



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

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Judgment No. 2024-UNAT-1434

**Hawa Haydar**  
**(Respondent/Applicant)**

**v.**

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

**JUDGMENT**

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Before:	Judge Nassib G. Ziadé, Presiding Judge Gao Xiaoli Judge Leslie F. Forbang
Case No.:	2023-1811
Date of Decision:	22 March 2024
Date of Publication:	6 May 2024
Registrar:	Juliet E. Johnson

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Counsel for Respondent/Applicant: Edwin Nhliziyu

Counsel for Appellant/Respondent: Rupa Mitra

**JUDGE NASSIB G. ZIADÉ, PRESIDING.**

1. Ms. Hawa Haydar challenged before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) the decision by her First Reporting Officer (FRO) to prepare her 2020-2021 performance appraisal offline rather than via the electronic performance appraisal system (ePAS) in *Inspira*, and to include negative comments and elements into her appraisal while rating her “successfully meets performance expectations” (contested decision). At the time of the contested decision, Ms. Haydar was a P-3 Supply Officer with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA).
2. By Judgment No. UNDT/2023/022 dated 30 March 2023 (impugned Judgment), the UNDT granted the application in part. The UNDT rescinded the filing of Ms. Haydar’s 2020-2021 performance appraisal in her personnel or other records to allow the Administration to give Ms. Haydar an opportunity to be heard on the negative comments before an independent, impartial and objective panel to ensure that the performance rating of “successfully meets performance expectations” was consistent with the comments.
3. The Secretary-General appeals the impugned Judgment.
4. For the reasons set out below, the Appeals Tribunal dismisses the Secretary-General’s appeal in part and modifies Judgment No. UNDT/2023/022 as to remedy only.

**Facts and Procedure**

5. Ms. Haydar joined MINUSCA as a P-3 Supply Officer in July 2014. She served as a Chief of the Supply Unit in the Life Support Section (LSS) until 4 December 2020 when MINUSCA relieved her of her responsibilities because she refused to perform key managerial functions.<sup>1</sup>
6. On 26 August 2020, Ms. Haydar’s FRO sent a draft section work plan to the Unit Chiefs, including Ms. Haydar, to develop their respective Unit plans pending the approval of the work plan for the entire section by the Chief, Supply Chain Management. Ms. Haydar’s FRO also advised the Unit Chiefs, including Ms. Haydar, to develop their individual work plans.<sup>2</sup>

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<sup>1</sup> Secretary-General’s appeal, para. 2; Ms. Haydar contested this matter before the UNDT which ruled on it in Judgment No. UNDT/2022/084.

<sup>2</sup> Impugned Judgment, para. 5.

7. On 7 October 2020, Ms. Haydar's FRO reminded the Unit Chiefs, including Ms. Haydar, to submit their individual and Unit draft work plans for approval by 14 October 2020. Ms. Haydar submitted the Supply Unit's draft work plan for review on 8 October 2020.<sup>3</sup>

8. On 13 October 2020, Ms. Haydar's FRO informed her that he had reviewed her Unit's draft work plan and that whilst he agreed with the goals, the Key Related Activities and Success Criteria needed some revision.<sup>4</sup> By e-mail dated 16 December 2020, Ms. Haydar informed her FRO that she had just returned from leave and that the Unit work plan he queried had been based on the previous year's work plan.<sup>5</sup> She did not make any changes.<sup>6</sup>

9. On 14 May 2021, Ms. Haydar's FRO requested Ms. Haydar to submit her work plan in *Inspira*. The FRO informed her that he had returned the work plan she had submitted because she had deleted all the goals and it had no core competencies or managerial competencies selected.<sup>7</sup>

10. By Interoffice Memorandum dated 25 May 2021, Ms. Haydar's FRO requested her to complete her work plan in *Inspira* and submit it for approval by 31 May 2021.<sup>8</sup> Ms. Haydar did not respond.<sup>9</sup>

