inspira notification informing her that her SRO, the Chief of the Arabic Translation Section, had endorsed the overall performance rating of “successfully meets expectations” made by her First Reporting Officer (FRO) for the period from 1 April 2021 to 31 March 2022.³ Ms. Abdellaoui’s SRO also introduced the comments below, which according to her were inconsistent with the assessment of her FRO:⁴

¹ Impugned Judgment, paras. 1 and 3.

² *Ibid.*, para. 4.

³ *Ibid.*, para. 5.

⁴ *Ibid.*, para. 6.

I agree on many aspects with her FRO: Naima's productivity was high, and no complaints were made regarding the quality of her work during the past cycle. Her efforts as champion of gender parity, as a member of UNOG's Multilingualism Action Team and as a staff representative wholeheartedly defending the interests of staff at ATS and beyond were indeed praiseworthy. I would however strongly encourage her to work on her communication skills and to make more genuine efforts to iron out her disagreements with other colleagues in a peaceful way, using a more respectful tone in her communications and refraining from making unsubstantiated but damaging accusations against her colleagues. I would be more than happy to work with her on these issues and to seek together with her FRO the best ways to help her improve on her communication skills, rebuild trust with her colleagues and solve all other outstanding issues, so that she may put her superior drafting skills and her other talents to better use.

8. On 13 August 2022, Ms. Abdellaoui requested management evaluation of the SRO's comments.⁵

9. By letter of 24 August 2022, the Management Evaluation Unit of the Department of Management Strategy, Policy and Compliance informed Ms. Abdellaoui that it found that her request for management evaluation was not receivable.⁶

10. On 29 November 2022, the Appellant filed with the UNDT an application regarding the SRO's comments that, pursuant to UNDT Order No. 119 (GVA/2022), was withdrawn and refiled on 20 December 2022.⁷ On 3 February 2023, the Secretary-General filed a reply pursuant to UNDT Order No. 5 (GVA/2023).⁸ On 21 July 2023, Ms. Abdellaoui filed a rejoinder according to UNDT Order No. 76 (GVA/2023), and on 9 August 2023, the Secretary-General filed comments on the rejoinder pursuant to UNDT Order No. 84 (GVA/2023).⁹ On 10 August 2023, Ms. Abdellaoui filed comments complementing her rejoinder of 21 July 2023.¹⁰ On 31 August 2023, the parties filed their respective closing submissions in accordance with UNDT Order No. 100 (GVA/2023).¹¹

11. On 10 October 2023, the UNDT issued its Judgment dismissing the application as not receivable *ratione materiae*. The UNDT found that the inclusion of the comments in

⁵ *Ibid.*, para. 13.

⁶ *Ibid.*, para. 14.

⁷ *Ibid.*, paras. 17 and 24.

⁸ *Ibid.*, paras. 28 and 29.

⁹ *Ibid.*, paras. 31, 32 and 38.

¹⁰ *Ibid.*, para. 39.

¹¹ *Ibid.*, para. 40.

Ms. Abdellaoui's ePas was not an appealable administrative decision under Article 2(1)(a) of its Statute and accordingly dismissed the application as not receivable *ratione materiae*.

12. By Order No. 547 (2023) dated 8 December 2023, the Appeals Tribunal granted Ms. Abdellaoui's motion for an extension of time to file an appeal within ten days from the date of the Order.

13. On 18 December 2023, Ms. Abdellaoui filed an appeal against the impugned Judgment, and the Secretary-General filed his answer on 16 February 2024.

