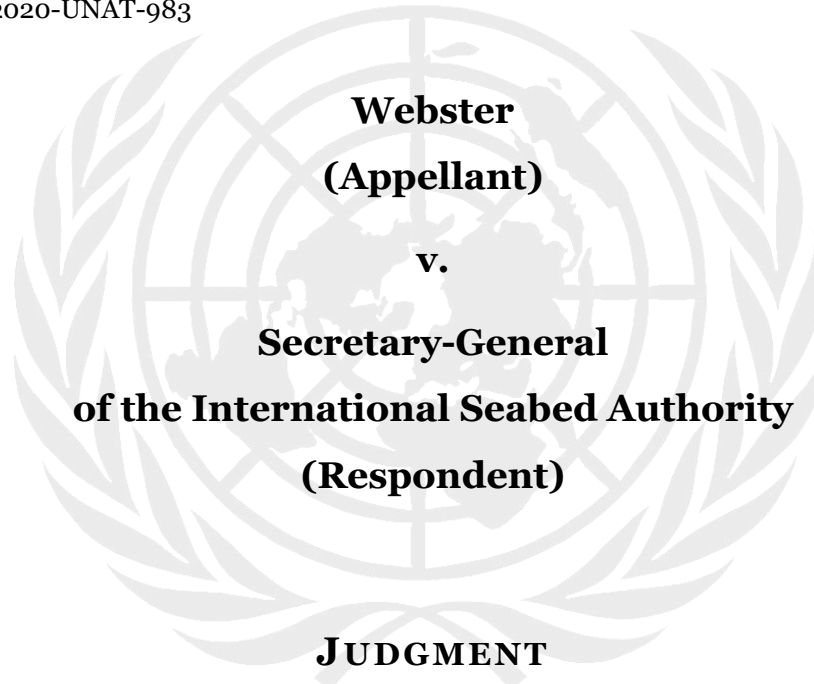




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2020-UNAT-983



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Before: Judge Kanwaldeep Sandhu, Presiding  
Judge Graeme Colgan  
Judge John Raymond Murphy

Case No.: 2019-1282

Date: 27 March 2020

Registrar: Weicheng Lin

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Counsel for Mr. Webster: David Stollow, Esq.

Counsel for ISA Secretary-General: Alfonso Ascencio-Herrera

**JUDGE KANWALDEEP SANDHU, PRESIDING.**

1. The Appellant appeals the decision of the Secretary-General of the International Seabed Authority (ISA Secretary-General and ISA, respectively) to separate him from service as a Budget and Internal Oversight Officer of ISA due to unauthorized absence and leave.
2. ISA's Joint Appeals Board (JAB) declined to recommend that the ISA Secretary-General review his decision to separate the Appellant from service as it found that the Appellant did not report for duty or take necessary steps over an extended period of time after the expiration of his sick leave.
3. The Appellant appeals to the United Nations Appeals Tribunal (Appeals Tribunal). The Respondent requests the Appeals Tribunal dismiss the appeal but also to review the finding of receivability of the appeal to the JAB.
4. For reasons set out below, we find that the JAB decision on receivability was not in error. However, we find there is a structural concern regarding the JAB appeals process. We find that it does not comply with the terms of the Special Agreement between the United Nations and the International Seabed Authority executed on 11 February 2010 (the Special Agreement). As a result, we remand the matter to the JAB to ensure the Appellant's case is dealt with in a manner that produces a written decision from a neutral first-instance process as required by the Special Agreement and Article 2(10) of the Statute of the United Nations Appeals Tribunal (the "Statute").

**Evidence & Submissions**

5. The Appellant joined the ISA in Kingston, Jamaica, on 30 March 2015, as a Budget and Internal Oversight Officer at the P-4 level on a two-year fixed-term appointment (FTA), which was subsequently extended for three years through 29 March 2020.
6. On 15 April 2017, the Appellant says he was attacked and robbed. He informed his supervisor, the Director of the Office of the Administrative Services, ISA. At work shortly afterwards, the Appellant had difficulty coping with the events.

7. Given a recommendation that the Appellant receive further medical treatment in another place where he would feel safe, the ISA authorized the Appellant to travel to New York. On 2 May 2017, the Medical Services Division (MSD), the United Nations in New York, approved the Appellant's request for certified sick leave retroactively from 18 April to 18 May 2017 and subsequently from 18 May to 18 June 2017.<sup>1</sup>

8. The ISA attempted to contact the Appellant between 24 April 2017 and 21 June 2017, without success.

9. The Appellant provides an e-mail to his supervisor, which he says he sent on 30 May 2017 reporting his progress following medical treatment. During the same period, April to June 2017, the Appellant was in regular communication via e-mail with the MSD.