11. On 16 June 2021, Ms. Haydar's FRO sent Ms. Haydar an e-mail attaching her offline work plan. That same day, Ms. Haydar informed her FRO that she was unwell and on sick leave.<sup>10</sup>

12. Between 24 and 27 August 2021, Ms. Haydar who was still away from the Mission on sick leave and her FRO exchanged e-mails concerning her ePAS for 2020-2021 (specifically, on who was responsible for the late approval of her work plan and on the way forward); the e-PASes for staff in the Supply Unit; and leave plans for LSS.<sup>11</sup> By e-mail dated 24 August 2021, with the offline

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<sup>3</sup> *Ibid.*, para. 6.

<sup>4</sup> E-mail from Ms. Haydar's FRO to Ms. Haydar, Annex 2 to Secretary-General's appeal.

<sup>5</sup> E-mail from Ms. Haydar to her FRO, Annex 2 to Secretary-General's appeal.

<sup>6</sup> Impugned Judgment, para. 8.

<sup>7</sup> E-mail from Ms. Haydar's FRO to Ms. Haydar, Annex 3 to Secretary-General's appeal.

<sup>8</sup> Interoffice memorandum from Ms. Haydar's FRO to Ms. Haydar, Annex 3 to Secretary-General's appeal.

<sup>9</sup> Impugned Judgment, para. 10.

<sup>10</sup> *Ibid.*, paras. 11-12.

<sup>11</sup> *Ibid.*, para. 13.

performance appraisal attached, the FRO advised Ms. Haydar to fill in her comments by 27 August 2021.<sup>12</sup>

13. On 8 September 2021, Ms. Haydar and her FRO met via Microsoft Teams to discuss her offline work plan.<sup>13</sup> On 13 September 2021, the FRO sent Ms. Haydar an e-mail, summarizing the discussion of 8 September 2021 and asking her to complete her offline individual work plan by 17 September 2021.<sup>14</sup> Ms. Haydar submitted her offline work plan on 8 October 2021.<sup>15</sup>

14. Ms. Haydar's FRO and SRO signed off on Ms. Haydar's 2020-2021 offline performance appraisal on 29 November 2021. While Ms. Haydar was rated as having successfully met performance expectations, parts of the FRO's narrative comments, endorsed by the SRO, were negative.<sup>16</sup>

15. By e-mail dated 30 November 2021, the FRO sent Ms. Haydar the completed offline performance evaluation advising her to complete her part and return the performance report by 14 December 2021.<sup>17</sup>

16. On 28 January 2022, Ms. Haydar requested management evaluation of the "deliberate delays in conducting the performance on time[]y manner starting each year from [M]arch 31 to April 30 and Use of e-performance to penalize staff member who speaks out against accountability and integrity". As remedies, she requested that her performance evaluation be done online in *Inspira*, that her work plan be discussed and that the process governing e-performance be followed. She further asked for "[f]air treatment just like the staff member in the Supply Unit" and requested "[n]o favoritism".<sup>18</sup>

17. On 10 March 2022, the Management Evaluation Unit (MEU) informed Ms. Haydar that her request was not receivable on grounds that the issuance of an offline performance document did not produce any legal consequences that affected the terms and conditions of

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<sup>12</sup> *Ibid.*, para. 14.

<sup>13</sup> *Ibid.*, para. 15.

<sup>14</sup> E-mail from Ms. Haydar's FRO to Ms. Haydar, Annex 4 to Secretary-General's appeal.

<sup>15</sup> Impugned Judgment, para. 15.

<sup>16</sup> Performance Management and Development Manual Appraisal Form, Annex 6 to Secretary-General's appeal.

<sup>17</sup> Impugned Judgment, para. 17.

<sup>18</sup> Request for a Management Evaluation, Annex 5 to Secretary-General's appeal.

her appointment; consequently, there was no administrative decision within the meaning of Staff Rule 11.2(a) that could be subject to review before the MEU.<sup>19</sup>

18. On 8 June 2022, Ms. Haydar filed an application before the UNDT contesting the decision of 29 November 2021 that she described as:<sup>20</sup>

The FRO prepared a[n] EPAS [electronic performance appraisal] offline instead of doing it in *INSPIRA* as is normally the case and did it in a manner that reflected negatively on the ... staff member despite the fact she was not the cause of the delay. He rated her “successfully meets performance expectations”, the comments and the majority of the individual elements rated make that rating a 'sham', only used to evade a rebuttal.

19. Ms. Haydar asked that the offline performance evaluation completed by her FRO be cancelled, and that a new evaluation be done in *Inspira* in accordance with the applicable legal provisions. She further asked that she be awarded compensation for the violation of her due process rights.

20. The UNDT held hearings from 21 to 23 February, on 28 February, and on 1 March 2023, during which oral evidence was adduced from Ms. Haydar herself, as well as from her FRO, the then Chief, LSS, and her SRO, the Chief, Service Delivery.<sup>21</sup>

21. On 30 March 2023, the UNDT issued the impugned Judgment. The UNDT found that the contested decision was in fact “the use of the performance appraisal to penalize [Ms. Haydar]”, and that “negative comments without recourse to rebuttal were in essence the penalization”.<sup>22</sup> The UNDT also defined the issue before it as having three components: a) the completion of the performance appraisal offline (instead of online in *Inspira*); b) negative comments in the performance appraisal; and c) due process rights in the performance appraisal.<sup>23</sup> The UNDT found that the application as it related to the decision to conduct an offline performance appraisal was not receivable because Ms. Haydar had failed to timely ask for management evaluation of the decision to conduct her performance appraisal offline within

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<sup>19</sup> Impugned Judgment, para. 20.

<sup>20</sup> *Ibid.*, para. 1.

<sup>21</sup> *Ibid.*, para. 3.

<sup>22</sup> *Ibid.*, para. 35.

<sup>23</sup> *Ibid.*

60 days of being notified of the decision.<sup>24</sup> However, the UNDT held that the application was receivable insofar as it related to the negative comments in Ms. Haydar’s appraisal.<sup>25</sup>

22. On the merits, the UNDT found that Ms. Haydar had not been given “an opportunity to be heard on the negative comments that detracted from the overall successful rating in her performance appraisal”, and that this represented a breach of her due process rights and her right to be assessed fairly.<sup>26</sup>

23. The UNDT granted the application in part and rescinded the filing of Ms. Haydar’s 2020-2021 performance appraisal in her personnel or other records to allow the Administration to give her an opportunity to be heard on the negative comments before an “independent, impartial and objective panel to ensure that the performance rating of successfully meets expectations is consistent with the comments”.<sup>27</sup>

24. The Secretary-General filed an appeal on 30 May 2023, and Ms. Haydar filed her answer on 27 July 2023.

### **Parties’ Submissions**

#### **The Secretary-General’s Appeal**

25. The Secretary-General contends that the UNDT erred in law in finding that Ms. Haydar’s challenge of the comments in her performance appraisal was receivable when she had failed to ask for management evaluation of such comments. Had the UNDT undertaken – as it was required to do – an analysis as to whether Ms. Haydar’s request for management evaluation could reasonably be interpreted to include a challenge of the comments in her appraisal, it would have found that she had failed to request management evaluation of such comments. The UNDT’s inherent authority to individualize and define the administrative decision impugned by a party before the UNDT does not encompass a power to do so in a way that circumvents the statutory requirement to request management evaluation. The Secretary-General emphasizes that Ms. Haydar had the benefit of counsel who filed the

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<sup>24</sup> *Ibid.*, para. 46.

<sup>25</sup> *Ibid.*, paras. 43-44.

<sup>26</sup> *Ibid.*, paras. 73-74.

<sup>27</sup> *Ibid.*, para. 82.

request for management evaluation on her behalf. Counsel is presumed to be aware of the relevant law and their actions and omissions legally reflect the persons they represent.

