



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

Judgment No. 2021-UNAT-1150

Andrea Barbato
(Appellant and Respondent on Cross-Appeal)

v.

Secretary-General
of the International Maritime Organization
(Respondent and Appellant on Cross-Appeal)

JUDGMENT

Before: Judge Dimitrios Raikos, Presiding
Judge Martha Halfeld
Judge John Raymond Murphy

Case No.: 2020-1492

Date: 29 October 2021

Registrar: Weicheng Lin

Counsel for Mr. Andrea Barbato: Alexandre Philippe Haines
Counsel for the Secretary-General: Dorota Lost-Sieminska

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. Andrea Barbato (Mr. Barbato) is a former staff member of the International Maritime Organization (IMO or Respondent). On 7 February 2019, Mr. Barbato filed a complaint with the Internal Oversight and Ethics Office (IOEO) over allegations of prohibited conduct by the then Director of the Administrative Division of the Organization. Following an investigation conducted by an external service provider, which concluded there was insufficient evidence to substantiate the allegations in the complaint, the Head of the IOEO closed the case and accordingly informed Mr. Barbato on 30 May 2019.

2. Mr. Barbato appealed that decision with the Staff Appeals Board (SAB) of the IMO on 8 August 2019. On 10 July 2020, the SAB, following a review of the evidence and merits of the case, issued a “decision” that the appeal should be partially granted and some remedies provided, based on the conclusions detailed in its decision. Further, on 8 September 2020, following a Joint Request for Reconsideration, the SAB “decided” that it was “not possible nor advisable for [it] to consider the remaining remedies requested by [Mr. Barbato]”.

3. Mr. Barbato has appealed against the above “decisions” of the SAB on 22 January 2021, and the Secretary-General of the IMO has cross-appealed against same “decisions” on 29 March 2021. For the reasons set forth in this Judgment, we remand the matter to the SAB.

Facts and Procedure

4. Mr. Barbato previously occupied the post of Head of Entitlements and Information Management at the P-4 level in Human Resources Services, Administrative Division, at the IMO. He served the Organization for 19 years until he went on sick leave on 28 August 2018. After exhaustion of his sick leave entitlements, he separated from the Organization on 24 March 2020 for health reasons.

5. The subject of the instant appeal centers on the substantive and procedural irregularities regarding the practices and processes of the purported neutral first instance body of the Organization, the SAB, and the IMO’s internal justice system as a whole.

6. The present case stems from the 7 February 2019 complaint that Mr. Barbato filed with IOEO against the Director of the Administrative Division, his then Second Report Officer (SRO).¹ In his complaint, Mr. Barbato alleged 11 cases of harassment and abuse of authority that constituted prohibited conduct on the part of the SRO. He submitted detailed accounts of each incident and included several exhibits to substantiate his claims.

7. The Head of IOEO reviewed the alleged cases of harassment and abuse of authority and concluded that there were sufficient grounds to warrant a formal fact-finding investigation. IOEO contracted an external service provider, OSACO Group, to conduct an investigation into the allegations of prohibited conduct by the SRO.

8. On 29 May 2019, OSACO submitted its final report to IOEO. The methodology employed by the investigators included interviewing Mr. Barbato, the SRO and other witnesses in addition to reviewing hard copies of documents and other electronic records. In conclusion, OSACO found there was insufficient evidence to substantiate any of the 11 incidents alleging prohibited conduct by the SRO.

9. On 30 May 2019, the Head of IOEO informed Mr. Barbato of his decision to close the case given the conclusion of the OSACO investigation that the facts established did not support a finding of prohibited conduct by the SRO (the Contested Decision).

10. On 8 August 2019, Mr. Barbato appealed the decision of the IOEO to close the case. Specifically, Mr. Barbato appealed against the conclusions and findings of OSACO on the basis that they were tainted with error and had ignored relevant evidence. Mr. Barbato further alleged that the Organization had failed to take into account the apparent conflict of interest that a managing partner of OSACO had, given his possible relationship with the SRO while they both worked at the United Nations Refugee Agency (UNHCR) during the same time period.

11. In his Statement of Appeal, Mr. Barbato sought the following remedies:

- (a) His full daily subsistence allowance (DSA) to be paid for a mission which took place from 25 July to 3 August 2018;

¹ Because the complaint was against the Director of the Administrative Division, who oversees the Human Resources Services, the Secretary-General of the IMO in view of an apparent conflict of interest designated the Head of IOEO as the responsible official to investigate the claims of Mr. Barbato, instead of processing the complaint through human resource channels.

- (b) Compensation for an alleged salary loss in June 2019 for sick leave;
- (c) A finding that the OSACO investigation was tainted with error and ignored relevant evidence;
- (d) An apology from the IMO;
- (e) Damages so that he can be placed in the same financial position he would have been had he not been forced to take sick leave and/or compensation, and
- (f) Compensation for reasonable legal costs incurred.

12. Following a failure to resolve the dispute through dialogue as provided for in Staff Rule 111.2(b), the SAB was constituted to consider Mr. Barbato's case. The board commenced its work on 27 November 2019.

13. The complete Statement of Appeal was received by the Chair of the SAB from the Deputy Director/Head, Legal Affairs Office (LAO), on 27 November 2019.

14. The SAB then transmitted same Statement of Appeal to the Director, Legal Affairs and External Relations Division (LED), as the designated representative of the Organization on 29 November 2019.²

15. The IMO submitted a written reply to the Statement of Appeal on 20 December 2019. Thereafter, Mr. Barbato filed comments to IMO's reply on 4 February 2020, and on 24 March 2020, IMO made additional written submissions in response to Mr. Barbato's comments.

The SAB Report and Addendum

16. On 10 July 2020, the SAB issued its report in which it examined the three main claims of the appellant, namely: (i) the allegations of prohibited conduct by the SRO in the 11 incidents detailed in the original complaint; (ii) the allegation that there were errors in the OSACO investigation and that it failed to consider relevant evidence, and (iii) the allegation of a conflict

² The Legal Affairs Office (LAO) is an office within the Legal Affairs and External Relations Division (LED).

of interest with regard to the engagement of OSACO given the alleged past relationship between an OSACO managing partner and the SRO (the SAB “Decision”).

17. First, regarding the 11 incidents of prohibited conduct, the three-member SAB reached consensus only in seven of the 11 cases. Therefore, in the remaining four cases, the members did not unanimously agree with the OSACO conclusion.

18. Second, the SAB could not come to full agreement as to whether the report contained taint or error to such a degree that it was no longer of value in concluding whether or not prohibited conduct had taken place.

19. Third, the SAB was however unified in its view regarding the alleged conflict of interest based on the possible working relationship between a managing partner of OSACO and the SRO. As such, the SAB concluded “although there is no clear evidence of any past professional relationship between the two parties, even the suggestion of a possibility that the parties knew each other or had interacted in a professional capacity whilst at UNHCR was concerning”.

20. Therefore, the SAB decided the investigation report of OSACO and the resulting findings and conclusions must not be used as the basis for the administrative decision to dismiss Mr. Barbato’s claim and close the case.

21. Concerning the remedies, the SAB only ruled on the appellant’s request for his full DSA to be paid for his mission to Rome to attend a board meeting of the United Nations Joint Staff Pension Fund.

22. On 28 July 2020, the parties made a joint request for reconsideration. Specifically, they requested the SAB to take decisions on the remaining requests for relief that were left unanswered in the SAB “Decision”.

23. On 8 September 2020, the SAB issued an addendum to its report explaining that the remainder of the requests by Mr. Barbato were unrelated to the matters under its remit. The board concluded:

As the SAB’s decision effectively invalidates the OSCACO investigation report and de facto rescinds administrative decision to close the case on the basis of that report, then the original claim remains just that - an allegation of improper conduct by [Mr. Barbato] against the [SRO], with no conclusion or outcome. Consequently, based on the reasons

already provided, it is simply not possible nor advisable for the SAB to consider the remaining remedies requested by [Mr. Barbato], notably those related to an apology, and damages and compensation, based on an inconclusive result, nor would it want to unduly prejudice any future decisions on possible remedies, by inappropriately taking a decision as part of this process.

Procedure before the Appeals Tribunal

24. On 22 January 2021, Mr. Barbato filed an appeal against the SAB “Decision” and the addendum on remedies dated 8 September 2020, pursuant to Order No. 394 (2020), which granted the appellant an extension of time.³ The appeal was registered with the United Nations Appeals Tribunal (Appeals Tribunal) as Case No. 2020-1492.

25. The IMO filed an answer and a cross-appeal on 29 March 2021. Mr. Barbato filed an answer to the cross-appeal on 7 July 2021, pursuant to Order No. 411 (2021) which also granted an extension of time.⁴

Submissions

Mr. Barbato’s Appeal

Jurisdiction

26. As a preliminary matter, Mr. Barbato submits it is unclear in the present case whether a legally compliant first instance decision has been taken at all. Mr. Barbato refers to the recent line of cases where the Appeals Tribunal highlighted the jurisdictional requirement that UNAT is competent to hear and pass judgment on an application filed against a specialized agency if, and only if, the latter utilizes a neutral first instance process.⁵

27. The February 2019 Staff Regulations and Staff Rules (SRSR), which were in place at the time the 10 July 2020 SAB “Decision” was rendered, as well as the October 2020 version states under Rule 111.1 (ii) that: “The final decision on the appeal shall be taken by the Secretary-General within four weeks following receipt of the Staff Appeals Board’s report, and shall be communicated

³ *Andrea Barbato v. Secretary-General of the International Maritime Organization*, Order No. 394 (2020).

⁴ *Andrea Barbato v. Secretary-General of the International Maritime Organization*, Order No. 411 (2021).

⁵ See *Sheffer v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-949; *Dispert & Hoe v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-958 (*Sheffer et al. Cases*).

to the staff member, together with a copy of the Board's report. The Secretary-General's decision and a copy of the Board's report shall also be transmitted to the Staff Committee, unless the staff member objects.”

28. Further, the appellant also submits that the February 2019 SRSR as well as the October 2020 version provides under Rule 111.1 (gg) that: “The Staff Appeals Board shall adopt its report by majority vote, and submit it to the Secretary-General. The report shall provide a written record and a written decision providing reasons, fact and law, and shall include the Board's recommendation. Votes on the recommendation shall be recorded, and any member of the Board may have his or her dissenting opinions included in the report.”

29. As such, Mr. Barbato argues the jurisdictional concerns articulated in the *Sheffer et al.* Cases remain unresolved as the IMO has failed to ensure that its SAB is properly constituted in terms of its nature and powers.

30. The appellant also highlights the flawed procedure undertaken by the Secretary-General of the IMO in which he purported to amend elements of the SRSR by issuing a memorandum to that effect on 30 July 2020.

31. Consequently, Mr. Barbato requests this Tribunal, as a preliminary matter, to rule on whether the SAB “Decision” is a legally compliant decision or is it only a recommendation, as provided for in the SRSR.

32. The appellant submits should this Tribunal find the SAB “Decision” to be only a recommendation, the Tribunal is minded to remit the matter because it is no longer possible for the original flaws identified in the appeal to be corrected through a fresh investigation as the SRO and witnesses in the case are no longer staff members of the IMO, and as such they are outside the scope of both the IMO’s investigative powers and its internal justice system.

33. In the instance the Tribunal finds the SAB “Decision” does amount to a lawful decision, as argued by the IMO, then the Tribunal is invited to exercise its appellate jurisdiction to correct the substantive and procedural irregularities that apply to this case.

Grounds of appeal

34. Mr. Barbato submits that the SAB and/or Secretary-General of the IMO: (i) failed to exercise jurisdiction; (ii) erred on questions of law; (iii) committed errors of procedure, such as to affect the decision of the case; and (iv) committed errors of facts leading to three incorrect findings by the SAB.

Errors of law and failure to exercise jurisdiction

35. The SAB was asked to provide a decision on the substance of Mr. Barbato's complaints and grant remedies in respect to them. In the 10 July 2020 SAB "Decision", however, the SAB only concluded the appeal should be partially granted and some remedies provided, noting that the three-member board was able to reach consensus only in seven of the 11 reported incidents of prohibited conduct. In doing so, the SAB operated more like a jury on determinations of fact instead of acting as a first instance decision-maker, taking into account the totality of the matters before it and then applying its findings of fact to law. In confining its obligation to fact-finding, the SAB thus abdicated its responsibility of addressing the merits of the complaint as a whole and to provide a remedy to the staff member. In so doing, the SAB made errors of law as it clearly misunderstood its role and functions and thus failed to exercise the jurisdiction vested in it.

36. The appellant also notes that there was not a single legally trained person sitting on the three-member board, and there was an obvious conflict of interest emanating from staff members sitting on the board who purportedly had the ability to overrule their own Secretary-General. As a final point on this issue, Mr. Barbato argues that the SAB never understood the function it was to discharge, which was to review the OSACO investigation for substantive and procedural irregularities and not to conduct a *de novo* investigation. The fact that the SAB did conclude there was a conflict of interest in and of itself confirms that the investigation was flawed and irregular. As such, it was obligated to provide a remedy to the appellant. Therefore, Mr. Barbato asks this Tribunal to remedy the failures in the investigation with an award of damages.

Errors of law and procedure, such as to affect the decision of the case

37. Second, Mr. Barbato argues the procedure adopted by the SAB was irregular and not in compliance with international administrative law as articulated in the *Sheffer et al.* Cases or in line with the most basic fair trial rights. The appellant had raised concerns with the IMO regarding

the non-binding recommendatory, non-judicial and lay nature of the SAB and the inherent conflicts of interest in the constitution of the board. Despite the oral pronouncements of the *Sheffer et al.* Cases conveyed on 25 October 2019 highlighting the lack of a neutral element in the first instance process, the IMO refused to apply any changes to the old SAB system, simply because the within case was a pre-existing one. Interestingly, the concerns brought about by the appellant were subsequently addressed by the Secretary-General of the IMO in a memorandum issued on 30 July 2020, which was 20 days after the SAB “Decision”. The memorandum provided that the SAB will make final decisions and not recommendations to the Secretary-General of the IMO and a roster of external experts would also be established based on their judicial and administrative law experience. By requiring the appellant to proceed with his complaint under the old system, this resulted in an arbitrary and capricious condition to access the internal justice system.

38. The irregularity and inadequacy of the old system is further compounded by the fact that the SAB Chair herself admitted to having taken advice on the within matters from the Legal Affairs and External Relations Division (LED) – the very same department that advises and represents the Secretary-General of the IMO before the SAB.

Errors of facts leading to three incorrect findings by the SAB

39. Finally, Mr. Barbato also submits that the SAB failed to properly address three items in his original complaint, namely regarding: (i) his application to the post of Head, Human Resources Services; (ii) a Vacancy Notice for Head, Operational Safety, OSHE Subdivision, MSD, and (iii) composition of the Advisory Board for Compensation Claims (ABCC). Mr. Barbato argues the SAB erred in its conclusions regarding these claims.

40. In conclusion, Mr. Barbato submits the SAB’s original view that the matter should be reinvestigated is no longer possible in light of the fact that the SRO and witnesses in the case are no longer staff members of the IMO and as such are outside the scope of both the IMO’s investigative powers and its internal justice system. As such, the Tribunal is invited to provide a remedy in damages for the original failure in the investigation and for the failures of the SAB. The appellant submitted medical evidence documenting the impact the alleged actions of the SRO had on his health.

41. Mr. Barbato seeks the following remedies:
- (a) an award for compensation, in an amount equivalent to not less than two years' net base salary;
 - (b) compensation for losing out on the Education Grant had the Organization not caused his illness that resulted in his separation;
 - (c) an award for damages in recognition of the failures in the IMO's internal justice system despite being on notice after the judgments in the *Sheffer et al.* Cases;
 - (d) an award in legal costs, noting that staff members of the IMO have no access to legal assistance, such as OSLA.

The IMO Secretary-General's Answer

Jurisdiction

42. The IMO Secretary-General submits the judgments in the *Sheffer et al.* Cases were orally pronounced on 25 October 2019 and the full written judgments were not transmitted to the IMO until 20 December 2019.⁶ The Respondent argues these judgments necessitated a revision of the Organization's SRSR and a renegotiation of the of the agreement between the United Nations and the IMO, accepting the jurisdiction of the Appeals Tribunal.

43. On 30 July 2020, the IMO Secretary-General issued a memorandum that suspended the application of Staff Rules 111.1 (gg) and (ii). This partial suspension called for the SAB to make final decisions instead of making recommendations to the IMO Secretary-General. Additionally, the Respondent also amended Staff Rule 111.1 (e) regarding the composition of the SAB. The amendment provided for an external legal expert to be appointed as Chair of the SAB.

44. At the time of the filing of Respondent's answer, a comprehensive and final revision of the SRSR was still underway and had not been completed. The Respondent noted however that it did execute an amended agreement between the United Nations and the IMO on 10 March 2021, conferring jurisdiction to the Appeals Tribunal.

⁶ See also *Spinardi v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-957.

45. The Respondent argues the SAB was competent to issue a decision in the present case, regardless of any conflicting regulations that were in effect at the time. This is because, reasons the Respondent, Article 10 (5) of the Appeals Tribunal Statute provides: “The judgements of the Appeals Tribunal shall be binding upon the parties.” As such, the Respondent argues the IMO was bound by the judgments in the *Sheffer et al.* Cases and that the jurisprudence emanating from this line of cases must prevail over any conflicting regulations.

No error in procedure

46. The appellant’s Statement of Appeal was submitted on 8 August 2019 before the judgments in the *Sheffer et al.* Cases were orally pronounced on 25 October 2019 and before the full written judgments were transmitted to the IMO on 20 December 2019. The Respondent also submitted its answer in the present case on the same day of 20 December 2019 when the written judgments in the *Sheffer et al.* Cases were transmitted to the Organization. It is the Respondent’s contention that the IMO decided not to stay the cases pending before the SAB in order to avoid a backlog.

The SAB did not fail to exercise jurisdiction

47. The Respondent argues the SAB did not fail to provide a remedy to Mr. Barbato. The Respondent submits that the SAB remanded the case for a new investigation, but the appellant rejected a proposal for a new investigation and instead chose to appeal to the UNAT. The Respondent agrees that the SRO has since left the Organization and is now outside its investigative powers, but the Respondent did propose that a new investigation team could review the investigation already conducted and fill any gaps or inconsistencies as far as possible. This was rejected by the appellant.

No errors of fact

48. The Respondent submits Mr. Barbato has failed to demonstrate how the SAB committed errors of fact and instead repeated the arguments that he had already made below. As such, Mr. Barbato is attempting to reargue his case.

No evidence of harm

49. As none of the alleged failures have been established, the request for remedies in damages has no legal basis and must be rejected. Specifically, a causal link between the appellant's illness and the acts of the Respondent has not been established. Additionally, this is the first time the appellant is requesting compensation for moral harm.

Award of legal costs

50. The Respondent submits the UNAT's power to award costs is restricted to cases in which a party has manifestly abused the proceedings, which is not the case here.

51. In conclusion, the Respondent requests the Appeals Tribunal to dismiss the within appeal in its entirety.

The IMO Secretary-General's Cross-Appeal

52. The IMO requests the Appeals Tribunal to overturn the SAB "Decision" finding that the OSACO investigation was flawed because of an alleged conflict of interest and as a result of other errors. As such, the Respondent asks the Tribunal to confirm the decision of the Head of the IOEO to close the case.

53. The Respondent also argues that the SAB erred on a question of law and fact when it determined that OSACO had a conflict of interest. The Respondent submits that the OSACO managing partner did not participate or advised on the investigation.

54. Second, the Respondent argues that the SAB erred on a question of law and fact, resulting in a manifestly unreasonable decision, when it concluded that there were errors in the investigation.

55. Third, the Respondent submits that the SAB erred on a question of law when it decided on the request for relief regarding an outstanding DSA payment, given that such claim had become moot.

Mr. Barbato's Answer to Cross-Appeal

56. Mr. Barbato submits the Organization is making simultaneously contradictory submissions: on one hand, defending the SAB competence, and on the other, arguing that the SAB "Decision" should be overturned.

57. Mr. Barbato argues there is clearly the potential for a perceived or actual conflict of interest given the managing partner with the alleged relationship to the SRO is one of two directors owning 81 percent of the OSACO Group.

58. Regarding the remainder of the Respondent's claims in his cross-appeal, Mr. Barbato submits the SAB did not err on questions of fact or law. As such, Mr. Barbato asks the Tribunal to reject the cross-appeal filed by the Organization.

Considerations

59. Article XI of the IMO's SRSR governs appeals from the SAB of IMO to this Tribunal. It is based on the terms of the Agreement between the United Nations and the IMO, which took effect on 1 July 2009, extending the jurisdiction of the Appeals Tribunal to the IMO under Article 2(10) of the Appeals Tribunal Statute (Statute). Rule 111.1(a) of the SRSR defines the SAB as a "neutral first process that includes a written record and a written decision providing reasons, fact and law ...". Rule 111.1(gg) – (jj) however indicate that the SAB does not have decision-making power but only recommendatory power. These rules provide:

(gg) The Staff Appeals Board shall adopt its report by majority vote, and submit it to the Secretary-General. The report shall provide a written record and a written decision providing reasons, fact and law, and shall include the Board's recommendation. Votes on the recommendation shall be recorded, and any member of the Board may have his or her dissenting opinions included in the report.

(hh) The Staff Appeals Board shall submit its report to the Secretary-General within four weeks after receiving all written submissions and hearing all oral statements concerning the issues before it. The Board may, however, extend this time limit in exceptional circumstances. The report shall take the form of the template set out under the Staff Appeals Board guidelines.

(ii) The final decision on the appeal shall be taken by the Secretary-General within four weeks following receipt of the Staff Appeals Board's report, and shall be communicated to the staff member, together with a copy of the Board's report. The Secretary-General's

decision and a copy of the Board's report shall also be transmitted to the Staff Committee, unless the staff member objects.

(jj) To enable staff members to exercise their right to make application to the United Nations Appeals Tribunal (UNAT), the Chairman of the Staff Appeals Board shall, at the request of the staff member, communicate the Board's report to him or her, if the Secretary-General has not made a decision upon the report within four weeks after the date on which the report was submitted.

60. As already held by the Appeals Tribunal in *Dispert & Hoe*,⁷ *Spinardi*,⁸ *Sheffer*,⁹ *Fogarty*,¹⁰ and recently in *Fogarty et al.*,¹¹ while the SAB may satisfy the requirement of a neutral first instance process, its decision is only advisory or recommendatory. In terms of these provisions, the SAB only gives advice to the Secretary-General of the IMO who takes the final decision. The Secretary-General cannot be a neutral or disinterested body since he is the executive representative of the IMO. Thus, the appeals to the SAB should be decided by a neutral first instance process that produces a written decision. The decision produced has to be the final decision from the neutral process: it cannot be the decision of the Secretary-General acting upon the recommendation of the SAB.

61. Further, IMO's Staff Regulation 8.2 provides that:

The Secretary-General shall establish joint administrative machinery with staff participation to advise the Secretary-General regarding human resources policies and general questions of staff welfare and to make to the Secretary-General such proposals as the Secretary-General may desire for amendment of staff regulations and staff rules and related administrative practices. Staff participation in the joint administrative machinery shall be through the Staff Association.

62. In addition, Staff Regulation 12.1 provides that the "Regulations may be supplemented or amended by the Council, without prejudice to the acquired rights of staff members". On the other hand, Staff Regulation 12.2 provides that the Secretary-General of the IMO "shall report annually to the Council such staff rules and amendments thereto as he or she may make to implement these Regulations".

⁷ *Dispert & Hoe* Judgment, *op. cit.*, paras. 18-21.

⁸ *Spinardi* Judgment, *op. cit.*, paras. 25-27.

⁹ *Sheffer* Judgment, *op. cit.*, paras. 26-28.

¹⁰ *Margaret Mary Fogarty v. Secretary-General of the International Maritime Organization*, Judgment No. 2021-UNAT-1117, paras.21-22.

¹¹ *Margaret Mary Fogarty et al. v. Secretary-General of the International Maritime Organization*, Judgment No. 2021-UNAT-1148, paras. 65, 67.

63. On 30 July 2020, in response to the judgments in the *Sheffer et al.* Cases, the Secretary-General of the IMO circulated an internal memorandum to all staff. In the memorandum, the Secretary-General of the IMO announced that he had ordered a review of the SRSR, particularly with respect to the dispute resolution and disciplinary mechanisms. As this was likely to take time, he had determined that “the introduction of some interim measures [is] necessary in order to ensure that our system complies with recent UNAT jurisprudence”. He thus directed as follows:

Staff Rules 111.1(gg) and (ii) are partially suspended. The SAB will no longer make recommendations to the Secretary-General regarding the cases before it. Instead it will serve as a neutral first-instance appellate body and will issue decisions in respect to the case, which will be binding on both the staff member and the Organization. Both the staff member and the Organization may have the opportunity to further appeal the decision of the SAB to UNAT, if appropriate.

64. As we have found in *Fogarty*:¹²

These provisions suggest that the power to amend the Staff Rules does indeed vest in the Secretary-General of the IMO while the power to amend the Staff Regulations is beyond his remit. Staff Rule 111 is a Rule not a Regulation. However, in his memorandum of 30 July 2020, by which he purported to partially suspend the operation of parts of Staff Rule 111, the Secretary-General of the IMO intimated that there was a process that needed to be followed before amendment and this involved the consideration of recommendations by the Senior Management Committee. That is why he introduced “some interim measures”. The source of his power to do that is equally not clear. Moreover, Staff Rule 111.1(d) could be interpreted to mean that changes to the appeals procedure may require consultation with the SAB. There may also be other constraints upon the Secretary-General of the IMO’s power of amendment in other legislative instruments that are not immediately evident or known to this Tribunal.

65. Consequently, at the time it made its impugned report in July 2020, the SAB did not have the power to make a decision in relation to Mr. Barbato’s appeal that was appealable to this Tribunal, nor did it have such authority in September 2020 when it revisited its first report upon the request of both litigants. The SAB did not have such power because the decision of the Secretary-General of the IMO to institute interim measures via the internal memorandum communicated on 30 July 2020 was an invalid exercise of his power. Therefore, the SAB’s authority to address Mr. Barbato’s case remained advisory or recommendatory.

¹² *Margaret Mary Fogarty* Judgment, *op. cit.*, para. 33.

66. And that is so, irrespective of the issue whether the SAB had the power to such a revisit of its earlier decision because it was *functus officio*. In addition, by passing, we also take note of the principle highlighted in Judgment 2028, *In re Stenberg*: “When a complainant calls for proof that power has in fact been delegated to a specific person, it is a matter for the Organisation to produce such proof.”¹³

67. In these circumstances, we are not satisfied that the essential elements are present to have constituted a decision by the SAB and therefore to allow us to consider and decide Mr. Barbato’s appeal and the IMO Secretary-General’s cross-appeal. Although in Mr. Barbato’s case, the SAB seems to have dealt with all aspects of his appeal and provided a written record with reasons, facts and law, it remains that the SAB did not issue a written decision but only a recommendation to the Secretary-General of the IMO. 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.

68. Therefore, to ensure compliance with this Tribunal’s jurisdictional requirements, the case has to be remanded to the SAB under Article 2(10) of this Tribunal’s Statute so it can issue a decision on Mr. Barbato’s appeal against the administrative decision issued by the Head of the IOEO, and communicated to Mr. Barbato on 30 May 2019, to close the case concerning his allegations of prohibited conduct by the then Director of the Administrative Division. Mr. Barbato’s appeal to the SAB must be reconsidered and decided by a neutral process, in line with the pronouncements of this Judgment, including all of Mr. Barbato’s requested remedies.

69. Because of the way in which this appeal is dealt with by us, we do not need to consider Mr. Barbato’s claims for an award of compensation for harm, pursuant to Article 9 (1)(b) of the Statute, and compensation for losing out on the Education Grant. The same goes for the IMO Secretary-General’s claims on cross-appeal.

Costs on appeal

70. Article 9 (2) of the Statute states: “Where the Appeals Tribunal determines that a party has manifestly abused the appeals process, it may award costs against that party”.

¹³ ILOAT Judgment No. 2028 (2001), para. 8 (3).

71. The UNAT's power to award costs is thus restricted by Statute to cases in which it determines that a party has manifestly abused the proceedings before it. In the absence of such a determination, the basic principle applicable in international courts on the question of costs is that each party shall bear its own costs.

72. On appeal, Mr. Barbato seeks costs against the IMO, noting that unlike United Nations Secretariat staff members, the IMO does not subscribe to and its staff members have no recourse to the Office of Staff Legal Assistance (OSLA). However, as already noted, the authority of the Appeals Tribunal to award costs presupposes that it has come to the conclusion that the proceedings before it have been manifestly abused by a party, which is not the case here in terms of IMO's filing of the cross-appeal. Thus, Mr. Barbato's request for an award of costs must be denied.

Judgment

73. The case is remanded to the SAB. Mr. Barbato's appeal to the SAB must be reconsidered and decided by a neutral process that produces a written record of the decision, which record must include reasons for the decision as well as a statement of the relevant facts and of the relevant law.

Original and Authoritative Version: English

Dated this 29th day of October 2021.

(Signed)

Judge Raikos, Presiding
Athens, Greece

(Signed)

Judge Halfeld
Juiz de Fora, Brazil

(Signed)

Judge Murphy
Cape Town, South Africa

Entered in the Register on this 24th day of November 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar