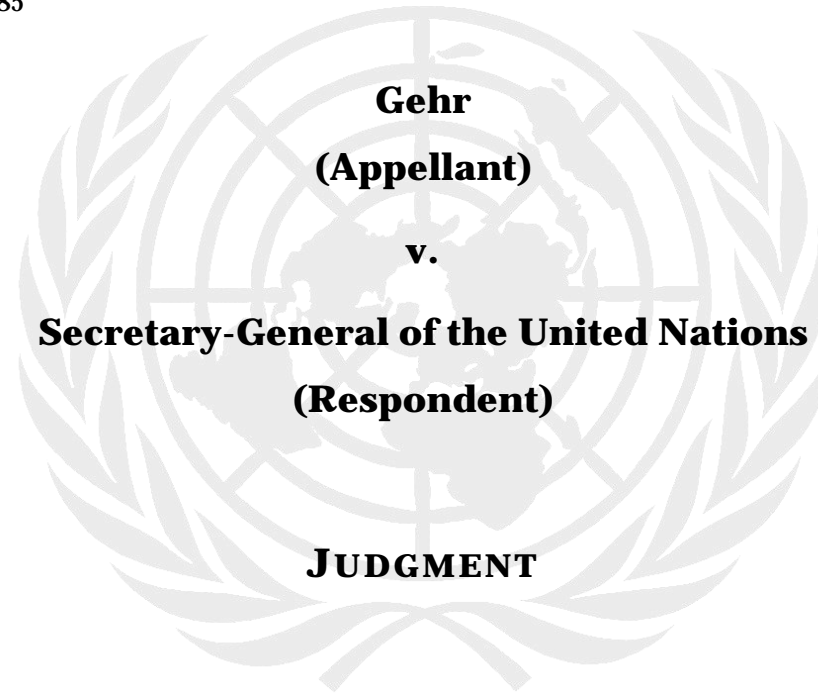




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Case No. 2012-285



**Gehr  
(Appellant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Mary Faherty, Presiding Judge Inés Weinberg de Roca Judge Sophia Adinyira
Judgment No.:	2012-UNAT-253
Date:	1 November 2012
Registrar:	Weicheng Lin

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Counsel for Appellant: Self-represented

Counsel for Respondent: Wambui Mwangi

**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 arguments with regard to the performance appraisal provided to him on 19 November 2010, in light of the Administration's subsequent communication to him, on 1 February 2011, that the appraisal was to be (and was) removed from his "Official Status File". Furthermore, we do not find fault with the approach adopted by the Dispute Tribunal Judge on the issue of the five versions of the performance appraisal provided to Mr. Gehr prior to 9 March 2011. Essential to the approach adopted by the UNDT is that the performance appraisal the Appellant has to concern himself with is the one dated 2 March 2011 and not any prior version of that appraisal.

4. In the course of its consideration of the Appellant's challenge to the Administration's decision to apply a single appraisal system and its failure to address the requests made by the Appellant in his email of 26 November 2010, the UNDT deemed the Appellant's claim in the above regard as not receivable on the basis that such claims were premature.

5. The UNDT's determination on the issue was made against the backdrop whereby at the time of the UNDT hearing, and thereafter, the Appellant and Management were (and remain) involved in the performance appraisal process, and indeed on 15 March 2011, Mr. Gehr submitted a written rebuttal statement of his 2009-2010 appraisal which included the invoking of a rebuttal panel, a process which was ongoing at the time of the UNDT hearing and indeed at the time of the oral hearing in this appeal.

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, the appraisal process utilized by his employer.

7. With regard to Mr. Gehr's claims of harassment, a reading of paragraphs 42 to 43 of the UNDT Judgment, together with paragraph 50, satisfies this Tribunal that the Dispute Tribunal Judge, with regard to allegations of harassment, has left it open to Mr. Gehr to raise this issue, insofar as it is relevant to the appraisal process, if he chooses to challenge his final 2009-2010 performance appraisal, once all steps in that process (including the rebuttal process) has been completed.

8. As to the allegations of harassment outside of the context of the administrative decisions the subject of the UNDT Judgment, we do not find that Mr. Gehr has made out any persuasive case that such issues ought properly have been considered by the Dispute Tribunal, in light of the nature of the administrative decisions under consideration in the UNDT Judgment.