Submissions

Ms. Abdellaoui's Appeal

14. Ms. Abdellaoui claims that the UNDT erred in fact and in law in finding the SRO's comments to be lawful and well-intentioned and failed to give due weight to the factual and contemporaneous evidence showing they were not. The evidence that Ms. Abdellaoui alleges the UNDT failed to properly consider includes: a 6 July 2022 e-mail exchange with her SRO; her 26 May 2022 e-mail; an e-mail exchange with the Human Resources Legal Unit of the Human Resources Management Service (HRLU-HRMS); an e-mail to the President of Hope Team; arbitration decisions against Hope Team; a 512-page compilation of e-mails in which the SRO included communications Ms. Abdellaoui had sent to staff as elected representative; an exchange of e-mails with the SRO; and an e-mail to staff on psychological harassment. Ms. Abdellaoui further argues that the UNDT should have considered evidence presented in another UNAT case resulting in Judgment No. 2022-UNAT-1231 (*Arvizú Trevino*), which she alleges shows that the President of Hope Team requested the dismissal of a colleague and proved his "constant penchant for destroying the careers of his colleagues". Ms. Abdellaoui claims that she had received that same treatment.

15. Ms. Abdellaoui contends that the SRO had no mandate or authority to make comments on her performance. The previous legal framework on performance management, Administrative Instruction ST/AI/2010/5 (Performance Management and Development System), provided in Section 8.5 that the SRO "may make comments". By contrast, Administrative Instruction ST/AI/2021/4 (Performance Management and Development System) currently in force does not provide for the SRO to introduce comments or directly evaluate a staff member's performance. Under Section 8.3 of ST/AI/2021/4, only the FRO could comment on her performance.

16. Ms. Abdellaoui alleges that the UNDT erred in finding that the SRO's comments did not constitute a reviewable administrative decision. In support of her contention, Ms. Abdellaoui refers to case law of the International Labour Organization Administrative Tribunal (ILOAT), the UNAT Judgment in *Ngokeng*,¹² and Section 15.7 of Administrative Instruction ST/AI/2021/4 to argue that the SRO's comments "breached ST/AI/2021/4 and thwarted its objectives". Ms. Abdellaoui argues that a negative comment in an otherwise "excellent performance appraisal" constitutes ill-motivation and is "non-compliant with Section 2.2 of ST/AI/2021/4", which provides that "[s]taff members, including first and second reporting officers, have a duty [...] to fully comply with the procedures established herein". Such ill-motivation is also shown by the SRO contravening ST/AI/2021/4 by entering such comments without prior discussion with the FRO and Ms. Abdellaoui and by "cautiously balancing his retaliatory comment with other positive comments to avoid having the *Handy* precedent applied to this case".¹³ Furthermore, Ms. Abdellaoui argues that the SRO's comments should have been included in the ePAS for the following cycle, and in this regard refers to the SRO's e-mail to Ms. Abdellaoui on 14 June 2022.

17. Ms. Abdellaoui argues that the UNDT erred in finding that there was no merit to her contention that her FRO and SRO had no competence to evaluate her functions as a staff representative and that the fact that Ms. Abdellaoui served as a staff representative did not exempt her from the obligations to communicate in a manner consistent with the communication competency as set forth in her workplan. The Dispute Tribunal erred in law when it concluded that staff representation activities are subject to performance evaluation as this curtails freedom of debate and discussion that attends freedom of association. This, she argues, has resulted in a breach of due process in so far as the impugned Judgment is biased in favour of the Administration to such extent that the staff's exercise of basic rights to freedom of association and the attending freedom of speech as staff representative are now considered part of the staff member's workplan. Ms. Abdellaoui asserts that the SRO's comments were made in retaliation against her staff representative actions of publicly criticizing the conduct and performance of longstanding officeholders forming the group called "Hope Team". In addition, Ms. Abdellaoui submits that the UNDT has unlawfully legitimized the "subtle censorship and intimidation by Ms. Abdellaoui's SRO introducing unlawful and defamatory comments in her ePAS".

¹² *Ngokeng v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-460.

¹³ *Simon Handy v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1044.