26. The Secretary-General further submits that the UNDT erred in law in finding that the challenge of the comments in Ms. Haydar’s performance appraisal with an overall rating of “successfully meets expectations” was receivable on grounds that they had direct legal consequences affecting her terms and conditions of appointment. The UNDT erred in relying on the UNAT’s jurisprudence in *Handy*<sup>28</sup> in reaching its conclusion in that regard. In *Handy*, the UNAT found that both Mr. Handy’s FRO and SRO made “profoundly negative” and “disparaging” comments which contradicted the ratings given by the FRO and effectively turned Mr. Handy’s overall positive performance appraisal into an unfavourable one. The UNAT concluded that, under the specific circumstances of that case, Mr. Handy’s performance evaluation, exceptionally, did constitute a reviewable administrative decision with direct legal consequences for Mr. Handy.

27. The Secretary-General asserts that the exceptional circumstances in *Handy* were however not present in Ms. Haydar’s case. The FRO’s comments did not “negate” the overall positive rating and did not effectively turn the rating into a negative one. The FRO never indicated anything close to a conclusion that Ms. Haydar’s performance had not been successful “in any possible way”. On the contrary, and as the UNDT noted, the FRO indicated that she had “achieved 4 of the 5 goals”. The Secretary-General emphasises that a rating of “successfully meets expectations” does not preclude a manager from identifying areas in which a staff member can improve. Staff members who meet performance expectations may have performance shortcomings in certain areas that they can improve to reach their full potential. The UNDT erred in finding that the comments in Ms. Haydar’s performance appraisal that indicated specific areas for her improvement rose to the level of the comments in *Handy*, and thereby effectively negated her overall rating.

28. The Secretary-General next claims that the UNDT erred in law and fact by finding that the Organization did not allow Ms. Haydar an opportunity to view and discuss the appraisal comments and thereby did not fairly assess her performance. There is no legal basis for the UNDT’s finding. The applicable legal framework in Administrative Instruction ST/AI/2010/5 (Performance Management and Development System) does not require a staff member to

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<sup>28</sup> *Simon Handy v. Secretary-General of the United Nations*, Judgment No. 2020-UNAT-1044.

“view” or “discuss” comments before supervisors sign the evaluation. In addition, the UNDT erred in fact as the FRO did provide Ms. Haydar with opportunities to discuss her work performance and the performance evaluation process. The Secretary-General points to several instances where Ms. Haydar’s FRO or SRO had called for meetings to discuss her outstanding performance evaluation and/or discuss her work plan where Ms. Haydar either refused to participate in the meetings or did attend but refused to discuss the issues. In view of Ms. Haydar’s continuous obstruction of the performance review process, which resulted in the appraisal being made offline, and in light of the applicable administrative framework, it was manifestly unreasonable for the UNDT to find that Ms. Haydar had not been given an opportunity to view and to discuss negative comments and offer feedback to any negative comment before the FRO sent his offline appraisal to her.

29. The Secretary-General contends that by the same token, the UNDT erred in fact by finding that the FRO had not previously discussed Ms. Haydar’s performance shortcomings with her in order to give her an opportunity to respond to them or to improve on them, and as a result, she had been “ambushed” by the completed performance appraisal. Ms. Haydar had multiple opportunities to discuss the issues that her FRO identified with her performance. In reaching its conclusion, the UNDT ignored the numerous e-mails showing that the FRO informed Ms. Haydar about concerns he had about her actions and inactions. She was well aware of her FRO’s concerns with her work performance and nothing in her offline appraisal would have come as a surprise to her.

30. Finally, the Secretary-General alleges that the UNDT exceeded its competence and erred in law by rescinding the filing of Ms. Haydar’s performance appraisal in her records to allow the Administration to give her an opportunity to be heard on the negative comments before an independent, impartial and objective panel to ensure that the performance rating of successfully meets expectations is consistent with the comments. There is no legal basis for the remedy that the UNDT ordered. The applicable legal framework in ST/AI/2010/5 does not envision the establishment of a panel such as ordered by the UNDT. The only panel that can be established is a rebuttal panel under Section 14 of ST/AI/2010/5, and Ms. Haydar’s case did not give rise to the establishment of such a panel.