*Did the UNDT err in concluding that Mr. Gehr's claim about the denial of a rebuttal process to him was moot because that decision had been, as found by the UNDT, superseded by the decision made in January/February 2011 to afford Mr. Gehr a right of rebuttal?*

9. It is not in question but that between 24 November 2010 and January/February 2011 the Appellant was faced with a procedure whereby, in the context of the performance appraisal system offered to him outside of the e-PAS system provided for in ST/AI/2002/3, he would not have an opportunity to rebut his performance appraisal.

10. We are of the view that in rendering Mr. Gehr's complaint about the rebuttal issue moot in light of the subsequent reversal of the decision of on 24 November 2010, the UNDT Judge failed to give sufficient weight to a central issue, namely the denial to Mr. Gehr, for a period of time, of the right to engage in a rebuttal process (should he wish to do so) in the context of the performance appraisal evaluation the Administration provided to him on 19 November 2010. This Tribunal recognises the fundamental right of an employee to be heard in the context of a performance evaluation process. Irrespective of whether the appraisal is conducted inside or

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 not contested and read as follows:

3. The Applicant joined the United Nations Office on Drugs and Crime ("UNODC") in 2002 in Vienna. With effect from 1 November 2007, he was appointed under a one-year fixed-term appointment to the post of Senior Terrorism Prevention Officer, at level P-5, in the Terrorism Prevention Branch ("TPB"), within the Division of Treaty Affairs ("DTA"). His functional title was changed to that of Chief of the Counter-Terrorism Legal Services Section I in April 2008.

4. With effect from 1 November 2008, the Applicant's fixed-term appointment was extended for one year until 31 October 2009. Due to a significant reduction in the TPB funding, his appointment was further extended for three months only effective 1 November 2009. It was subsequently extended for one year effective 1 February 2010.

5. In early November 2009, the Chief of TPB and the Officer-in-Charge of DTA, respectively the Applicant's first and second reporting officers, conducted with the Applicant his mid-point review for the 2009-2010 performance cycle.

6. In the fall of 2009, the Chief of TPB and the Officer-in-Charge of DTA announced to TPB staff that the Branch was to be reorganized and, on 8 December 2009, they informed the Applicant that his post would be abolished and that he would be

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.

9. On 25 March 2010, the Chief of 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 of 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 of DTA had not been designated as his reporting officer though he had taken part in the appraisal.

10. On 15 April 2010, the Officer-in-Charge of 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 first reporting officer in order to finalise his e-PAS report.

11. An exchange of emails ensued between the Applicant and the Officer-in-Charge of 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.

12. By an email of 5 May 2010, the Officer-in-Charge of 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 of the e-PAS. Responding to this email on 6 May, the Applicant took issue with the proposed course of action and enquired about the provisions according to which such appraisal would be conducted.

13. On 12 October 2010, the Chief of TPB wrote to the Applicant, stating that, in case he persisted not to take action to finalise his e-PAS report, she and his second reporting officer 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. The

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 possibility of a rebuttal did not apply.

16. By an email of 26 November 2010 to the Chief of TPB, the Officer-in-Charge of DTA and the Chief of 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.

17. 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.

18. By an email of 1 December 2010, the Officer-in-Charge of DTA informed the Applicant that the option proposed in his email of 26 November 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. He also stated that the deadline for the Applicant to submit his comments had been extended to 10 December 2010.

19. 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 official status file. It added that it would prepare a revised version, which would not refer to matters pertaining to the 2010-2011 performance cycle and which the Applicant would be entitled to rebut in accordance with section 15 of ST/AI/2002/3.

20. Meanwhile, on 25 January 2011, the Applicant filed the application which forms the subject of the present Judgment, noting that he had not received any response to his request for management evaluation within the prescribed 45 days.

21. 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, 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 April pursuant to administrative instruction ST/AI/2010/5 (Performance Management and Development System).

30. On 12 May 2011, the Applicant transmitted to the Director of the Division for Management and the Officer-in-Charge of HRMS the names of the three members whom he had selected to sit on his rebuttal panel.

15. On 14 December 2011, the UNDT issued Judgment No. UNDT/2011/211. The UNDT found that in light of the Administration's rescission of the contested decision relating to the inclusion of events post-dating 31 March 2010 in Mr. Gehr's 2009-2010 performance appraisal as well as the decision that Mr. Gehr was not entitled to rebut his performance appraisal, Mr. Gehr's claim in these respects had become moot.

16. The UNDT considered Mr. Gehr's claim regarding the Administration's decision to carry out a single performance appraisal for 2009-2010 and to apply ST/AI/2002/3 to this appraisal premature and rejected it as not receivable as the rebuttal process regarding his performance appraisal was still pending.

17. The UNDT found unsubstantiated and rejected Mr. Gehr's claim that the Administration failed to answer his queries concerning the applicable procedures regarding his performance appraisal. Mr. Gehr was informed in clear terms at latest by 15 April 2010 that ST/AI/2002/3 would be applied with a view to appraising his 2009-2010 performance.

18. Turning to Mr. Gehr's harassment claim, the UNDT noted that Mr. Gehr's complaints were based on performance appraisals that had been superseded, and accordingly his claim had become moot. The UNDT also noted that the Appellant could not challenge the comments or the individual ratings given by his reporting officers in support of an overall rating which might be modified as a result of the rebuttal process.

19. Finally, the UNDT dismissed Mr. Gehr's claim that he had been prejudiced by the Administration's failure to provide a timely response to his request for management evaluation. The Statute of the UNDT provides for the situation where no response to a management evaluation is provided and it does not affect an Appellant's right to seize the Tribunal.

20. The UNDT rejected Mr. Gehr's application, without prejudice to his right to file a new application at a later stage upon the conclusion of the performance appraisal rebuttal process.

21. Mr. Gehr appeals the UNDT Judgment. On 25 June 2012, the Appeals Tribunal conducted an oral hearing in Geneva, Switzerland. Both parties attended the hearing via video-link.



### **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 carry out a single performance appraisal for the period 2009-2010 was irreceivable as premature. The issue of Mr. Gehr's 2009-2010 performance is pending before the Rebuttal Panel. Since no final 2009-2010 performance appraisal had been provided, the UNDT correctly concluded that the matter was not receivable as premature, but did not preclude Mr. Gehr from filing a new application at a later date to challenge the basis for, or the outcome of, the rebuttal process.

28. The Secretary-General avers that the UNDT considered Mr. Gehr's claims of inter alia harassment and correctly concluded that they were either moot or premature. Mr. Gehr's claims were related to his 2009-2010 performance evaluation. The performance appraisal dated

19 November 2010 had since been rescinded by the Administration and the operative appraisal process was yet to be finalized as it was before the Rebuttal Panel.

29. The Secretary-General submits that the UNDT correctly concluded that the Administration's non-compliance with the statutory time limit for management evaluation did not prejudice Mr. Gehr's right to file an application with the UNDT. Staff Rule 11.2(d) does not provide staff members with a right to a response to their request of management evaluation within 45 days, but provides the Administration with an opportunity to re-examine and, if necessary, rescind an impugned decision, prior to the conclusion of any proceedings before the UNDT. When the Administration fails to respond to an appellant within the 45-day time limit, he or she may file an application with the UNDT without causing any unnecessary delay to the appellant.

30. The Secretary-General submits that the UNDT did not err in not guaranteeing access to the public at the United Nations premises in Vienna to follow the proceedings. The assignment of a venue is a matter for the UNDT's discretion and, in the present case, the UNDT did not consider it necessary under the provisions of Article 5 of the UNDT Statute to order a change in venue. Mr. Gehr has not shown any error in the UNDT's determination in this regard. Further, once the UNDT has determined the venue, granted public access at such venue, and ensured the participation of the parties through electronic means if they are not located at the venue, the UNDT has fully discharged its obligation under its procedures.

31. The Secretary-General submits that the UNDT correctly concluded that the evidence that was subject of Order No. 139 (GVA/2011) was irrelevant and fell within the scope of Article 15.7 of the UNDT Rules of Procedure. The UNDT correctly concluded that the proffered evidence was part of the informal resolution process and therefore constituted privileged information under Article 15.7 of the UNDT Rules of Procedure. The UNDT also correctly concluded that the proffered evidence was irrelevant as it postdated the contested decisions, thus having little bearing on the matter.

### **Considerations**

32. The Appeals Tribunal has considered the written and oral submissions made by the parties. A number of issues arise for consideration in the context of Mr. Gehr's appeal from Judgment No. UNDT/2011/211. The Appeals Tribunal will address these issues in turn.

*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 asserted that any reference in the report to matters that took place after 31 March 2010 were linked to the performance of your functions during the e-PAS cycle 2009-2010. The Administration also asserted that you had not substantiated this claim in your request for management evaluation.

In its supplemental response dated 28 January 2011, the Administration indicated that, "in the interests of narrowing the range of issues between Management and the Applicant", it will remove the written evaluation report dated 19 November 2010 and your comments thereon from your Official Status File (OSF) and will "delete from [your] evaluation any references to [your] conduct that actually took place in the 2010-11 cycle".

35. The letter also advised that "the MEU considered that the aspects of your request for management evaluation concerning the references to matters outside the 2009-10 PAS cycle, and your right of rebuttal, are now moot".

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.

40. What this Tribunal had to determine firstly, with regard to the extension of the appraisal period issue, is whether the Dispute Tribunal Judge erred in fact and in law by regarding as moot Mr. Gehr’s complaint about his having been initially (on 19 November 2010) provided with a

performance appraisal which extended beyond 31 March 2010, by virtue of the fact that the Administration in January/February 2011 limited the performance appraisal to the period from 1 April 2009 to 31 March 2010.

41. The sequential developments in the present case indicate that the time frame in which Mr. Gehr was subject to a proposed mid-term appraisal system extending beyond 31 March 2010 was from 19 November 2010 (when he received the appraisal) to January/February 2011 - a period of approximately two months. Addressing Mr. Gehr's complaint on the issue of the extension of his appraisal period beyond 31 March 2010, the UNDT Judge, at paragraph 38 of his Judgment, stated:

In the instant case, although the Administration conceded that the Applicant's 2009-2010 performance appraisal initially referred to matters post-dating 31 March 2010, it indicated in January 2011 that a revised performance appraisal would be prepared, and that this appraisal alone would be placed in his official status file. The Applicant was provided on 9 March 2011 with the revised appraisal, which does not refer to matters post-dating 31 March 2010. His claim in this respect is therefore moot and he has not explained how, in his opinion, his rights remain affected by a decision which has now been superseded, nor has he shown that he was still suffering any injury because of that decision.

42. Clearly, the decision by the Administration to extend Mr. Gehr's appraisal period beyond 31 March 2010 was irregular but it was an irregularity which was redressed by the Administration by January/February 2011.

43. The Appeals Tribunal does not find in Mr. Gehr's submissions any persuasive argument such as to convince it to reverse the Dispute Tribunal's finding, articulated at paragraph 38 of its Judgment, that Mr. Gehr's complaint with regard to the extension of the appraisal period was moot.

44. The Appeals Tribunal is of the opinion that while it was irregular, the initial decision made to appraise Mr. Gehr's performance beyond 31 March 2010 was not, of itself, absent any evidence of mala fides on the part of the Administration, an action that merited consideration by the UNDT in terms of a compensatory award.

45. Thus, in the absence of the Appellant satisfying this Tribunal that the Dispute Tribunal's approach was manifestly unreasonable, this Tribunal does not regard as manifestly unreasonable the approach adopted by the UNDT with regard to the question of the extension of the



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. What the UNDT rejected as moot was the Appellant's claim of harassment etc. in respect of a performance appraisal received on 19 November 2010, an appraisal which, as advised to him on 1 February 2011, was to be removed from his Official Status File and it rejected as moot the

harassment claims concerning the fact that he was provided with versions of his appraisal dated 7, 9, 11 February and 2 March 2011.

50. We are satisfied, having regard to the evidence before it, the approach of the UNDT was not manifestly unreasonable.

51. We do not find fault with the manner in which the UNDT considered the fact that five versions of the duly signed appraisal of 2 March 2011 had been provided to the Appellant. Essential to the approach adopted by the UNDT Judge is that the performance appraisal the Appellant has to concern himself with is that dated 2 March 2011 and not any prior version of that appraisal.

*Did the UNDT err in concluding that Mr. Gehr's claim about the denial of a rebuttal process to him was moot because that decision had been, as found by the UNDT, superseded by the decision made in January/February 2011 to afford Mr. Gehr a right of rebuttal?*

52. It is not in question but that between 24 November 2010 and January/February 2011 the Appellant was faced with a procedure whereby, in the context of the performance appraisal system offered to him outside of the e-PAS system provided for in ST/AI/2002/3, he would not have an opportunity to rebut his performance appraisal. Specifically, on 24 November 2010 Mr. Gehr was advised as follows:

Dear Walter,

I am advised by HRMS that the provisions regarding rebuttals of performance appraisal ratings are only available in respect of actions taken as part of the ePAS process. As you have declined to finalise your 2009-10 ePAS, we have had to move forward with your evaluation outside of the ePAS process. As such, HRMS advises the possibility of a rebuttal does not apply to the written evaluation appraisals shared with you by us.

53. As previously set out, the Administration ultimately changed its approach on the issue of the Appellant's entitlement to rebut his performance appraisal and on 1 February 2011, Mr. Gehr was advised of that change of mind in the following terms:

The Administration further stated that it will prepare a revised written evaluation report consistent with ST/AI/2002/3, in respect of which, once you have signed the report, you will be entitled to a rebuttal in accordance with Section 15 of the ST/AI.

54. In the course of that letter the Appellant was also, inter alia, advised as follows:

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 evaluation must only be in the format prescribed by the e-PAS system. Instead, ST/AI/2002/3 establishes the processes that must be followed and the matters to be considered, in conducting the performance appraisal. These include the designation of reporting officers (Section 4), the development of departmental, work unit and individual work plans (Sections 5 and 6), responsibilities for implementation and monitoring (Section 7), the mid-point review, performance appraisal and the rating system (Sections 8, 9 and 10). The MEU considered that, in this sense, the actual mechanism is less important from the obligation to comport with the substantive obligations and the principles embodied in the administrative issuance.

The MEU further considered that, in fulfilling its obligation to evaluate your performance, the Administration is entitled to use a method of evaluation that is consistent with the PAS and that does not violate your due process rights. In this regard, based on its review of the process in your case, the MEU was satisfied that the Administration's decision to conduct a written evaluation outside the electronic PAS mechanism was made because of your refusal to use that process as required. The MEU further considered that the decision by the Administration to conduct an evaluation outside the e-PAS mechanism in your case was nevertheless consistent with the principles of the PAS and would allow the Administration to fulfill its obligations under ST/AI/2002/3, taking into account your refusal to participate in the process.

In the light of the foregoing consideration of your case, the Secretary-General has decided to endorse the findings and recommendations of the MEU and to uphold the decision to prepare a written performance evaluation report for the PAS cycle 2009 - 2010 as a consequence of your refusal to use the e-PAS mechanism. The Secretary-General also noted the MEU's conclusion that the aspects of your request concerning the references to matters outside the 2009-10 PAS cycle and your right of rebuttal of the performance appraisal are now moot.

55. On 9 March 2011, the Appellant was provided with the finalized paper version of his written performance evaluation for the period from 1 April 2009 to 31 March 2010 and he was informed as follows:

[...] I wish to inform you that in case you disagree the rating given for this cycle, you may, within 30 days of signing the completed form, submit a written rebuttal statement in accordance with Section 15 of ST/AI/2002/3.

56. Mr. Gehr embarked on the rebuttal process on 15 March 2011, a process which was ongoing at the date of the UNDT hearing and indeed at the date of the UNAT hearing.

57. Addressing Mr. Gehr's claim with regard to the denial to him for a period of time of a right of rebuttal, the UNDT Judge, in light of the fact that that decision had been reversed and that the Appellant had embarked on a rebuttal process, concluded that the issue was moot and declined to further consider the claim on the basis that "the Applicant had not proved that he was still suffering any damage as a result of the decision".

58. The question for the Appeals Tribunal is whether in its conclusions on this issue the Dispute Tribunal erred in fact or law and/or whether there was a failure on its part to exercise the jurisdiction vested in it.

59. We are of the view that in rendering Mr. Gehr's complaint about the rebuttal issue moot in light of the subsequent reversal of the decision of 24 November 2010, the UNDT Judge failed to give sufficient weight to a central issue, namely the denial to Mr. Gehr, for a period of time, of the right to engage in a rebuttal process (should he wish to do so) in the context of the performance appraisal evaluation the Administration provided to him on 19 November 2010. This Tribunal recognises the fundamental right of an employee to be heard in the context of a performance evaluation process. Irrespective of whether the appraisal is conducted inside or 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. The Administration itself recognises such a fundamental right as it is provided for at paragraph 15 of ST/AI/2002/3. The right to have a rebuttal process is not mere procedural courtesy but a substantive right which all employees are entitled to invoke.

60. The Appeals Tribunal notes that in the letter of 1 February 2011 to Mr. Gehr, the Administration, in explaining the decisions taken in October and November 2010 to conduct a performance evaluation outside of ST/AI/2002/3, made reference to its primary obligations under Staff Regulation 1.3 to evaluate Mr. Gehr's performance. In the context of the explanation given in that letter for the decisions that had been made in October/November 2010 concerning the scope and method of the then intended appraisal process, the letter of 1 February 2011 refers to the importance of the "obligation to comport with the substantive obligations and the principles embodied in the administrative issuance". While the Administration gave due recognition to its substantive obligations when it made the decision to appraise Mr. Gehr's

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 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.

*The decision to carry out a single appraisal*

65. From a perusal of the facts in this case it is clear that by the spring of 2010 the Appellant's employer had embarked on an e-PAS appraisal system for the period 1 April 2009 to 31 March 2010. The Appellant's response to an email of 25 March 2010 was to challenge the single appraisal system being applied to his work performance on the basis that the e-PAS appraisal system applied only to staff members who had appointments of at least one year's

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 decision to apply a single appraisal system and its failure to address the requests made by the Appellant in his email of 26 November 2010, the UNDT deemed the Appellant's claim in the above regard as not receivable on the basis that such claims were premature.

67. Mr. Gehr submits that in its Judgment the UNDT "dodged" its obligation to pass judgement on the Administration's decision to evaluate his 2009-2010 performance in a single appraisal and to apply ST/AI/2002/3 to that appraisal.

68. Addressing the matter, the Dispute Tribunal Judge stated, at paragraphs 42 and 43 of his Judgment, as follows:

42. In the opinion of the Tribunal, it would be inconsistent with its standard of review to allow the Tribunal to interfere with the review of a performance appraisal before a final rating resulting from the rebuttal process has been given. In view of the fact that the appraisal of a staff member's performance is a matter for which the Administration enjoys discretion (see *Mandol* UNDT/2011/013), in exercising judicial review the Dispute Tribunal must determine "if the decision under challenge is reasonable and fair, legally and *procedurally correct*, and proportionate" (See *Sandwidi* 2010 – Unat – 084, emphasis added). Bearing in mind these considerations, the Tribunal held in *Gehr* UNDT/2011/178 that preliminary decisions such as the choice of an appropriate basis for a staff member's performance appraisal can only be reviewed within the context of the assessment of the final decision, that is, the outcome of the staff member's performance appraisal.

43. In the present case, the rebuttal process regarding the Applicant's performance appraisal is still pending. Therefore, his performance rating cannot be considered as final.

69. The UNDT's determination on the issue was made against the backdrop whereby at the time of the UNDT hearing, and thereafter, the Appellant and Management were (and remained) involved in the performance appraisal process, and indeed, as already indicated, on 15 March 2011 Mr. Gehr submitted a written rebuttal statement of his 2009-2010 appraisal which included the invoking of a rebuttal panel, a process which was ongoing at the time of the UNDT hearing and indeed at the time of the oral hearing in this appeal.

70. While deeming the Appellant's arguments with regard to the above irreceivable on the basis that they were premature, the UNDT Judge went on to state, at paragraph 45:

The above is without prejudice to the Applicant's right to file at a later stage a new application to challenge the basis for or the outcome of the rebuttal process or to seek compensation for the delay in finalising the process once its outcome is known.

71. 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, the appraisal process utilized by his employer.

72. Thus in all of those circumstances, Mr. Gehr's appeal on this issue is dismissed.

*Mr. Gehr's appeal as to the manner in which the UNDT dealt with his claims of harassment*

(i) Mr. Gehr submits that the UNDT erred in law and failed to exercise jurisdiction vested in it by reason of its failure to address

- 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,
- lack of integrity of the management evaluation process.

(ii) Moreover, Mr. Gehr, inter alia, submits that the series of administrative decisions contested in the case before the UNDT constituted harassment "in their own right" and were therefore "individually as well as collectively, i.e. together with the other incidents forming the chain of harassment and abuse of authority in breach of the Appellant's contract". In particular, he maintains that the UNDT excluded the possibility that the performance appraisals and the denial of rebuttal were acts of abuse of authority and harassment in the sense of ST/SGB/2008/5 and therefore in breach of the Appellant's contract.

73. With regard to (i) above, this Tribunal does not agree that the UNDT failed to address, where appropriate, Mr. Gehr's harassment claims. As evidenced by the recitals at paragraph 31 (f), (g) and (h) of the UNDT Judgment, the Dispute Tribunal Judge was alert to the claims of

abuse of authority, ill will, harassment and retaliation being made by Mr. Gehr. In the context of the Appellant's submissions with regard to the issue of the extension of the performance appraisal beyond 31 March 2010 and the series of performance appraisals provided to him between November 2010 and March 2011, we have already referred to the approach adopted by the UNDT Judge to Mr. Gehr's claim of harassment with regard to the performance appraisal of 19 November 2010 and the appraisals dated 7, 9 and 11 February 2011 and 2 March 2011.

74. A reading of paragraphs 42 to 43 of the UNDT Judgment (already quoted elsewhere in this Judgment), together with paragraph 50 (see below) satisfies this Tribunal that the Dispute Tribunal Judge, with regard to allegations of harassment, has left it open to Mr. Gehr to raise this issue, insofar as it is relevant to the appraisal process, if he chooses to challenge his final 2009-2010 performance appraisal, once all steps in that process (including the rebuttal process) have been completed.

75. Paragraph 50 of the UNDT Judgment states as follows:

Subsidiarily, the Tribunal considers that, for the reasons explained above (see paras. 42 to 43), absent a final performance rating, the Applicant may not challenge the comments made or individual ratings given by his reporting officers in support of an overall rating which might be modified as a result of the rebuttal process.

76. In the opinion of this Tribunal, the UNDT did not fail to exercise the jurisdiction vested in it but rather, it acted within its jurisdiction in adopting such an approach – effectively leaving the door open to Mr. Gehr to raise such matters before the UNDT in the future, in the appropriate context.

77. We note the Appellant's other submissions with regard to allegations of harassment outside of the context of the administrative decisions, the subject of the UNDT Judgment. However, we do not find that Mr. Gehr has made out any persuasive case that such issues ought properly have been considered by the Dispute Tribunal, in light of the nature of the administrative decisions under consideration in the UNDT Judgment. These decisions were described by Mr. Gehr himself in his letter to the Secretary-General on 1 December 2010 as the decisions:

- to carry out a single performance appraisal for the performance appraisal cycle 2009/2010, i.e. for the period 01 April 2009 to 31 March 2010;
- to nevertheless evaluate my performance for events which occurred after this period;



- 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. With regard to (ii) above, neither do we find any convincing argument in Mr. Gehr's submissions on this issue. Mr. Gehr referred to the "possibility" of the contested decisions of themselves constituting harassment on the part of the Administration.

80. As already referred to, one of the contested decisions in the present case was ill-thought out and one such decision did (as found by this Tribunal), for a period of time, deprive Mr. Gehr of his right to due process. We also agree with the Dispute Tribunal's assessment of the provision to Mr. Gehr of a number of different versions of his appraisal as highlighting a "lack of rigour and diligence" on the part of the Administration. Those actions on the part of the Administration however, of themselves, do not necessarily constitute harassment. Substantive and procedural rights and obligations and statutory provisions may from time to time be subject to infringement and such infringement can occur for a myriad of reasons. Such infringements may arise from conscious or unconscious acts or omissions on the part of the perpetrator. In the instant case, we are satisfied that Mr. Gehr had not put forward any argument sufficient to warrant consideration by the UNDT (or by this Tribunal) that the contested decisions in issue were taken or motivated on the basis of ill will or bad faith towards him or with the intention to harass him. His claims in this regard are thus dismissed.

*Mr. Gehr's appeal against the UNDT's failure to find that the Administration was in breach of its obligation under Staff Rule 11.2 (d) to communicate the outcome of the management evaluation within 45 calendar days*

81. It is a matter of fact that the management evaluation process initiated by the Appellant was responded to outside of the 45 calendar day period provided for in the Statute. By the time

the Appellant received the MEU's answer to his request, he had (following the expiry of the 45-day period) filed his application with the UNDT. Mr. Gehr brought the Administration's deficiencies in this regard to the attention of the UNDT, an issue which was duly addressed by the Dispute Tribunal Judge at paragraphs 51 to 53 of his Judgment. The UNDT observed that Article 8.1(d) (i) (b) of its Statute expressly provides for the situation where Management does not respond to a request for management evaluation, namely the entitlement of the requestor to apply to the Dispute Tribunal. This is what Mr. Gehr in fact did.

82. Other than noting that the MEU's failure to comply with the 45-day period did not affect Mr. Gehr's right to seize the Tribunal, and noting that the MEU's delay did not cause Mr. Gehr prejudice, the Dispute Tribunal did not consider the issue further. The Appeals Tribunal has considered the Appellant's submissions on the matter and it rejects entirely his claim that the UNDT's approach was indicative of "obvious bias" on the part of the UNDT against him. We are satisfied, from what is set out in the UNDT Judgment, that had the UNDT considered it necessary in the interests of fairness and justice to so do, it would have, if the factual situation merited it, provided relief to the Appellant for any prejudice that might have accrued to him. The Dispute Tribunal Judge did not find any such prejudice and the UNDT is the body best placed to make that determination. We are further satisfied to reject the Appellant's submissions that the UNDT displayed "a deep misunderstanding" of the management evaluation process. Furthermore we reject the contention that the manner in which the UNDT dealt with the issue affected any substantive element of Mr. Gehr's claims before the Dispute Tribunal. We dismiss his appeal on this issue accordingly.

*The rejection of evidence issue*

83. The Appellant takes issue with the Dispute Tribunal's rejection of the filing made by him on 2 September 2011 of additional evidence with regard to the present case and indeed to a number of other applications also lodged by Mr. Gehr with the UNDT.

84. A portion of the additional evidence is the subject of Annex No. 3 and Annex No. 4 to his submissions in this appeal. The annexes comprise an excerpt from a record of a telephone conversation between the Appellant and the Regional Ombudsman on 2 June 2011 and an excerpt of a telephone conversation between Mr. Gehr and the Chief, HRMS, UNODC dated 10 June 2011.

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 "unduly influenced the outcome of the proceedings". The Dispute Tribunal has a broad discretion to determine the admissibility of evidence under Article 18(1) of its Rules of Procedure and has a broad discretion in ruling on the relevance of that evidence to the matters in respect of which it has to issue a determination. The Dispute Tribunal, having access to the entirety of the evidence relied on by the parties and to the submissions made by them in support thereof, is best placed to consider the relevance of any evidence, documentary or otherwise, and the weight to be attached to any evidence deemed admissible. The Tribunal finds no error in the approach adopted by the UNDT. Furthermore, none of the arguments put forward by the Appellant in the course of his submissions has persuaded this Tribunal that the UNDT erred in its determination that the telephone conversation of 2 June 2011 was in contravention of Article 15(7) of the UNDT Rules of Procedure. Thus, Mr. Gehr's appeal with regard to Order No. 139 (GVA/2011) is dismissed.

*Mr. Gehr's claim that the proceedings before the UNDT were not heard in public*

89. The Appellant appeals, inter alia, the decision of the UNDT on 9 November 2011 rejecting his request to grant access to the public to the video conference room in Vienna from which both the Appellant and the Respondent were connected to the UNDT in Geneva. This is an issue which is also the subject matter of an appeal by Mr. Gehr to this Tribunal in respect of

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.

Original and Authoritative Version: English

Dated this 1st day of November 2012 in New York, United States.

*(signed)*

Judge Faherty, Presiding

*(signed)*

Judge Weinberg de Roca

*(signed)*

Judge Adinyira

Entered in the Register on this 30<sup>th</sup> day of November 2012 in New York, United States.

*(signed)*

Weicheng Lin, Registrar