10. On 22 June 2017, the Appellant's supervisor contacted the Appellant and reminded him of the expiry of his certified sick leave on 18 June 2017 and the need for the latter to request an extension of his certified sick leave. The Appellant responded that he would ask his doctor to provide a medical progress report to the MSD. According to the Appellant, he encountered difficulties in obtaining such a report.

11. In a letter dated 14 July 2017, the ISA Secretary-General informed the Appellant that his period of certified sick leave had expired on 18 June 2017, and that the ISA and the MSD had not had any communication from the Appellant regarding his condition despite several attempts to contact him by phone and e-mail. The ISA Secretary-General thus determined that "[his] absence from 19 June 2017 onwards was deemed unauthorized," and "[his] continued absence and lack of communication is deemed as abandonment of post as defined under ISA Staff Rule 9.1 b)". However, the ISA Secretary-General advised the Appellant that, if the MSD would certify his absence based on a medical report provided by his medical practitioner before 20 July 2017, "[his] status as an ISA staff member will remain unchanged".

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<sup>1</sup> According to the information provided by the Head of Medical Entitlements, MSD (renamed "Division of Healthcare Management and Occupational Safety and Health), the MSD has an ongoing agreement since 2017 with the ISA in providing medical support for staff of the ISA. This includes review of sick leave cases above 20 working days in a calendar year (with subsequent recommendations) and recommendations on MEDEVAC. The MSD provides this service to the ISA at no cost.

12. The MSD did not provide such a certification before 20 July 2017. On 20 July 2017, the Appellant e-mailed his supervisor saying that he was still in the process of obtaining the necessary sick leave approvals.

13. In another letter dated 1 August 2017 to the Appellant, the ISA Secretary-General reiterated the basis of the decision to separate him from service.

14. Subsequently, on 10 August 2017, the MSA certified the Appellant's sick leave retroactively from 19 June 2017 through 30 September 2017.

15. In an e-mail dated 16 August 2017, a human resources officer, ISA, advised the Appellant that, notwithstanding the MSD's retroactive certification, he would still be separated from service on the basis of abandonment of post, but the effective date of separation would be delayed to 30 September 2017 to coincide with the last day of his newly-approved certified sick leave.

16. On 7 November 2017, the Appellant filed an appeal with the JAB to contest the decision to separate him from service on the basis of abandonment of post. He alleged that he had an approved sick leave up to 30 September 2017, that he had not failed to report on his condition, and that ISA had failed to follow the proper procedures. He sought rescission of the separation decision, and his reinstatement to his post until the end of his contract on 29 March 2020, among other things.

17. On 3 May 2018, the JAB issued a report on receivability in respect of the appeal. It found that the Appellant sent e-mails on 14 September 2017, but they did not arrive at the desired destination. Consequently, the JAB found the Appellant's appeal receivable and recommended that the ISA Secretary-General conduct an administrative review of the decision to separate the Appellant from service "as a matter of urgency". In a letter dated 16 May 2018, the ISA Secretary-General informed the Appellant of his decision "not to follow the JAB recommendation". The ISA Secretary-General reiterated that there was no basis to review his decision.

18. On 21 March 2019, the JAB issued its final report. The JAB found that the attack and robbery had happened, and that there was no serious evidence indicating that the Appellant had engaged in outside employment without authorization. However, the JAB found that, over an extended period of time, the Appellant had failed to report for duty or take other necessary

steps after the expiration of his certified sick leave in spite of the repeated efforts by the ISA Secretariat to contact him. In the view of the JAB, such a failure was not affected by the retrospective sick leave certification by the MSD, and it justified the decision to separate him from service on the basis of abandonment of post.

19. In Order No. 368 (2020) dated 24 February 2020, the Appeals Tribunal granted the Appellant's motion for leave to file an additional pleading. The Appeals Tribunal directed the Registry to include the Appellant's additional pleading and the ISA Secretary-General's response thereto in the official case record.

### **Submissions**

#### **The Appellant's Appeal**

20. The Appellant says the ISA Secretary-General's decision to separate him from service on the basis of abandonment of post was factually unsustainable, unfair, unreasonable and procedurally deficient.

21. The Appellant states that he did not abandon, or intend to abandon, his post as he was in contact with his supervisor between 19 June 2017 and 14 July 2017. In addition, he says he obtained sick leave certification from the MSD and the delay in obtaining a new sick leave certification does not mean that he abandoned his post. Having accepted the MSD's jurisdiction, ISA was required to respect the MSD procedures and was bound by the MSD's conclusions.

22. The ISA Staff Regulations and Rules do not define what constitutes an abandonment of post, nor do they set forth any procedure to be followed. He says the ISA Secretary-General does not have unfettered and unrestricted discretion to separate sick or injured staff from service.

23. He says the ISA Secretary-General failed to adhere to basic procedural fairness. Contrary to ST/AI/400,<sup>2</sup> the ISA Administration did not send Mr. Webster any warning, written or verbal, about the risk of abandonment of post, prior to the ISA Secretary-General's

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<sup>2</sup> An administrative instruction titled "Abandonment of post" issued by the Assistant Secretary-General for Human Resources Management of the United Nations dated 22 December 1994. Its purpose was to define what constituted abandonment of post and to set out the procedure to be followed in cases where a staff member of the United Nations might be deemed to have abandoned his or her post.

14 July 2017 letter. Nor did the ISA Secretary-General provide Mr. Webster with any opportunity to respond.

24. The Appellant requests that the Appeals Tribunal order rescission of the contested decision, removal of any reference to an abandonment of post from his personnel records, payment of his salary and entitlements for the months from July to September 2017 and his salary and entitlements until the end of his contract in March 2020, payment of six months' net base salary as moral damages and payment of 20,564.24 Canadian Dollars in partial compensation for his legal costs. Moreover, the Appellant requests that the Appeals Tribunal order the ISA Secretary-General to provide him with a satisfactory letter of reference, and to pay the Appellant an unspecified amount as costs for his abuse of process.

#### **The ISA Secretary-General's Answer**

25. The ISA Secretary-General submits that the Appellant failed to explain the legal basis of his appeal, and he has not identified any of the five grounds of appeal and he merely reiterates the arguments which he made to the JAB and which the JAB considered and dismissed.

26. Contrary to the finding by the JAB that the Appellant's request for administrative review was receivable, the ISA Secretary-General requests that the Appeals Tribunal review the issue of receivability. The two technical information reports establish that ISA never received the alleged request for administrative review from the Appellant.

27. Should the Appeals Tribunal determine that the appeal is receivable, the ISA Secretary-General maintains that the JAB correctly found that the Appellant had not reported for duty or taken other required steps after the expiration of his sick leave on 18 June 2017. Despite several warnings and numerous contacts by the ISA Administration, the Appellant failed to communicate with the ISA Secretary-General for 59 consecutive days; he did not report for duty or provide any explanation for his absence; he appeared to have engaged in an outside activity without authorization.

28. There was a clear and inexcusable negligence on the Appellant's part in failing to timely submit his medical report. It is noted that the Appellant had managed to obtain a proper sick leave authorization in due time, but he failed to obtain a new certificate in a timeous manner without justification. He produced the new certificate almost two months after the expiry of

his certified sick leave on 18 June 2017, and more than 20 days after his separation. The record shows that he started only on 12 July 2017, *i.e.*, four weeks after the expiry of his certified sick leave, to obtain a new medical certificate.

29. The JAB correctly established that the ISA had properly followed its applicable rules and procedures in separating the Appellant from service on the basis of abandonment of post, in accordance with ISA's Staff Rules 5.1(b), 6.2(f), and 9.1(b) and paragraph 1.2 of ISBA/ST/AI/2017/2 (ISA's Administrative Instruction titled "Sick leave" dated 19 April 2017).

30. Contrary to the Appellant's assertions, as correctly determined by the JAB, the United Nations Administrative Instruction ST/AI/400 titled "Abandonment of post" is not an ISA administrative instruction, and is therefore not applicable to the ISA, as the United Nations and the ISA are two different autonomous international organizations.

31. Contrary to the Appellant's assertions, the MSD does not have the authority or power to grant sick leaves to the ISA staff members or to overcome the ISA Secretary-General's decision, and only the ISA Secretary-General can approve sick leaves for the ISA staff members in accordance with ISA Staff Rule 6.2(a). Upon learning of the MSD's retroactive certification of his sick leave, the ISA Administration wrote to the Appellant on 16 August 2017 in accordance with paragraph 3.10 of ISBA/ST/AI/2017/2 and extended his fixed-term appointment only to enable him to utilize his sick leave entitlements, without giving rise to any further entitlement.

32. The ISA Secretary-General requests that the Appeals Tribunal dismiss the current appeal in its entirety.

### **Considerations**

#### *I. Was the appeal to the JAB receivable?*

33. On 3 May 2018, the JAB held that the Appellant's appeal was receivable as the Appellant had e-mailed his request for administrative review within the two-month time limit set out by ISA's Staff Rule 11.2(a), and as a result, recommended the ISA Secretary-General conduct a review of the contested decision. On 16 May 2018, the Respondent declined to follow the JAB's recommendation and disputed the JAB's decision on receivability. The Respondent continues to argue receivability of the appeal to the JAB before the Appeals Tribunal.

34. We find the JAB did not err in finding that the Appellant had sent a request for administrative review by 14 September 2017, and that this satisfied the requirement under Rule 11.2(a) of the ISA Staff Rules that the request be “sent” within the time limit. Rule 11.2(a) clearly states that a letter addressed to the ISA Secretary-General requesting the review be “sent” within two months from the date the staff member received written notification of the contested decision. It does not require that the Administration “receive” the request within the time limit. The Rule’s emphasis is in the staff member’s actions. The JAB had evidence that the e-mails requesting the review were sent in a timely manner and was correct in finding the appeal receivable.

35. We agree with the JAB’s conclusion that the appeal was receivable and not time barred.

*II. Did the JAB process comply with the requirements of the Special Agreement?*

36. However, more fundamentally, we are concerned that the contested “decision” subject to appeal to the Appeals Tribunal, be it the JAB report or the ISA Secretary-General’s final decision in light of the JAB’s report, does not conform to the requirements of the Special Agreement that provides that the ISA “utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law” .

37. Article 2(10) of the Statute similarly states that a “... special agreement may only be concluded if the agency, organization or entity *utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law ...*” (Emphasis added).

38. Article 2(5) of the Special Agreement reiterates that an “application shall not be receivable unless the person concerned has previously submitted the dispute to the neutral first instance process provided for in the Staff Regulations of the Authority and the latter has communicated *its opinion* to the Secretary General ...” (emphasis added). Rule 11.1 of ISA’s Staff Rules provides that the JAB is established to “consider and advise the Secretary-General regarding appeals ...”. Rule 11.2(o) provides that the “final decision on the appeal will normally be taken by the Secretary General within 14 days after the (JAB) panel has forwarded its report ...”



39. The foregoing suggests that the JAB is the neutral first instance process. However, the JAB's report is not a "decision" but an "opinion"; the JAB simply provides advice or recommendations to the ISA Secretary-General, who has discretion to adopt the recommendations or ignore them (as occurred with the JAB's report of 3 May 2018, which was not accepted by the ISA Secretary-General).

40. In addition, neither the JAB's report nor the ISA Secretary-General's decision that incorporates the JAB's findings or recommendations can be considered a "written decision providing reasons, fact and law". The JAB's report may be said to provide a written record (there is a detailed enumeration of the evidence) and certain findings such as that the "attack and robbery took place" and that the "Appellant did not report for duty or take other necessary steps after the expiration of his sick leave". However, it does not provide reasons or an analysis that includes specific findings of underlying facts and application of the law to those facts. As indicated above, as the JAB's report is a non-binding recommendation to the ISA Secretary-General, it is not a "decision" as contemplated by the Special Agreement.

41. The Special Agreement provides that it is the ISA Secretary-General's decision resulting from the JAB's report that is appealable to the Appeals Tribunal.

42. As stated in *Spinardi*,<sup>3</sup> the Appeals Tribunal Statute requires that these special agreements establish a neutral first instance process and body to decide disputes and that the head of the organization (i.e., the ISA Secretary General) whose decision is appealed cannot constitute that neutral body. As the Appeals Tribunal is the second level of appeals, we cannot conduct a review without a decision from a neutral first instance process. That is the case here.

43. Therefore, we find that the Special Agreement and the resulting Staff Rules do not comply with the Statute and we are unable to exercise our jurisdiction as a second level tribunal.

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<sup>3</sup> *Spinardi v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-957.

**Judgment**

44. To ensure compliance with the jurisdictional requirements of the Special Agreement and Article 2(10) of the Statute, we remand the matter to the JAB. The Appellant's appeal to the JAB should be reconsidered and decided by a neutral first instance process that produces a written decision and record that includes a statement of the relevant facts and law, with written reasons and analysis.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of March 2020.

*(Signed)*

Judge Sandhu, Presiding  
Vancouver, Canada

*(Signed)*

Judge Colgan  
Auckland, New Zealand

*(Signed)*

Judge Murphy  
Cape Town, South Africa

Entered in the Register on this 19<sup>th</sup> day of June 2020 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar