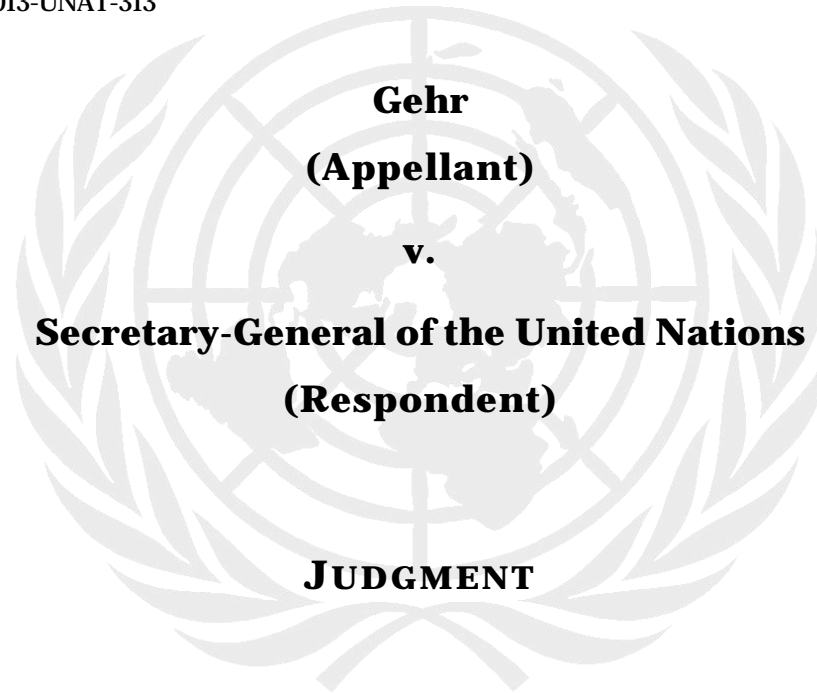




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2013-UNAT-313



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Before:	Judge Mary Faherty, Presiding Judge Luis María Simón Judge Sophia Adinyira
Case No.:	2012-349
Date:	28 March 2013
Registrar:	Weicheng Lin

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

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Walter Gehr against Summary Judgment No. UNDT/2012/103, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 3 July 2012 in the case of *Gehr v. Secretary-General of the United Nations*. Mr. Gehr appealed on 19 July 2012, and the Secretary-General answered on 20 September 2012.

### **Facts and Procedure**

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

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

4. On 3 January 2012, the Director of DTA signed off on Mr. Gehr's 2011 performance appraisal system (ePAS) in the capacity of both the first and the second reporting officer. Mr. Gehr filed a rebuttal statement and selected the names of three D-1 staff members to serve on the ePAS rebuttal panel.

5. On 3 February 2012, the Chief of the Human Resources Management Service (HRMS) of UNODC advised Mr. Gehr that the three staff members whom he had selected to serve on the ePAS rebuttal panel were not eligible to serve, as the rebuttal panel members had to be equal in grade or higher than the reporting officer whose appraisal was being rebutted and the DTA Director held grade D-2. The Chief of HRMS further advised Mr. Gehr that guidance was being sought from the headquarters in New York as to how to proceed, as there was only one individual on the UNODC list of rebuttal panel members whose grade was D-2 and none at a higher level.

6. On 19 April 2012, Mr. Gehr received a new list of rebuttal panel members. He selected three staff members at the D-2 level from the new list, but stressed that one of them, Ms. O., should recuse herself.

7. On 17 June 2012, HRMS offered Mr. Gehr two options to either agree to the inclusion of staff members from other offices on the list of rebuttal panel members or to select from the existing list another staff member who would be promoted to D-2 in August 2012. Mr. Gehr

rejected HRMS' proposal. On 19 June 2012, HRMS asked Mr. Gehr how he wished to proceed with his ePAS rebuttal now that he had rejected the only two possible options.

8. On 27 June 2012, Mr. Gehr submitted a request for management evaluation of what he claimed to be a "decision" which was communicated to him on 19 June 2012. On the same day, he also filed an application with the Dispute Tribunal. On 28 June 2012, Mr. Gehr sent to the UNDT the response from the Management Evaluation Unit rejecting his request and asked that it be added to his case file. On 2 July 2012, Mr. Gehr sought leave to submit an amended application.

9. In Summary Judgment No. UNDT/2012/103, the Dispute Tribunal rejected Mr. Gehr's application as not receivable, as he had failed to identify any appealable decision. In the view of the Dispute Tribunal, the alternative proposed by HRMS did not qualify as a "final decision", nor could it be considered as a decision not to proceed with the rebuttal process. The Dispute Tribunal concluded that the rebuttal process regarding Mr. Gehr's 2011 ePAS was ongoing and his application was therefore premature.

10. At the request of Mr. Gehr, the Tribunal held an oral hearing on 22 March 2013, with Mr. Gehr attending by video-link and the Secretary-General's representative participating in person.

### **Submissions**

#### **Mr. Gehr's Appeal**

11. The UNDT failed to exercise the jurisdiction vested in it by concluding that the decision to offer him two options could only be reviewed within the context of the assessment of the final decision. By deciding not to review his application, the UNDT erred in procedure. It is the role of the Dispute Tribunal to determine if an administrative decision is procedurally correct. In his view, the signing of his performance appraisal by one person as both the first and second reporting officer was procedurally incorrect.

12. Mr. Gehr maintains that he had no legal obligation to make the choice at the request of the Administration under existing procedures. It amounted to denying him the right to rebut his ePAS, in violation of his terms of appointment.

13. Mr. Gehr submits that the UNDT exceeded its jurisdiction by issuing a summary judgment without a proper legal basis and that the UNDT erred in procedure when it issued the summary judgment without giving an opportunity to the Respondent to reply to his application in violation of the principle of *audi alteram partem*.

**Secretary-General's Answer**

14. The Secretary-General submits that the UNDT was correct in dismissing Mr. Gehr's application as premature, given that his ePAS rebuttal process was still ongoing. The composition of the rebuttal panel can only be challenged in the context of an appeal against the outcome of that process, but cannot alone be the subject of another application to the UNDT.

15. The Secretary-General maintains that in his appeal to this Tribunal Mr. Gehr essentially repeats the claims that he has already put forward before the UNDT.

16. The Secretary-General also maintains that the UNDT properly exercised its authority under Article 9 of its Rules of Procedure to determine, on its own initiative, that a summary judgment was appropriate in the present case, as the only question at issue was legal in nature. In the opinion of the Secretary-General, the UNDT may issue a summary judgment without seeking submissions from a party, where the outcome of the summary judgment is not adverse to the interests of that party. The Secretary-General states that the issuance of the summary judgment without first seeking his submission does not raise any concerns on his part.

**Considerations**

17. The Appeals Tribunal has considered the written submissions of the parties together with the submissions made in the course of the oral hearing.

18. The issue for this Tribunal is whether the Dispute Tribunal was correct in law in rejecting Mr. Gehr's application as premature. Article 2(1) of the Dispute Tribunal Statute provides that the Dispute Tribunal is competent to hear and pass judgment on an application appealing "an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment".

19. We are satisfied that the Dispute Tribunal, in assessing whether the actions of the Administration vis-à-vis the rebuttal process concerning Mr. Gehr's 2011 ePAS constituted an administrative decision for the purpose of Article 2(1) of the UNDT Statute, correctly determined that no appealable administrative decision was identified by Mr. Gehr. We are further satisfied that the Dispute Tribunal, in reaching its decision, correctly assessed the complained-of actions and/or omissions against the definition of an administrative decision provided by the former United Nations Administrative Tribunal in Judgment No. 1157, *Andronov* (2003). Accordingly, the Dispute Tribunal was correct in law when it stated, at paragraph 20 of its Judgment, that "[t]he Administration's proposed alternative does not in any way qualify as a 'final decision'. Nor can it be considered as a decision 'not to proceed' with the rebuttal process in relation to [Mr. Gehr's] 2011 performance appraisal."

20. There is nothing in Mr. Gehr's written or oral submissions to persuade this Tribunal that the UNDT, given the particular facts of the present case, made any error of law or fact in rejecting the application as premature.

21. In the course of this appeal, Mr. Gehr sought to engage the Appeals Tribunal on the question of the merits of his claim against the Administration. He maintains that administrative instruction ST/AI/2010/5 was unlawfully applied to his ePAS process and that, once applied (albeit, he claims, unlawfully), the Administration did not then comply with the provisions of the aforementioned administrative instruction. Mr. Gehr raises this issue before this Tribunal in circumstances where the Dispute Tribunal, for the reasons already stated, has declined at this time to entertain the merits of his application. An evaluation by the Dispute Tribunal on the merits of Mr. Gehr's complaint may arise if, at the end of the appraisal process, he chooses to challenge the performance appraisal decision by way of an application to the UNDT following management evaluation. Thus there is no legitimacy in Mr. Gehr raising the merits of his case with this Tribunal. We have already adjudicated on this particular argument in an earlier judgment.<sup>1</sup>

22. Accordingly, Mr. Gehr's appeal against the Dispute Tribunal's decision to reject his application as premature is dismissed.

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<sup>1</sup> *Gehr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-253.

23. Mr. Gehr further submits that the Dispute Tribunal had no legal basis to proceed by way of summary judgment. We reject Mr. Gehr's submission on this issue. Article 9 of the Dispute Tribunal's Rules of Procedure provides:

A party may move for summary judgement when there is no dispute as to the material facts of the case and a party is entitled to judgement as a matter of law. The Dispute Tribunal may determine, on its own initiative, that summary judgement is appropriate.

The UNDT correctly determined that the criterion for summary judgment was met when it determined that “[i]n the present case, the facts are clear and the only issue—whether the contested decision is capable of being appealed—is ... a matter of law”.

24. Mr. Gehr further maintains in the course of his written submissions that the Dispute Tribunal's decision to proceed by way of summary judgment offended the principle of *audi alteram partem*. Mr. Gehr has no legal or factual basis for advancing this proposition since his application was given due consideration by the Dispute Tribunal within the legal parameters of the application, as determined by that Tribunal. His appeal on this issue is dismissed.

### **Judgment**

25. Mr. Gehr's appeal is dismissed in its entirety, and we affirm the Summary Judgment of the UNDT.

Original and Authoritative Version: English

Dated this 28<sup>th</sup> day of March 2013 in New York, United States.

*(Signed)*

Judge Faherty, Presiding

*(Signed)*

Judge Simón

*(Signed)*

Judge Adinyira

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

*(Signed)*

Weicheng Lin, Registrar