18. Ms. Abdellaoui requests that the Appeals Tribunal reverse the impugned Judgment. She asks that the Appeals Tribunal order the removal of all adverse material from her 2021-2022 Performance Document, and that the SRO's non-compliance with ST/AI/2021/4 be recorded in his Performance Document and be reflected in his overall ratings. Ms. Abdellaoui also seeks compensation for moral damages for breach of her substantive due process rights in the amount of one year's salary, and compensation for moral damages stemming from the psychological distress and illness suffered which were triggered by the SRO's e-mail sent to her on 6 July 2022 in the amount of 10,000 US dollars. In support of her request, Ms. Abdellaoui annexes the SRO's 6 July 2022 e-mail and two medical reports dated 11 July 2022 and 18 July 2022.

The Secretary-General's Answer

19. The Secretary-General contends that the UNDT correctly found that the application was not receivable. A performance appraisal containing a positive final rating cannot, in itself, constitute an administrative decision directly and adversely affecting the rights of a staff member, and as a result, it is not a reviewable decision. The Secretary-General submits that the UNDT also noted the exception to the UNAT jurisprudence as established in *Handy*, in which the UNAT ruled that "when the reasoning [of comments in a performance appraisal] detracts from the overall favourable conclusion, such as to affect the terms and conditions of the staff member's contract", a performance evaluation may become reviewable by the UNDT.¹⁴ The UNDT correctly found that in the present case, the SRO's disputed comment was constructive, reasonable, and balanced by other comments that provided a positive perspective supporting the overall rating and therefore did not detract from the overall satisfactory appraisal as in *Handy*.

20. In addition, the Secretary-General avers that the UNDT correctly found no merit in Ms. Abdellaoui's allegation that the SRO's comments did contravene Administrative Instruction ST/AI/292 (Filing of Adverse Material in Personnel Records). The UNDT found that adverse material within the meaning of Section 2 of ST/AI/292 refers to an independent document and not a portion of a document as in the present case. The UNDT also found that Section 5 of ST/AI/292 suggests that all performance material is a matter of record governed by ST/AI/2021/4, and to the extent that any conflict could be perceived between ST/AI/292 and ST/AI/2021/4, the UNDT correctly applied the principle *lex posterior derogat priori* giving favour to ST/AI/2021/4 in relation to performance material.

¹⁴ *Simon Handy* Judgment, *op. cit.*, para. 34.

21. The Secretary-General contends that the UNDT correctly found that there was no evidence of retaliation due to Ms. Abdellaoui's engaging in staff representation activities and that Ms. Abdellaoui had failed to demonstrate that her SRO's comment infringed on any rights as a staff representative. In view of the foregoing, the UNDT correctly concluded that Ms. Abdellaoui had not established any direct legal consequences resulting from her ePAS, that the SRO's comments in question did not constitute a reviewable administrative decision, and that Ms. Abdellaoui's application was therefore not receivable *ratione materiae*.

22. Next, the Secretary-General contends that Ms. Abdellaoui has not demonstrated that the UNDT failed to consider all the evidence and that the impugned Judgment is vitiated on that ground. As a preliminary matter, the documents submitted by Ms. Abdellaoui to the UNAT as Annexes 5, 6, 7, 9, 11, 12 and 13 in support of her arguments were not presented before the UNDT even though they were available at the time. Ms. Abdellaoui has not submitted a motion showing exceptional circumstances for the admission of these documents pursuant to Article 2(5) of the UNAT Statute. The UNDT is not obliged to cite in its judgment every motion or piece of evidence presented by the parties, and the only annex the UNDT did not explicitly refer to, Annex 4, had no relation with the case at hand. As to Annexes 2, 3, 8 and 10, the Secretary-General contends that the impugned Judgment explicitly referred to these documents.

23. The Secretary-General contends that Ms. Abdellaoui has failed to demonstrate that the UNDT erred in dismissing her argument that the SRO had no mandate or authority to make comments on her performance. In the present case, the SRO first endorsed the FRO's performance appraisal, as provided in ST/AI/2021/4, and recognized Ms. Abdellaoui's successful performance. In the scope of his review, the SRO stressed an area of improvement regarding Ms. Abdellaoui's communication as he is entitled to ensure that the comments given are constructive and consistent. Indeed, the obligation for the SRO pursuant to ST/AI/2021/4 to review the FRO's comments would be meaningless if he could not correct or add his own point of view to the FRO's performance appraisal.