31. The UNDT cannot assume legislative authority to supplement the existing legal framework. The UNAT has held that neither the UNDT nor this Court has the authority to amend any Regulation or Rule of the Organization. Moreover, this is not a case where the



written law is silent or has to be interpreted because it is not explicit. In view of the foregoing, the UNDT acted *ultra vires* in ordering the Administration to set up an “independent, impartial and objective panel” to hear Ms. Haydar’s comments on her performance appraisal, and to thereby require the Administration to undertake an administrative process that is not envisioned in the applicable legal framework of ST/AI/2010/5.

32. The Secretary-General requests the UNAT to reverse the impugned Judgment and to dismiss Ms. Haydar’s application in its entirety.

### **Ms. Haydar’s Answer**

33. Ms. Haydar submits that she had clearly shown during the hearing before the UNDT that it had been the FRO and not her who had refused to cooperate with her ePAS process. During the hearing before the UNDT, her FRO cited an e-mail dated 16 December 2020 to substantiate that she had failed to cooperate. However, in that e-mail she had merely sought clarification, and when pressed for an explanation on why this e-mail should be characterized as non-cooperation, the FRO had no explanation to offer.

34. Ms. Haydar contends that on 4 December 2020, her FRO stripped her of her supervisory role over a dispute that concerned the recruitment of a United Nations Volunteer, who did not meet the experience requirements for the post, and her supervisors effectively waived the requirement to get her on board. Ms. Haydar submits that “the general disregard of UN rules and procedures was not an isolated event”, and she was punished for speaking out. In an instance related to a different staff member who “had been imposed on her”, there was an ongoing dispute about completing that staff member’s ePAS, and Ms. Haydar claims that in that case she refused to complete the ePAS while others tasking that staff member did not submit their evaluations. She refused to violate the applicable rules in that regard.

35. Ms. Haydar submits that an offline performance evaluation may only be prepared in cases where a staff member refuses to cooperate with her own ePAS process. Her FRO tried to misrepresent the dispute to make it seem like Ms. Haydar refused to cooperate with her own ePAS process, a narrative which is not supported by the evidence. Ms. Haydar left the mission on 5 May 2021 to seek medical help in the United States for a condition she had been suffering from for several years. While on sick leave, her FRO sent her two e-mails asking her to complete the offline ePAS. Following her return, her FRO refused to complete her ePAS in *Inspira*. Ms. Haydar

further expounds on her claim that the FRO's reliance on an offline performance evaluation was unlawful and motivated by bad faith. She recounts the different e-mail exchanges and discussions regarding their disputes on matters such as (illegal) recruitment practices to demonstrate her FRO's alleged motivation to penalize her.

36. Ms. Haydar contends that the principle in *Handy* is to prevent sham ratings by adding derogatory comments in a performance evaluation that render an overall positive performance evaluation negative. In Ms. Haydar's case, the adverse comments were inaccurate, unbalanced, and went unchallenged. The UNDT found that letting the offline evaluation stand had the effect of introducing adverse material into Ms. Haydar's official records. Before the UNDT, Ms. Haydar argued successfully that there was no justification for the FRO to go offline and then to refuse to complete her ePAS in *Inspira*. Moreover, Ms. Haydar's performance evaluations in *Inspira* for the year before the offline ePAS and the year following the offline ePAS show that Ms. Haydar is competent and that the offline ePAS was an outlier. It was not consistent with the *Inspira* ePASes which support Ms. Haydar's assertion that Ms. Haydar's FRO undertook to provide an offline evaluation in order to make adverse comments which he could not have done in *Inspira*. The offline evaluation shows a degree of hostility which results from disagreements in relation to the recruitment and placement of two staff members assigned to Ms. Haydar's office, and it does not reflect Ms. Haydar's true performance.

37. Ms. Haydar reiterates that the UNDT found that there had been no consultation in the preparation of the Unit work plan, that the process was started only five months into the performance cycle, that there had been no midpoint review of Ms. Haydar's performance and that the decision to switch to an offline performance evaluation was made while she was on sick leave. When Ms. Haydar returned and asked to complete her ePAS in *Inspira*, it was her FRO who refused to cooperate. The UNDT further found that Ms. Haydar had not been given a chance to respond to the negative comments in her offline evaluation. Moreover, Ms. Haydar's shortcomings as recorded in the offline performance evaluation were never discussed with her.

38. Ms. Haydar requests that the Appeals Tribunal dismiss the appeal and that it impose "whatever sanctions are available" on grounds that the Secretary-General is deliberately trying to mislead the Appeals Tribunal in an attempt to obtain the reversal of the impugned Judgment.

### Considerations

39. The threshold issue in this case is whether the application was receivable *ratione materiae* before the UNDT. Article 2(1)(a) of the UNDT Statute provides that the Dispute Tribunal “shall be competent to hear and pass judgement on an application filed by an individual ... [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment”. Under the applicable Staff Rules, a staff member wishing to “contest an administrative decision” on this basis must first make a timely “request for a management evaluation of the administrative decision”.<sup>29</sup> It is well settled that a claim which has not first been raised in a request for management evaluation is not receivable *ratione materiae*.<sup>30</sup>

40. It is not disputed that Ms. Haydar did request a management evaluation of the performance appraisal, prior to seeking review by the UNDT. The performance appraisal was completed on 29 November 2021, and received by Ms. Haydar on 30 November 2021. Ms. Haydar submitted a request for a management evaluation on 28 January 2022, and the MEU advised her on 10 March 2022 that her request was not receivable. On 8 June 2022, Ms. Haydar submitted her application to the UNDT. The core disputed issue here is whether the management evaluation request and the UNDT application involve the same administrative decision. The UNDT concluded that, with respect to the inclusion of negative comments in Ms. Haydar’s appraisal, the issue had been raised to the MEU in a timely fashion; the Secretary-General contends, however, that this conclusion was incorrect and outside the UNDT’s authority in this case.

41. The resolution of this dispute thus requires an analysis of what exactly Ms. Haydar had raised in her management evaluation request, as compared to what exactly she raised with the UNDT, keeping in mind the UNDT’s inherent power to adequately interpret and identify what is being contested.<sup>31</sup>

42. While not a model of clarity, Ms. Haydar’s request for a management evaluation characterized the “administrative decision to be evaluated” as, *inter alia*, the “[u]se of

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<sup>29</sup> Staff Rule 11.2(a).

<sup>30</sup> *Marius Mihail Russo-Got v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1300, para. 19.

<sup>31</sup> *Husein Taha Abu Heija v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2023-UNAT-1327, para. 30; *Archana Patkar v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1102, para. 21.

e-performance to penalize staff member who speaks out against accountability and integrity”.<sup>32</sup> Ms. Haydar further contended that “[t]he impugned decision should be set aside [because] it casts [her] in a bad light by suggesting [she] was uncooperative”.<sup>33</sup> In her application to the Dispute Tribunal, Ms. Haydar sought review of the performance appraisal which “reflected negatively on [her]”, and while rating her as “‘successfully meets performance expectations’, the comments and the majority of the individual elements rated make that rating a ‘sham’”.<sup>34</sup>

43. The UNDT conducted extensive proceedings to familiarize itself with the factual and procedural background of this matter and concluded that “the claim before the Tribunal ... is that [Ms. Haydar] is aggrieved by the decision of the Respondent dated 29 November 2021 in which her performance appraisal report ... was by its nature and contents used to penalize her. As a result of the negative comments in her performance appraisal without recourse to rebuttal, her terms and conditions of employment were violated”.<sup>35</sup>

44. In light of the underlying record, the proceedings undertaken by the UNDT, and the UNDT’s explanation of its analysis, we conclude as a threshold matter that the UNDT acted within its authority and inherent power to define the administrative decision challenged, to identify the subject of judicial review, and to find that Ms. Haydar had effectively challenged the same administrative decision both in the management evaluation process and before the UNDT.

45. Having crossed that threshold, we must address another preliminary matter, namely, whether the performance evaluation here, which rated Ms. Haydar as having “successfully met performance expectations”, is itself an appealable administrative decision. We recall that for a decision to be subject to judicial review, it must have as its key characteristic the capacity to produce direct legal consequences affecting a staff member’s terms and conditions of employment.<sup>36</sup> The MEU here held that the request for management evaluation was not receivable because a favorable performance review did not have such consequences, and the Secretary-General asks this Tribunal to conclude likewise.

46. Our determination of whether an action is an “administrative decision” does not turn on the label applied by the Organization. Rather, the analysis turns on whether an action has

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<sup>32</sup> Request for a Management Evaluation, Annex 5 to Secretary-General’s appeal, p. 2.

<sup>33</sup> *Ibid.*, p. 4.

<sup>34</sup> Impugned Judgment, para. 1.

<sup>35</sup> *Ibid.*, para. 32.

<sup>36</sup> *Husein Taha Abu Heija Judgment, op. cit.*, para. 29; *Archana Patkar Judgment, op. cit.*, para. 22.

“the capacity to produce direct legal consequences”. Accordingly, this Tribunal must examine the underlying circumstances and context of the challenged action. With particular regard to a facially positive performance evaluation, we look to the “actual character” of the evaluation, including whether the reasoning or narrative comments so detract from the overall favorable conclusion that they can be said to have a direct adverse impact on the terms and conditions of the staff member’s employment.<sup>37</sup>

47. Our examination of the record finds ample support for the UNDT’s conclusion that the evaluation here falls within this recognized, albeit narrow, exception. While commending Ms. Haydar and her team for their effective response to the Covid-19 outbreak, the narrative finds that “her good performance was marred by her creation of a hostile work environment in her unit”; and further states that she “refused to assign tasks” to a subordinate based on “strained relations”; that she devoted her energy to “resisting” her supervisors, and lists in some detail the ways in which that perceived resistance was manifested. These comments, all from the FRO, were “fully endorse[d]” by the SRO.<sup>38</sup>

48. The paucity of positive comments, compared with the pointed and overwhelmingly negative comments in the performance appraisal render this evaluation an “administrative decision” with, in this context, a direct adverse impact on Ms. Haydar’s employment. The application was receivable as a matter of law.

49. Because the application was receivable *ratione materiae* before the UNDT, we must now address whether the UNDT correctly decided the merits of the application. Specifically, we must examine whether the UNDT erred in law or in fact in finding that Ms. Haydar had a right to be heard on the negative comments, and was denied that opportunity, and that absent such opportunity there was a breach of her due process rights in sufficient regard to find a violation of her terms and conditions of employment.

50. Ms. Haydar contends that she was denied an opportunity during the appraisal process, and prior to the challenged decision, to address management concerns regarding her performance. The record does not support that contention. To the contrary, many of the issues which later appeared in the performance appraisal were directly raised with Ms. Haydar by her

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<sup>37</sup> *Simon Handy* Judgment, *op. cit.*, paras. 24, 41-43, 46, and 48.

<sup>38</sup> Offline Performance Management and Development Manual Appraisal Form 2020-2021, Annex 6 to Secretary-General’s appeal, pp. 5-7.

FRO, and a candid exchange of views on Ms. Haydar's performance took place in a variety of e-mail exchanges.<sup>39</sup> The Secretary-General's contentions in this particular regard are correct.

51. The legal issue arises, however, in the manner by which the negative evaluation was officially presented in the performance evaluation. By characterizing Ms. Haydar's performance as "successfully meets performance expectations", management precluded Ms. Haydar from contesting the appraisal through the management evaluation process. Whether by design or not, the combination of the overwhelmingly negative comments regarding Ms. Haydar with the final assessment of "successfully meets performance expectations" produced a highly negative employment record which could never be challenged or reviewed through channels outside the internal justice system.

52. This is not to say, and we do not rule, that the substance of the performance evaluation regarding Ms. Haydar was incorrect. Rather, we hold that this substantively negative performance evaluation cannot be allowed to stand where it is coupled with a final conclusion which operates to deprive the staff member of any opportunity to contest the evaluation through normal channels. We thus dismiss the Secretary-General's appeal in that regard and affirm the rescission of the performance evaluation.

53. While we agree with the UNDT's thoughtful resolution of the threshold issues as well as its determination of a substantive illegality, we part ways with the UNDT regarding the appropriate remedy in this case. The UNDT rescinded the challenged performance appraisal subject to an opportunity for Ms. Haydar to be heard on the negative comments before an "independent, impartial and objective panel".<sup>40</sup> We find this remedy to be outside the authority of the UNDT.

54. The UNDT Statute authorizes the UNDT to "only order one or both of the following: (a) Rescission of the contested administrative decision or specific performance ...; (b) Compensation for harm".<sup>41</sup> The impugned Judgment, while including an order of rescission, goes beyond either of these forms of remedy to order the formation of a vaguely defined "panel" with seeming authority to review the performance rating and, perhaps, to revise the rating or the underlying comments to match the extant rating.<sup>42</sup> We agree with the Secretary-General

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<sup>39</sup> Annexes R/15 and R/16 to Secretary-General's Response to UNDT Order No. 016 dated 30 January 2023.

<sup>40</sup> Impugned Judgment, para. 82.

<sup>41</sup> UNDT Statute, Article 10(5).

<sup>42</sup> Impugned Judgment, para. 82.

that such a novel administrative process is *ultra vires* and effectively legislative in nature, and therefore grant the appeal, and reverse the impugned Judgment, in this respect.

55. We do not, however, agree with the Secretary-General that no remedy is appropriate. We have determined that the application was receivable *ratione materiae*, and that Ms. Haydar’s rights were violated by the challenged administrative decision. It would be erroneous to then conclude that she is without a remedy. In light of the nature of the violation, we rescind the performance appraisal of 29 November 2021 in order to provide management an opportunity to revise that evaluation in a manner consistent with the rulings of the UNDT and this Tribunal. Such revision may address the ultimate conclusion as to Ms. Haydar’s performance during the relevant period, or underlying comments regarding that conclusion, or both. In any event, the individuals preparing such a revision are reminded that the ultimate conclusion they reach in their assessment must be supported by the comments and not fundamentally undermined by them. Such appraisal may, but is not required to, be completed in *Inspira*. Upon completion of this revision, Ms. Haydar will have all applicable rights for review, based on the nature of the revised evaluation.

56. Finally, we address Ms. Haydar’s claim for sanctions against the Secretary-General for the manner in which this appeal has been argued. This request is without support. The Appeals Tribunal may award costs against a party, who in an extreme case, “has manifestly abused the appeals process”,<sup>43</sup> but no such showing has been made here.<sup>44</sup>

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<sup>43</sup> UNAT Statute, Article 9(2).

<sup>44</sup> *Cf. Vijay Neekhra v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2023-UNAT-1335, paras. 71-72.

**Judgment**

57. The Secretary-General's appeal is dismissed, except with respect to the remedy which is modified, as set forth above. Judgment No. UNDT/2023/022 is affirmed with respect to the rescission of the contested decision and modified as to the remedy.

Original and Authoritative Version: English

Decision dated this 22<sup>nd</sup> day of March 2024 in New York, United States.

*(Signed)*

Judge Ziadé, Presiding

*(Signed)*

Judge Gao

*(Signed)*

Judge Forbang

Judgment published and entered into the Register on this 6<sup>th</sup> day of May 2024 in New York, United States.

*(Signed)*

Juliet E. Johnson, Registrar