24. The Secretary-General claims that Ms. Abdellaoui has failed to demonstrate that the UNDT erred in finding that the SRO's comments did not constitute a reviewable administrative decision. First, Ms. Abdellaoui's reference to "administrative tribunal case law" and "ILOAT case law" is misplaced. The UNAT and the UNDT are circumscribed by their Statutes and are not bound by ILOAT case law. There is also no merit in Ms. Abdellaoui's contention that it

follows from an interpretation of *Ngokeng* and ST/AI/2021/4 that the SRO's comments constitute a reviewable administrative decision. The UNDT correctly recalled that a performance with a good final rating does not affect the conditions of service. Second, the assertion that a negative comment in a performance appraisal is ill-motivated renders the purpose of performance evaluations meaningless. There would be no room for improvement if managers could not address performance issues and invite staff members to improve in their performance appraisal. Third, Ms. Abdellaoui's contention that the comment should have been included in the ePAS for the following cycle since the SRO decided to maintain his comment on 14 June 2022 is erroneous. The 14 June 2022 e-mail is not a new decision, but a confirmation of the retention of the comments finalized on 1 May 2022. Fourth, the SRO's comment does not reach the standard of *Handy* precisely because it is well-balanced, as pointed out by Ms. Abdellaoui herself.

25. The Secretary-General avers that Ms. Abdellaoui has failed to demonstrate that the UNDT erred in finding that the SRO's comments did not infringe on any rights in relation to her role as a staff representative. The SRO's comments regarding Ms. Abdellaoui's staff representative activities were positive. The SRO's encouragement to Ms. Abdellaoui to improve her communication skills concerned her communication in the context of her daily work as a Reviser in the Arabic Translation Section and not as a staff representative, as supported by the evidence on record. The UNDT correctly found that the fact that Ms. Abdellaoui served as a staff representative did not exempt her from the obligations to communicate in a manner consistent with the communication competency set forth in her workplan. Furthermore, overall, the SRO's appraisal was positive as he stated that he agreed on many aspects with the FRO's comments and recognized that Ms. Abdellaoui's productivity was high as well as the quality of her work and her efforts as a champion of gender parity, as a member of UNOG's Multilingualism Action Team and as a staff representative. Finally, under Article 2 of the UNDT Statute, the UNDT has no jurisdiction to conduct investigations into retaliation complaints, except for the purpose of determining if an impugned administrative decision was improperly motivated, where it is within the competence of the UNDT to examine such allegations. In the absence of an administrative decision, the UNDT has no jurisdiction to examine allegations of retaliation and Ms. Abdellaoui fails to demonstrate otherwise.

26. Finally, the Secretary-General contends that Ms. Abdellaoui has failed to demonstrate that she is entitled to compensation for moral damages and accordingly her request for compensation should be dismissed. The first medical report should not be admitted as evidence since it was known to Ms. Abdellaoui at the time of the proceedings before the UNDT and was not presented before the UNDT. Furthermore, she has not submitted a motion before the UNAT demonstrating exceptional circumstances to adduce evidence. Moreover, the second medical report fails to specify the reason for Ms. Abdellaoui's illness as well as any link between her illness and the SRO's comments. Consequently, if the UNAT were to decide to consider Ms. Abdellaoui's request for compensation for moral damages, Ms. Abdellaoui has failed to provide evidence of harm to demonstrate that she is entitled to compensation for moral damages.

27. The Secretary-General asks that the UNAT affirm the UNDT Judgment and dismiss the appeal in its entirety.

Considerations

28. The primary issue presented is whether Ms. Abdellaoui's application to the UNDT was receivable *ratione materiae*.

29. To resolve that issue, we must determine whether the challenged performance evaluation, which rated Ms. Abdellaoui as "successfully meets expectations", was an appealable administrative decision. Article 2 of the UNDT Statute provides that the UNDT "shall be competent to hear and pass judgement on an application" which appeals "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment".¹⁵ Applying this provision, we recall that for a performance evaluation to be an appealable administrative decision, it must have as its key characteristic the capacity to produce direct legal consequences affecting a staff member's terms and conditions of employment.¹⁶

30. In the context of performance evaluations, the applicable Performance Management and Development System, ST/AI/2021/4, provides a mechanism for staff who have received either of two sub-par ratings ("does not meet performance expectations" or "partially meets

¹⁵ UNDT Statute, Article 2(1)(a).

¹⁶ *Hawa Haydar v. Secretary-General of the United Nations*, Judgment No. 2024-UNAT-1434, para. 45; *Simon Handy Judgment*, *op. cit.*, para. 26; *Beidas v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-685, para. 24.

performance expectations”) to initiate a rebuttal process and, in appropriate circumstances, to then appeal the resulting rating through the United Nations’ formal justice mechanisms.¹⁷ Under those same provisions, staff who have received either of the two higher ratings, including that issued for Ms. Abdellaoui, may not initiate a rebuttal, nor may they appeal the rating.¹⁸

31. While the Administrative Instruction provides that a performance “rating resulting from an evaluation that has not been rebutted is final and not subject to appeal”,¹⁹ UNAT precedents indicate that, in appropriate circumstances, even a performance rating which is technically positive and therefore not rebuttable nor appealable, may nonetheless be reviewable if it has the capacity to produce direct legal consequences. In general, this inquiry requires examination of the underlying context of the challenged action. When examining a nominally positive performance evaluation, we look to the “actual character” of the evaluation, in particular to whether the comments made in connection with the rating, taken as a whole, are negative such that they fundamentally undermine a facially favorable rating and therefore have a direct adverse impact on the terms and conditions of the staff member’s employment.²⁰

32. The final rating assigned to Ms. Abdellaoui was “B – Successfully meets performance expectations”. This rating means that, in the FRO’s view, Ms. Abdellaoui had “fully achieved the defined success criteria and/or performance expectations for the majority of the goals, key results and achievements during the cycle”.²¹ Reading the performance evaluation documents as a whole, that rating is fully supported by the comments from both the FRO and SRO, and is not contradicted or undermined by the commentary provided by the SRO of which Ms. Abdellaoui complains.

33. The FRO’s comments, which make up the bulk of the performance evaluation, are uniformly positive and take note of Ms. Abdellaoui’s “high quality” work, her high productivity, her “high soft skills”, and her “high degree of judgment and knowledge”, among other things, and provide specific examples backing up each element of the comments. Based on that assessment, the FRO issued the “final rating” of “successfully meets expectations”.

¹⁷ ST/AI/2021/4, Sections 15.1 and 15.7.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, Section 15.7.

²⁰ *Hawa Haydar* Judgment, *op. cit.*, para. 46; *Simon Handy* Judgment, *op. cit.*, para. 34.

²¹ ST/AI/2021/4, Section 9.5.

34. Under the applicable Administrative Instruction, the SRO has the responsibility to “ensure fairness and consistency throughout the [performance management and development] cycle”, and that “[r]atings and comments given are factually sound, free of bias, constructive and consistent”.²² With respect to the end-of-cycle performance review, these responsibilities require the SRO to “review and endorse, as appropriate, the evaluation of the first reporting officer, in accordance with his or her role as described in sections 5.4 and 5.5”.²³ After such review and endorsement “[a]ll parties should electronically sign or acknowledge the completed performance document”.²⁴

35. The SRO carried out those responsibilities by adding comments and endorsing the FRO’s performance rating. The SRO began by stating that “I agree on many aspects with her FRO”, noting Ms. Abdellaoui’s high productivity, work quality, and “superior drafting skills”, as well as her “praiseworthy” work on a Multilingualism Action team and as a staff representative. Along with these particularly positive comments, the SRO “strongly encourage[ed]” Ms. Abdellaoui “to work on her communication skills and to make more genuine efforts to iron out her disagreements with other colleagues in a peaceful way, using a more respectful tone in her communications and refraining from making unsubstantiated but damaging accusations against her colleagues”.

36. Looked at either in isolation, or in conjunction with the FRO’s comments, the SRO’s “encouragement” to Ms. Abdellaoui – while undeniably critical in nature – did not change the actual character of the evaluation or so detract from the remaining favorable discussion as to have a direct adverse impact on the terms and conditions of Ms. Abdellaoui’s employment. The inclusion of constructive criticism does not convert a positive evaluation into a negative one, particularly where, as here, the positive assessment – made by both the FRO and the SRO – heavily outweighs the negative.²⁵ Indeed, the addition of the constructive criticism supported the final rating of “B – Successfully meets performance expectations”, rather than the higher possible rating of “A – Exceeds performance expectations”. By way of contrast, in *Haydar*, the UNAT found that “pointed and overwhelmingly negative comments” in a performance appraisal, coupled with a “paucity of positive comments”, rendered the evaluation an

²² *Ibid.*, Section 5.5.

²³ *Ibid.*, Section 8.5.

²⁴ *Ibid.*, Section 8.6.

²⁵ *Beidas* Judgment, *op. cit.*

administrative decision which was reviewable as a matter of law.²⁶ Similarly, in *Handy*, the SRO rendered overwhelmingly negative comments disagreeing with the FRO's comments which on their face undermined the validity of the final ranking.²⁷ It would not be fair to analogize this performance evaluation to either of these past cases.

37. Accordingly, we concur with the UNDT's determination that the challenged performance evaluation was not an "administrative decision" and agree that the application was therefore not receivable *ratione materiae*.

38. Ms. Abdellaoui also takes issue with the UNDT's determination that it was appropriate for the FRO and SRO to comment on actions taken in her capacity as a staff representative. As an initial matter, because the application was not receivable *ratione materiae*, the UNDT's *dicta* in this regard is not reviewable by this Tribunal nor binding on the parties. In any event, there is no basis to conclude that the particular comments challenged here exceeded the bounds of appropriate management oversight in the context of a performance evaluation.

39. Notably, it is Ms. Abdellaoui who raised the issue of her staff representative role in her "Self-Evaluation" at the beginning of the performance evaluation document. She noted that she had been "[r]elected staff representative and member of the Executive Bureau of UNOG Staff Union", and that she "[r]egularly emailed colleagues on staff issues, received emails of praise/encouragement, and queries which [she] answered promptly". Both the FRO and the SRO made favorable note of this role, with the latter referring to Ms. Abdellaoui's staff representative work as "praiseworthy". While the SRO went on to encourage her to "refrain[] from making unsubstantiated but damaging accusations against her colleagues", there is no evidence that this statement was solely, or even primarily referring to her actions as staff representative as opposed to those as a staff member. And, in any event, a staff representative – while guaranteed great latitude in their freedom of expression and advocacy – remains "under a special obligation not to abuse his/her rights by using expressions or resorting to behaviour incompatible with the decorum appropriate to his/her status both as an international civil servant and as an elected staff representative".²⁸ Without exploring the outer limits of permissible commentary on staff representative conduct in the context of a

²⁶ *Hawa Haydar* Judgment, *op. cit.*, paras. 47-48.

²⁷ *Simon Handy* Judgment, *op. cit.*, paras. 28-34.

²⁸ *Sergio Baltazar Arvizú Trevino v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1231, para. 66.

performance evaluation in the abstract, we readily find that the challenged comments here do not even approach, much less exceed, those bounds.

40. Ms. Abdellaoui also claims that the SRO's comments (to the extent they were critical of her performance) constitute "adverse material" which should be removed pursuant to ST/AI/292. That Administrative Instruction, issued in 1982, provides generally that "[a]s a matter of principle, [adverse] material may not be included in the personnel file unless it has been shown to the staff members concerned and the staff member is thereby given an opportunity to make comments thereon".²⁹ With specific regard to performance evaluations, that Administrative Instruction explains that "[u]nder the existing system [as of 1982], all performance reports ... are a matter of record and are open to rebuttal by the staff member".³⁰ Subsequently, the United Nations Secretariat has issued further administrative instructions refining the process for performance evaluation, culminating in the current ST/AI/2021/4, which allows for staff rebuttal only of performance ratings of "partially meets performance expectations" and "does not meet performance expectations".³¹ Staff, such as Ms. Abdellaoui, who receive a higher rating "cannot initiate a rebuttal".³² Read harmoniously, and in the context of the UNAT's determinations which have addressed the receivability of performance evaluations, these two Administrative Instructions must be construed to mean that critical comments in an otherwise positive evaluation, which do not rise to the level which would render the evaluation reviewable, do not constitute "adverse material" for which a rebuttal must be allowed.

41. Finally, Ms. Abdellaoui contends that the SRO's comments were unlawfully made because, in her view, the applicable Administrative Instruction forbids the SRO from making any comments whatsoever on a performance evaluation. The basis of this claim is that, while the prior Administrative Instruction provided that the SRO "may make comments, as appropriate" on an FRO's evaluation,³³ this language was removed in the current Administrative Instruction, which now states that "[t]he second reporting officer shall review and endorse, as appropriate, the evaluation of the first reporting officer, in accordance with his or her role as described in sections 5.4 and 5.5".³⁴ This change in language, Ms. Abdellaoui

²⁹ ST/AI/292, para. 2.

³⁰ *Ibid.*, para. 5 (emphasis added).

³¹ ST/AI/2021/4, Section 15.

³² *Ibid.*

³³ ST/AI/2010/5, Section 8.5.

³⁴ ST/AI/2021/4, Section 8.5.

contends, means that the SRO now lacks authority to make any comments, whether negative or positive in nature.

42. This argument is unpersuasive. To begin with, the applicable Administrative Instruction does not say that the SRO is forbidden to comment on the performance of staff who work under their review. Nor does the revised language support such a reading. Indeed, the SRO's obligation is now directed to "review and endorse, as appropriate, the evaluation of the first reporting officer, in accordance with his or her role as described in sections 5.4 and 5.5".³⁵ Those sections in turn call for the SRO to ensure "consistency between the comments on and the overall rating of individual staff members for a given performance management and development cycle", and to manage the evaluation process so that "comments given are factually sound ..., constructive and consistent".³⁶ This mandate does not preclude comments by the SRO. In the matter now under consideration, for example, the SRO's comments provided context to ensure the consistency between the FRO's overwhelmingly positive review and the FRO's rating of "B – Successfully meets performance expectations", rather than "A – Exceeds performance expectations". We therefore reject Ms. Abdellaoui's assertion that the SRO's comments were in some way unauthorized or *ultra vires*.

43. Because we find that the application was not receivable *ratione materiae*, and based on the additional conclusions set forth above, we also reject Ms. Abdellaoui's claim for moral damages. Leaving aside whether the medical reports she has submitted would support such a finding, moral damages are not available where there is no underlying finding of illegality.³⁷ The Appeals Tribunal has found no illegality, and therefore moral damages are not available.

³⁵ *Ibid.*, Section 8.5.

³⁶ *Ibid.*, Sections 5.5(a) and (b).

³⁷ *Sarah Coleman v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1228, para. 38; *Boubacar Dieng v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1118, para. 68; *Kebede v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-874, para. 20; *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. 19.

Judgment

44. Ms. Abdellaoui's appeal is dismissed, and Judgment No. UNDT/2023/113 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 25th day of October 2024 in New York, United States.

(Signed)

Judge Ziadé, Presiding

(Signed)

Judge Gao

(Signed)

Judge Sandhu

Judgment published and entered into the Register on this 30th day of December 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar