



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

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Judgment No. 2023-UNAT-1369

**Andrew K. Webster**  
**(Appellant)**

**v.**

**Secretary-General**  
**of the International Seabed Authority**  
**(Respondent)**

**JUDGMENT**

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Before: Judge Martha Halfeld, Presiding  
Judge Dimitrios Raikos  
Judge Sabine Knierim

Case No.: 2022-1744

Date of Decision: 30 June 2023

Date of Publication: 1 August 2023

Registrar: Juliet Johnson

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Counsel for Appellant: David Stolow

Counsel for Respondent: Mariana Durney, Yongsheng Cai, Cristián Gimenez Corte

**JUDGE MARTHA HALFELD, PRESIDING.**

1. Mr. Andrew K. Webster (Mr. Webster), a former staff member of the International Seabed Authority (ISA or Agency), contested the decision of the Administration to separate him from service on the grounds of abandonment of post (contested decision).
2. On 22 September 2022, a panel of the Joint Appeals Board of the ISA (JAB) issued its final decision<sup>1</sup> (impugned JAB Decision) in which it decided that the Administration's decision to separate Mr. Webster from service on the grounds of abandonment of post was lawful and that, therefore, the ISA Secretary-General was not required to review his decision to separate Mr. Webster from service.
3. On 1 November 2022, Mr. Webster lodged an appeal of the impugned JAB Decision with the United Nations Appeals Tribunal (UNAT or Appeals Tribunal).
4. For the reasons set out below, the Appeals Tribunal partially grants the appeal and reverses the impugned JAB Decision.

**Facts and Procedure<sup>2</sup>**

5. On 30 March 2015, Mr. Webster joined ISA in Kingston, Jamaica, as a Budget and Internal Oversight Officer, Grade P-4, on a fixed-term appointment, which was subsequently extended until 29 March 2020.
6. On 15 April 2017, Mr. Webster alleged that he was attacked and robbed in Kingston. He informed his supervisor, the ISA Director of the Office of Administrative Services, of the attack.
7. Shortly afterwards, Mr. Webster had difficulties coping with these events and ISA authorised him to travel to New York, United States, to receive medical treatment at a place where he would feel safe.
8. On 2 May 2017, the Medical Service Division (MSD) of the United Nations approved Mr. Webster's request for certified sick leave retroactively from 18 April 2017 to 18 May 2017 and, subsequently from 18 May to 18 June 2017.

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<sup>1</sup> *Andrew Webster v. Secretary-General of the International Seabed Authority*, Case No. ISA/JAB/2017/01, 22 September 2022.

<sup>2</sup> Summarized from the JAB Reports and Judgments of the Appeals Tribunal.

9. From April to 18 June 2017, while Mr. Webster was on sick leave, ISA alleged that it tried to contact him by phone multiple times in order to obtain an update on his medical condition, without success. The Administration also alleged that, on 15 June 2017, it contacted Mr. Webster by e-mail in order to inform him that his certified sick leave was about to expire and that, if he intended to seek further extension, he needed to submit an appropriate request. Mr. Webster denied the existence of such an e-mail.<sup>3</sup> Mr. Webster also observed that, during this period, he was in regular communication with the MSD by e-mail. On 30 May 2017, Mr. Webster also contacted his supervisor by e-mail to advise him of his medical situation as well as of the fact that he “hope[d] to recover soon and return to work”.<sup>4</sup>

10. On 22 June 2017, Mr. Webster’s supervisor contacted him by phone and reminded him that his certified sick leave had expired on 18 June 2017 and that the Administration needed an extension of it, which Mr. Webster agreed to obtain. On the same date, Mr. Webster contacted his doctor and requested a medical report.<sup>5</sup>

11. On 24 June 2017, Mr. Webster contacted the MSD by e-mail and informed them that his doctor was away for one to two weeks and that he would update them as soon as the medical report was available for their review.<sup>6</sup>

12. On 12 July 2017, Mr. Webster contacted the MSD by e-mail again. He informed them of his medical situation and alleged that he also intended to forward a psychotherapist report dated 10 July 2017, but that he forgot to attach it to the e-mail, which he did three days later, on 15 July 2017.<sup>7</sup>

13. On 14 July 2017, the ISA Secretary-General formally advised Mr. Webster by letter that his period of certified sick leave had expired on 18 June 2017, and that, despite several attempts to contact him by phone and e-mail, ISA and the MSD had not received any communication from him regarding his condition. The ISA Secretary-General thus determined that his absence from 19 June 2017 onwards was deemed unauthorised and that his “continued absence and lack of communication [was] deemed as abandonment of post as defined under ISA Staff Rule 9.1(b)”. However, the ISA Secretary-General advised Mr. Webster that, if the MSD certified his absence

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<sup>3</sup> In his appeal, Mr. Webster contends that this e-mail has never been produced by the ISA Secretary-General.

<sup>4</sup> E-mail of 30 May 2017 from Mr. Webster to the Administration.

<sup>5</sup> E-mails of 22 June 2017 from Mr. Webster to the Administration and to his doctor.

<sup>6</sup> E-mail of 24 June 2017 from Mr. Webster to the MSD.

<sup>7</sup> E-mails of 12 and 15 July 2017 from Mr. Webster to the MSD.

based on a medical report provided by his medical practitioner before 20 July 2017, his “status as an ISA staff member [would] remain unchanged”.<sup>8</sup>

14. On 19 and 20 July 2017, Mr. Webster contacted by e-mail his supervisor as well as an ISA Human Resources Officer (HRO) to whom he sent the medical certificate of 10 July 2017 of his psychotherapist (who worked at the same clinic as his psychiatrist) and informed them that he was in the process of obtaining the medical report.<sup>9</sup> On 19 July 2017, Mr. Webster was also advised by the MSD that they would need a medical report signed by a licensed psychiatrist (and not a psychotherapist) to be able to process his extension of certified sick leave.<sup>10</sup>

15. Mr. Webster alleged that he encountered several difficulties in obtaining said medical report, especially as his psychiatrist and psychotherapist were on vacation.

16. On 2 August 2017, the ISA Secretary-General reiterated to Mr. Webster, by letter dated 1 August 2017, the decision to separate him from service on the grounds of abandonment of post. The ISA Secretary-General specified that Mr. Webster’s “response on 19 July which communicated that a medical certificate had been submitted to [the MSD did] not change the basis of [his] separation from service from the [ISA] but rather [would] determine the effective date of separation” and that he would remain an ISA staff member solely for “administrative purposes to finalize [his] entitlements under sick leave and on humanitarian grounds given the circumstances that initially gave rise to [his] initial absence on certified leave”.<sup>11</sup>

17. On 10 August 2017, the MSD certified Mr. Webster’s sick leave retroactively from 19 June to 30 September 2017.

18. On 16 August 2017, the ISA HRO informed Mr. Webster by e-mail that notwithstanding the MSD retroactive certification, he was still separated from service on the basis of abandonment of post, that his status as staff member remained unchanged solely for the administrative purpose of finalizing his sick leave entitlements and that the effective date of his

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<sup>8</sup> *Webster v. Secretary-General of the International Seabed Authority*, Judgment No. 2020-UNAT-983, para. 11. See also letter of 14 July 2017.

<sup>9</sup> *Ibid.*, para. 12. See also e-mails of 19 and 20 June 2017 from Mr. Webster to the Administration.

<sup>10</sup> E-mail of 19 July 2017 from the MSD to Mr. Webster.

<sup>11</sup> Letter of 1 August 2017.

separation would be delayed to 30 September 2017 to coincide with the last day of his newly approved certified sick leave.<sup>12</sup>

19. On 14 September 2017, Mr. Webster requested administrative review of the decision to separate him from service on the grounds of abandonment of post by e-mail to the ISA Secretary-General. The ISA Secretary-General alleged that he did not receive this e-mail.<sup>13</sup>

20. On 7 November 2017, Mr. Webster filed an appeal with the JAB to challenge the decision to separate him from service on the basis of abandonment of post.

21. On 6 January 2018, the ISA Secretary-General, in his reply, submitted that the appeal was not receivable as Mr. Webster had not submitted his request for administrative review within the time limit established by ISA Staff Rule 11.2(a), because ISA maintained that they had not received his e-mail of 14 September 2017.

*Procedures before the JAB and the Appeals Tribunal*

22. On 3 May 2018, the JAB issued its Report on receivability in Case No. ISA/JAB/2017/01 (JAB Report on receivability). It found that Mr. Webster sent an e-mail requesting an administrative review of the decision to separate him from service to the ISA Secretary-General on 14 September 2017 and that the plain meaning of ISA Staff Rule 11.2(a) only requires the ISA staff member to send his request within the time limit, but not for the Administration to receive it in such time. Therefore, it concluded that the appeal was receivable and recommended to the ISA Secretary-General to address Mr. Webster's request for administrative review as a matter of urgency.

23. On 16 May 2018, the ISA Secretary-General informed Mr. Webster that he had decided not to follow the JAB recommendation.<sup>14</sup>

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<sup>12</sup> *Webster v. Secretary-General of the International Seabed Authority*, Judgment No. 2020-UNAT-983, para. 15. See also e-mail of 16 August 2017 from the Administration to Mr. Webster.

<sup>13</sup> E-mail and Request for administrative review of 14 September 2017 from Mr. Webster to the Administration.

<sup>14</sup> Letter of 16 May 2018.

24. On 6 June 2018, the JAB issued Procedural Order No.1. Referring to its Report on receivability, it concluded that “while its eventual recommendation on the substance [was] recommendatory, its decision on receivability [was] final”.<sup>15</sup>

25. On 21 March 2019, the JAB issued its Report in Case No. ISA/JAB/2017/01 (JAB Report No. 1). It concluded that the ISA Secretary-General had failed to demonstrate that the attack and robbery of 15 April 2017 had not occurred (as the ISA Secretary-General claimed) or that Mr. Webster engaged or sought to engage in outside employment during his absence. However, the JAB found that Mr. Webster failed to report for duty after the expiration of his last medical certificate, to respond to the Administration and to comply with his obligation to produce an adequate and timely medical certificate. In the view of the JAB, such a failure was not affected by the sick leave certification issued *a posteriori* by the MSD. Therefore, it concluded that, pursuant to ISA Staff Rule 9.1(b), the Administration was justified to separate Mr. Webster from service, and did not recommend the ISA Secretary-General to review his decision.

26. On 3 July 2019, Mr. Webster appealed JAB Report No. 1 to the Appeals Tribunal.

27. On 27 March 2020, the Appeals Tribunal issued Judgment No. 2020-UNAT-983. As to the question of receivability, it confirmed that Mr. Webster’s appeal was receivable as he sent his request for administrative review within the two-month limit set out by ISA Staff Rule 11.2(a).<sup>16</sup> However, it concluded that the JAB, in its Report No. 1, provided an opinion and not a decision and, therefore, was not a neutral first instance body as required by Article 2(10) of the Appeals Tribunal Statute and Article 2(5) of the Special Agreement between ISA and the Secretary-General of the United Nations (Special Agreement). Therefore, the Appeals Tribunal remanded the case to the JAB for reconsideration by a neutral first instance body that would produce a “written decision and record that includes a statement of the relevant facts and law, with written reasons and analysis”.<sup>17</sup>

28. Following the remand from the Appeals Tribunal, the JAB re-established to review Mr. Webster’s case. On 14 October 2020, the JAB issued its second Report in Case No. ISA/JAB/2017/01 (JAB Report No. 2). It maintained that the facts of the attack and robbery on Mr. Webster had not been put into question, and that there was no serious evidence that

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<sup>15</sup> Procedural Order No. 1 of 6 June 2018.

<sup>16</sup> *Webster v. Secretary-General of the International Seabed Authority*, Judgment No. 2020-UNAT-983, paras. 33-35.

<sup>17</sup> *Ibid.*, para. 44.

Mr. Webster engaged in outside employment. However, it confirmed that Mr. Webster's failure to report for duty upon the expiration of his second medical certificate justified the Administration's decision to separate him from service on the grounds of abandonment of post and decided that the ISA Secretary-General was not required to review his decision. The JAB also recommended that the ISA statutory provisions be amended as soon as reasonably possible, to align them with the conclusions of the Appeals Tribunal in Judgment No. 2020-UNAT-983.

29. On 15 December 2020, Mr. Webster appealed JAB Report No. 2 to the Appeals Tribunal.

30. On 18 March 2022, the Appeals Tribunal issued Judgment No. 2022-UNAT-1192. It observed that despite the recommendation of the JAB on 14 October 2020, there had been no amendments to the ISA Staff Rules. Consequently, the JAB still did not have the power to issue a final decision that would be binding on the ISA Secretary-General, as required by the terms of Article 2(10) of the Appeals Tribunal Statute. Therefore, it remanded the case to the JAB to ensure compliance with the requirements set out in this Article by amending the ISA Staff Rules.<sup>18</sup>

#### *Impugned JAB Decision*

31. Following the second remand from the Appeals Tribunal, ISA amended its Staff Rules and the JAB re-established to review Mr. Webster's case for the third time. On 22 September 2022, the JAB issued the impugned JAB Decision in which it agreed and confirmed the reasoning and conclusions of JAB Reports No. 1 and No. 2. It further decided that the ISA Secretary-General was not required to review his decision to separate Mr. Webster from service on the grounds of abandonment of post.

32. On 1 November 2022, Mr. Webster filed an appeal of the impugned JAB Decision with the Appeals Tribunal, to which the ISA Secretary-General responded on 9 January 2023.

### **Submissions<sup>19</sup>**

#### **Mr. Webster's Appeal**

33. Mr. Webster requests that the Appeals Tribunal reverse the impugned JAB Decision, find that he did not abandon his post and remove any references to an abandonment of post from his

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<sup>18</sup> *Andrew Webster v. Secretary-General of the International Seabed Authority*, Judgment No. 2022-UNAT-1192, paras. 38 and 43-45.

<sup>19</sup> Summarized from the JAB Reports and Judgments of the Appeals Tribunal.

personnel file. He also requests that the Appeals Tribunal order ISA to provide him with a “satisfactory” letter of reference and to pay him his salary and entitlements for the months of July to September 2017 as well as until the end of his fixed-term appointment in March 2020. Finally, he requests that the Appeals Tribunal “rule and order that the decisions and conduct of the ISA and the [ISA Secretary-General] [...] [were] an abuse of process warranting the payment of costs” and award him six-months’ net base salary for the moral damages that he suffered as a result of the impugned JAB Decision as well as the reimbursement of his legal fees of CAD 70,942.85.

34. Mr. Webster submits that his grounds of appeal are “the same” as those in his appeal of 3 July 2019.

35. With regard to the impugned JAB Decision, Mr. Webster contends that he did not abandon, or intend to abandon, his post. Relying on the plain meaning of the term “abandonment” as well as on Appeals Tribunal jurisprudence, he submits that an abandonment of post requires “proof of intent”.<sup>20</sup> He also notes that pursuant to ISA Staff Rule 9.1(b), an abandonment of post requires some “action” initiated by the ISA staff member.

36. In the present case, Mr. Webster further notes that he intended to return to work, took reasonable steps to obtain the required medical report for a new sick leave certification, kept in contact with the Administration and advised it of those steps. He submits that he was acting reasonably in attempting to get the required medical report for a new sick leave certification. Therefore, he argues that the delay in obtaining a new sick leave certification does not mean that he abandoned his post. On the contrary, for the Administration to rely on the fact that “his certified sick leave expired on 18 June 2017 is simply irreconcilable with the 22 June 2017 call”.

37. Mr. Webster also contends that there is an inherent contradiction and irreconcilability in the ISA Secretary-General’s actions deeming that he had abandoned his post while recognizing the jurisdiction of the MSD and his entitlement to an MSD-approved sick leave. Having accepted the jurisdiction of the MSD, Mr. Webster argues that ISA was required to respect its procedures and was bound by its conclusions. Therefore, he argues that “[i]n maintaining his decision to separate [him] for abandonment of post—despite the MSD’s retroactive sick leave approval—the [ISA Secretary-General] contradicted the ISA’s Sick Leave Instruction”.

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<sup>20</sup> *El Shaer v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-942.



38. Mr. Webster submits that ISA failed to adhere to basic procedural fairness. He argues that even if the ISA Staff Regulations and Rules do not define what constitutes an abandonment of post or set forth any procedure to be followed, the ISA Secretary-General does not have unfettered and unrestricted discretion regarding a finding of abandonment of post, and that it had the obligation to act in good faith. Relying on ISA Staff Regulation 12.5, ISA Staff Rule 13.2 and Section 6 of ISA Secretary-General's Bulletin ISBA/ST/SGB/2017/7 (Staff Rules of the ISA), Mr. Webster submits that the ISA Secretary-General was not entitled to disregard Administrative Instruction ST/AI/400 (Abandonment of post) and that, therefore, the ISA Secretary-General failed "to adhere to the spirit of ST/AI/400, or any corresponding basic notion of procedural fairness as expressed in ST/AI/400". Indeed, contrary to ST/AI/400, the Administration did not send Mr. Webster any warning, written or verbal, about the risk of abandonment of post, prior to the letter of 14 July 2017 or provide him with any opportunity to respond.

39. Finally, referring to the Agreement concerning the relationship between the United Nations and ISA of 14 March 2017, which provides that the United Nations and ISA "agree to apply, in the interests of uniform standards of international employment and to the extent feasible, common personnel standards, methods and arrangements designed to avoid unjustified differences in terms and conditions of employment", Mr. Webster submits that ST/AI/400 applied to ISA and that the ISA Secretary-General failed to comply with this Administrative Instruction.

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

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

41. The ISA Secretary-General submits that Mr. Webster failed to explain the legal basis of his appeal, and that he has not identified any of the five grounds of appeal as referred to in Article 8(2) of the Appeals Tribunal Rules of Procedure or any reversible errors in the impugned JAB Decision.

42. He also observes that Mr. Webster's arguments are largely a repetition of the ones that he made before the JAB.

43. The ISA Secretary-General contends that there is no evidence that Mr. Webster had been a victim of an attack and a robbery in Kingston on 15 April 2017 and that during his absence for sick leave, he seemed to have engaged in an outside occupation without authorisation, as he began

to sign his e-mails as “Andrew Webster. Global Accounting, Audit, Performance and Risk Analysis” instead of as an ISA staff member.

44. The ISA Secretary-General submits that the JAB correctly found that Mr. Webster did not report for duty or took other required steps after the expiration of his certified sick leave on 18 June 2017. On the contrary, the ISA Secretary-General contends that despite numerous contacts by the Administration, Mr. Webster failed to communicate with ISA for 59 consecutive days and for 31 days after the expiration of his certified sick leave.<sup>21</sup>

45. The ISA Secretary-General also argues that Mr. Webster did not provide any explanation to justify his absence. He should have contacted ISA, produced an additional medical certificate, and requested an extension of the sick leave authorisation in due time, “as he had done for the previous two leave requests (...), [b]ut he failed to do so”. Therefore, the ISA Secretary-General submits that Mr. Webster showed “clear and inexcusable negligence” in submitting his medical report almost two months after the expiration of his certified sick leave and to provide any justification for his delay.

46. The ISA Secretary-General contends that the JAB correctly concluded that the Administration had followed the applicable ISA legal framework in separating Mr. Webster from service on the grounds of abandonment of post, namely ISA Staff Rules 5.1(b), 6.2(a), 6.2(f), 9.1(b) as well as paragraph 1.2 and Section 2 of Administrative Instruction ISBA/ST/AI/2017/2 (Sick leave).

47. The ISA Secretary-General submits that the impugned JAB Decision was properly based on ISA Staff Regulations and Rules. He argues that ST/AI/400 is not applicable to ISA, as the United Nations and ISA are two different autonomous international organizations and that ISA is not in law bound to comply with the United Nations administrative instructions. Moreover, if a United Nations rule or regulation is to be applied to ISA, there should be a formal adoption of that rule or regulation.

48. Finally, the ISA Secretary-General submits that the JAB correctly held that the certification of the MSD does not apply retroactively and that it does not have the authority or power to overturn a decision of the ISA Secretary-General. He observes that pursuant to ISA Staff Rule 6.2(a) only

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<sup>21</sup> In his answer, the ISA Secretary-General specifies that the Administration tried to contact Mr. Webster on at least 30 occasions while he was on sick leave, between April and the end of May 2017 and on 30 additional occasions before 22 June 2017.

the ISA Secretary-General can approve sick leave for ISA staff members and that, in the present case, Mr. Webster has not demonstrated any extraordinary circumstance that may justify an exception to this ISA Staff Rule.

### Considerations

#### *Preliminary matter: the jurisdictional issue*

49. This is the third time that this case has been heard by this Appeals Tribunal. In its Judgment No. 2020-UNAT-983, the Appeals Tribunal found that there was a structural concern regarding the JAB appeals process since it did not comply with the terms of the Special Agreement. As a result, the matter was remanded to the JAB to ensure that the case was dealt with in a manner that produced a written decision and record that included a statement of the relevant facts and law, with written reasons and analysis, as required by the Special Agreement, Article 2(10) of the Appeals Tribunal Statute and ISA Staff Rule 11.3(a).<sup>22</sup> These instruments stipulate, *inter alia*, the following:

Article 2 of the Appeals Tribunal Statute

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10. The Appeals Tribunal shall be competent to hear and pass judgement on an application filed against a specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations or other international organization or entity established by a treaty and participating in the common system of conditions of service, where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the jurisdiction of the Appeals Tribunal, consonant with the present statute. (...) Such special agreement shall also contain other provisions required for the Appeals Tribunal to carry out its functions vis-a-vis the agency, organization or entity. Such 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. In such cases remands, if any, shall be to the first instance process of the agency, organization or entity.

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<sup>22</sup> *Webster v. Secretary-General of the International Seabed Authority*, Judgment No. 2020-UNAT-983, paras. 4 and 44.

ISA Staff Rule 11.3(a)

In accordance with article 2 of the Agreement between the United Nations and the Authority on acceptance of jurisdiction of the United Nations Appeals Tribunal, the United Nations Appeals Tribunal shall have jurisdiction over an appeal against:

- (i) An administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment and that has been submitted to a panel of the Joint Appeals Board in accordance with rule 11.2;
- (ii) An administrative decision where the Secretary-General and the applicant have agreed to submit the application directly to the United Nations Appeals Tribunal;
- (iii) An appeal against an administrative decision imposing a disciplinary measure;
- (iv) An appeal against a decision of the Standing Committee acting on behalf of the United Nations Joint Staff Pension Board, alleging non-observance of the regulations of the United Nations Joint Staff Pension Fund.

50. Following Judgment No. 2020-UNAT-983, a JAB Panel was re-established to review Mr. Webster's case on remand. It dismissed Mr. Webster's appeal on the merits and affirmed the ISA decision to separate him from service on the grounds of abandonment of post. Mr. Webster appealed JAB Report No. 2. However, the Appeals Tribunal again remanded the case to the JAB to ensure compliance with the jurisdictional requirements of Article 2(10) of the Appeals Tribunal Statute. In its Judgment No. 2022-UNAT-1192, the Appeals Tribunal found that: i) under the then ISA Staff Regulations and Rules which had not been amended, the JAB had only legal authority to issue a recommendation, but did not have the power to issue a decision binding on the ISA Secretary-General; ii) the JAB Panel did not issue a decision, but a mere recommendation to the ISA Secretary-General; iii) there thus had been no compliance with the terms of Article 2(10) of the Appeals Tribunal Statute; and iv) as the Appeals Tribunal is the second level of appeal, it could not conduct a review without a decision from a neutral first instance process.<sup>23</sup>

51. Subsequently, on 24 May 2022, amendments to the ISA Staff Rules were promulgated by its Secretary-General, applying "to all appeals that have been remanded from the (...) Appeals Tribunal since 27 March 2020".<sup>24</sup> A third JAB Report, the impugned JAB Decision,

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<sup>23</sup> *Andrew Webster v. Secretary-General of the International Seabed Authority*, Judgment No. 2022-UNAT-1192, paras. 1 and 43.

<sup>24</sup> ISA Secretary-General's Bulletin ISBA/ST/SGB/2020/1/Amend. 1 (Amendments to the Staff Rules of ISA), para. 2.

was issued on 22 September 2022, referring to the previous JAB Reports No. 1 and No. 2 dated 21 March 2019 and 14 October 2020.

52. Before embarking on the merits of the case, it is therefore necessary to address the issue of the Appeals Tribunal jurisdiction, in light of Article 2(10) of its Statute. This provision 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*”.<sup>25</sup> Based on the facts before us and after a thorough review of the applicable law, including the amended ISA Staff Rules, the JAB is now such a neutral first instance process.

53. In *Spinardi*,<sup>26</sup> we noted that a neutral first instance process must be established to decide disputes, and that the head of an agency or organization whose decision is under appeal cannot be the final decision-maker of that first instance process. Further, as restated in *Fogarty*,<sup>27</sup> for the UNAT to conduct its function as an appellate tribunal, the impugned decisions must emanate from a neutral first instance process.

54. As in *Sud*,<sup>28</sup> in the present case, ISA has now made considerable internal changes in its law to satisfy the requirements of Article 2(10) of the Appeals Tribunal Statute. Indeed, the ISA Staff Rules (ISA highest-ranking instrument on staff relations) were amended in May 2022 to reflect that the JAB will no longer “consider and *advise* the [ISA] Secretary-General regarding appeals”, but will “consider and *decide* appeals”.<sup>29</sup> The changes also substituted the term “recommend to the [ISA] Secretary-General” for “request the [ISA] Secretary-General”, and “adopt and submit a report to the [ISA] Secretary-General” for “adopt and issue a written decision”.<sup>30</sup> In addition, the amendment repealed ISA Staff Rule 11.2(o), which established that “[t]he final decision on the appeal will normally be taken by the [ISA] Secretary-General”

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<sup>25</sup> Emphasis added.

<sup>26</sup> *Spinardi v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-957, para. 26.

<sup>27</sup> *Margaret Mary Fogarty, Robert Sheffer, Monia Spinardi, Astrid Dispert & Minglee Hoe v. Secretary-General of the International Maritime Organization*, Judgment No. 2021-UNAT-1148, paras. 7 and 10.

<sup>28</sup> *Sud v. President of the International Fund for Agricultural Development*, Judgment No. 2022-UNAT-1217.

<sup>29</sup> ISA Staff Rule 11.1(a) (emphasis added).

<sup>30</sup> ISA Staff Rule 11.2.

and replaced, *inter alia*, in [ISA] Staff Rule 11.3(b), the term “*decision by the [ISA] Secretary-General* based on the report of a panel of the [JAB]” for “*decision of the [JAB]*”.<sup>31</sup>

55. The JAB thus no longer provides only advice or mere recommendations to the ISA Secretary-General, but rather final decisions, as required by Article 2(10) of the Statute. Its constitution is now correct, even though: i) it may still only “request” (and not “order”) the ISA Secretary-General to suspend action in case it considers that the contested decision would result in irreparable injury to the appellant;<sup>32</sup> and ii) its decision is still named a “report”. These minor lapses in the language, however, do not undermine the substantial evolution in the ISA legal framework applicable to the administration of justice since Judgment No. 2022-UNAT-1192 was delivered in Mr. Webster’s case and the Appeals Tribunal’s jurisdiction over this matter is now proper.

56. Having said that, it is the last Report from the JAB Panel, dating from 22 September 2022, which is now the impugned JAB decision. The Appeals Tribunal has found that all the facts are on the record and, even though the impugned JAB Decision did not consider all relevant matters and cannot therefore be deemed correct, there is no need to remand the case for additional findings of fact. This case is thus ready to be heard at the appellate level.

*The contested administrative decision*

57. The letter dated 14 July 2017, from the ISA Secretary-General to Mr. Webster, stated the following:

SUBJECT: Official Status of Mr. Andrew Webster with The International Seabed Authority

Dear Mr. Webster,

In reviewing the records and related correspondence on file, this is to convey and reconfirm that your period of certified sick leave commenced on 18 April and ended on 18 June 2017.

Despite several attempts to contact you by phone and email, ISA management nor UN Medical Services Division (MSD) have not had any further communication

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<sup>31</sup> Emphasis added.

<sup>32</sup> ISA Staff Rule 11.2(c)(ii).

from you regarding your current condition. Thus your continued absence and lack of communication is deemed as abandonment of post as defined under ISA Staff Rule 9.1 b).

Given the above and as per ISA Staff Rule 5.1 b) ii) and 6.2 d), your absence from 19 June 2017 onwards was deemed unauthorized. However, in efforts to provide you with maximum possible support and opportunity to contact either ISA or MSD, your annual leave balance was charged in order to release your salary for the month of June 2017.

The remaining 13 days of annual leave balance have now been charged to record your continued unauthorized absence. This means your July salary will be prorated with your separation from ISA as staff member effective 19 July 2017 close of business.

In the event your absence is certified by MSD before 20 July 2017 based on a medical report provided by your medical practitioner, your status as an ISA staff member will remain unchanged.

Kind regards.

58. In turn, the letter dated 1 August 2017 between the same people clarified the content and reiterated the previous decision, containing the following information:

Dear Mr. Webster,

Reference is made to ISA correspondence dated 14 July 2017 conveying that as per ISA Staff Rule 9.1 b) your continued absence and lack of communication with any ISA or UN official was deemed abandonment of post.

Your response on 19 July which communicated that a medical certificate had been submitted to UN Medical Services Division does not change the basis of your separation from service from the International Seabed Authority but rather will determine the effective date of separation.

Thus, your status as staff member currently remains unchanged solely for administrative purposes to finalize your entitlements under sick leave and on humanitarian grounds given the circumstances that initially gave rise to your initial absence on certified sick leave.

The Office of Administrative Services will prepare a summary of salary and related allowances to which you may be entitled to upon separation and communicate directly with you in due course.

Sincerely,

59. The final date of separation was determined by the e-mail dated 16 August 2017, which mentioned the following:

Dear Andrew .. thank you for sharing the sick leave report and am pleased to hear you are focused on your recovery.

Reference is made to official correspondence dated 2 August which clarifies that as per ISA Staff Rule 9.1 b), you will be separated from service on the basis of abandonment of post.

Your status as staff member currently remains unchanged solely for administrative purposes to finalize your entitlements under sick leave. Based on the certification received, your separation date will be effective COB 30 Sept 2017.

With best regards,

60. It could first appear that the contested administrative decision would be the e-mail dated 16 August 2017, which reconsidered the previous date of separation mentioned in the letter dated 14 July 2017, fixing the final separation date on 30 September 2017. However, the firm and unequivocal communication about the decision to separate Mr. Webster from service was transmitted by the letter dated 14 July 2017, which is the contested administrative decision. Indeed, it was in this letter where ISA stated that “your continued absence and lack of communication is deemed as abandonment of post” and then explained “your July salary will be prorated *with your separation from ISA as staff member effective 19 July 2017 close of business*”.<sup>33</sup> This letter thus established both the abandonment of post and the decision to separate Mr. Webster from service.

61. It could be argued that because this same 14 July 2017 letter also stated that “[i]n the event your absence is certified by MSD before 20 July 2017 based on a medical report provided by your medical practitioner, your status as an ISA staff member will remain unchanged”, this signalled that the decision to separate Mr. Webster was not yet final and could still depend on a medical certificate which, according to the letter of 1 August 2017, was later submitted. However, this same 1 August 2017 letter clarified that “your status as staff member currently remains unchanged solely for administrative purposes to finalize your entitlements under sick leave and on humanitarian grounds given the circumstances that initially gave rise to your initial absence on certified sick leave”. This seems to be in keeping with the information, contained in the 14 July 2017 letter, that Mr. Webster’s 13 days of annual leave balance would be charged to record his unauthorised absence and his salary would be calculated *pro rata* with his separation from service as ISA staff member effective 19 July 2017. Then, on 1 August 2017, after he submitted such a certificate, the Administration confirmed his “entitlements under

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<sup>33</sup> Emphasis added.



*sick leave*” (and no longer under *annual leave*),<sup>34</sup> which was later confirmed in the e-mail of 16 August 2017.

62. The letter of 1 August 2017 was therefore a mere reiteration of the decision already taken. The only aspect left undecided was the exact date on which the separation would become effective based on the use of certified sick leave. The JAB Panel also decided that the administrative decision was taken on 14 July 2017.<sup>35</sup>

63. Therefore, even though the matter of receivability is not an issue here, since it was dealt with in Judgment No. 2020-UNAT-983,<sup>36</sup> for the purposes of our Judgment on the merits, the Appeals Tribunal will consider that the final decision to separate Mr. Webster was taken on 14 July 2017 for the reasons detailed in that letter. Subsequently, the date of separation was fixed on 30 September 2017 by the 16 August 2017 e-mail.

*The separation from service—abandonment of post?*

64. Regarding the merits of the case, the impugned JAB Decision mainly incorporated and repeated the two previous JAB Reports which were formally flawed due to the jurisdictional issue mentioned previously. Having approached the matter in only three paragraphs, the impugned JAB Decision lacks detail and depth and is materially erroneous when it comes to the main finding of the alleged abandonment of post by Mr. Webster.<sup>37</sup> The Appeals Tribunal will examine the three JAB Reports together as if they were a single document.

65. Despite dismissing Mr. Webster’s appeal, the JAB Panel found that the two preliminary considerations submitted by the ISA Secretary-General were unsubstantiated. Indeed, contrary to the ISA Secretary-General’s arguments, the JAB Panel found that: i) Mr. Webster’s attack and robbery took place in Kingston, leading to the successive periods of sick leave, whereby Mr. Webster chose to return to Canada; and ii) there was no serious evidence that Mr. Webster had engaged in (or sought to engage in) other employment and, therefore, no breach of the ISA Staff Regulations was established. Even though the ISA Secretary-General does not agree with these findings in his answer to the appeal, this is

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<sup>34</sup> Emphasis added.

<sup>35</sup> JAB Report on receivability, paras. 22 and 32-33.

<sup>36</sup> *Webster v. Secretary-General of the International Seabed Authority*, Judgment No. 2020-UNAT-983, para. 35.

<sup>37</sup> Impugned JAB Decision, paras. 10-11 and 16.

not enough for the Appeals Tribunal to differ from the JAB's reasoning in this particular regard.

66. What remains to be considered is thus whether the JAB Panel erred in its conclusions that: i) Mr. Webster did not contact the Administration for many weeks between April and July 2017 and failed to report for duty or take other necessary steps after the expiration of his sick leave on 18 June 2017, which constituted a failure to comply with the rules for sick leave, including his obligation to produce adequate and timely medical certificates; and ii) Mr. Webster's failure to report for duty was not affected by the "retrospective" sick leave certification issued by the MSD.<sup>38</sup>

67. In its JAB Report No. 1, the JAB Panel noted that throughout the period between April and July 2017, ISA sought to give Mr. Webster opportunities to regularise his position as regards his sick leave, which had expired on 18 June 2017, but that he was for the most part unresponsive. The JAB Panel found convincing the ISA Secretary-General's summary which stated:<sup>39</sup>

... Over these long period [sic], [Mr. Webster] did not inform the [ISA Secretary-General] on his health condition, he did not phone the [ISA Secretary-General], he did not send an email commenting on the evolution of this treatment, did not report any news to his supervisors.

... [S]ince the expiration of this sick leave on 18 June, the Appellant did not report for duty, and he did not provide any explanation of his absence, ...

68. The JAB Panel further found that the "retrospective" medical certificate issued by the MSD did not alter the fact that Mr. Webster failed to report for duty upon the expiration of his second certified sick leave on 18 June 2017 and that such a failure justified the decision to separate him from service in accordance with ISA Staff Rule 9.1(b).<sup>40</sup> According to the 14 July 2017 letter, the exact date on which the separation from service would become effective, based on Mr. Webster's use of certified sick leave, was initially on 19 July 2017 (after his annual leave balance had been charged from 19 June 2017). However, due to his additional approved certified sick leave, his separation from service became effective 30 September 2017.<sup>41</sup>

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<sup>38</sup> Impugned JAB Decision, paras. 10 and 11; JAB Report No. 1, paras. 3 and 37-40.

<sup>39</sup> JAB Report No. 1, para. 40.

<sup>40</sup> JAB Report No. 1, paras. 40-41.

<sup>41</sup> E-mail of 16 August 2017 from the Administration to Mr. Webster.

69. In his appeal, Mr. Webster insists that the decision to separate him from service on the basis of abandonment of post is unfair and unfounded because he never abandoned or intended to abandon his post during his certified sick leave. He maintains that, after the attack and robbery he suffered on 15 April 2017, he reported for work. However, having suffered an anxiety and panic attack, he was taken to the hospital and took successive periods of sick leave, but he always intended to return to work and manifested such intention to ISA. He also insists on the fact that, being under medical treatment, he had requested a medical report from his psychotherapist, but only obtained it on 12 July 2017. He forwarded it to the MSD on the same date but alleged that he forgot to attach it to the e-mail, which he did on 15 July 2017. On 19 July 2017, he forwarded this e-mail to ISA.

70. As outlined before in this Judgment, the timeline of the events demonstrates that, shortly after Mr. Webster alleged that he had suffered the attack and robbery in Kingston on 15 April 2017, he was authorised to travel abroad to receive medical treatments. Further, his certified sick leave was approved retroactively for a month from 18 April 2017 onwards and then up until 18 June 2017, when he did not report for work, which led to the decision to separate him from service. The main issue is hence whether the JAB Panel erred when it found that the retrospective medical certification by the MSD did not excuse Mr. Webster's failure to report for duty.<sup>42</sup>

71. The applicable legal framework regarding sick leave and abandonment of post within ISA derives mostly from its Staff Rules and from ISBA/ST/AI/2017/2. While these legal provisions establish quite a thorough framework concerning sick leave, they are quite modest with regard to the definition of abandonment of post. A general rule determines the right to take uncertified sick leave for up to seven working days in a calendar year, the limit above which the sick leave should be approved/certified in accordance with certain conditions. ISA staff members are supposed to inform their supervisors as soon as possible of absences due to illness or injury, by promptly submitting any medical certificate or medical report required. However, if the ISA staff member belatedly submits the required medical certificate or report due to circumstances beyond his or her control, the absence may be charged to sick leave upon certification by the MSD (retroactive certification). The definition of abandonment of post is a single sentence which provides that abandonment is a separation initiated by the

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<sup>42</sup> Impugned JAB Decision, para. 11.

ISA staff member other than by way of resignation and is not considered a termination initiated by the ISA Secretary-General. The full reading of these provisions is as follows:<sup>43</sup>

ISA Staff Rule 5.1

Annual leave

...

(b) (i) Annual leave may be taken in units of days and half days;

(ii) Leave may be taken only when authorized. *If a staff member is absent from work without authorization, payment of salary and allowances shall cease for the period of unauthorized absence. However, if, in the opinion of the Secretary-General, the absence was caused by reasons beyond the staff member's control, and the staff member has accrued annual leave, the absence will be charged to that leave;*

(iii) All arrangements as to leave shall be subject to the exigencies of the service, which may require that leave be taken by a staff member during a period designated by the Secretary-General. The personal circumstances and preferences of the individual staff member shall, as far as possible, be considered.

ISA Staff Rule 6.2

Sick leave

(a) Staff members who are unable to perform their duties by reason of illness or injury or whose attendance at work is prevented by public health requirements will be granted sick leave. All sick leave must be approved on behalf of, and under conditions established by, the Secretary-General.

...

Uncertified sick leave

(c) A staff member may take uncertified sick leave for up to seven working days in a calendar year, when incapacitated for the performance of his or her duties by illness or injury. Part or all of this entitlement may be used to attend to family related emergencies, or for paternity leave in case of birth or adoption of a child.

*Certified sick leave*

*(d) Sick leave taken by a staff member in excess of the limits set in paragraph(c) above requires approval in accordance with conditions established by the Secretary-General. When those conditions are not met, the absence shall be treated as unauthorized in accordance with rule 5.1 (b)(ii).*

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<sup>43</sup> Emphasis added.

Sickness during annual leave

(e) When sickness of more than five consecutive working days in any seven-day period occurs while a staff member is on annual leave, including home leave, sick leave may be approved subject to appropriate medical certification.

Obligations of staff members

(f) *Staff members shall inform their supervisors as soon as possible of absences due to illness or injury. They shall promptly submit any medical certificate or medical report required under conditions to be specified by the Secretary-General.*

(g) A staff member may be required at any time to submit a medical report as to his or her condition or to undergo a medical examination by a duly qualified medical practitioner in conformity with United Nations medical standards. When, in the opinion of the Secretary-General, a medical condition impairs a staff member's ability to perform his or her functions, the staff member may be directed not to attend the office and requested to seek treatment from a duly qualified medical practitioner. The staff member shall comply promptly with any direction or request under this rule.

(h) A staff member shall immediately notify the Secretary-General of any case of contagious disease occurring in his or her household or of any quarantine order affecting the household. In such a case, or in the case of any other condition which may affect the health of others, the Secretary-General shall decide whether the staff member should be excused from attendance at the office. If so, the staff member shall receive full salary and other emoluments for the period of authorized absence.

(i) A staff member shall not, while on sick leave, leave the duty station without the prior approval of the Secretary-General.

ISA Staff Rule 9.1

Special Advisory Board, definition of termination, and abolition of posts and reduction of staff

...

Definition of termination

(b) A termination within the meaning of the Staff Regulations is a separation from service initiated by the Secretary-General, other than retirement at the age of sixty-two years or more or summary dismissal for serious misconduct. *Abandonment of post is a separation initiated by the staff member other than by way of resignation and is not considered a termination initiated by the Secretary-General within the meaning of staff regulation 9.1 (a).* Retirement under article 28 of the Regulations of the United Nations Joint Staff Pension Fund shall not be regarded as a termination within the meaning of the Staff Regulations and Staff Rules.

ISBA/ST/AI/2017/2

Section 1

General

1.1 Sick leave may be granted under Staff Rule 6.2 in accordance with the provisions of the present instruction.

1.2 All sick leave must be supported by a certificate or report from a medical practitioner licensed to practise where the certificate or report is issued, except when uncertified sick leave is permitted under conditions set out in Staff Rule 6.2.

Section 2

Certification of sick leave

2.1 Unless uncertified sick leave is allowed under section 1.2 above, a staff member who is unable to perform his or her duties by reason of illness or injury must submit a medical certificate or a medical report, as provided in sections 2.2 and 2.3 below, no later than the twentieth working day following the initial absence from duty.

...

2.3 After 20 working days of sick leave have been certified in accordance with section 2.2, certification of further sick leave by the UN Medical Services Department shall be required. For that purpose, the staff member shall submit to the Human Resources Officer or other appropriate officer, in a sealed envelope, a detailed medical report from a duly qualified medical practitioner.

...

2.5 If no certificate or report is submitted as required by sections 2.1 to 2.4 above or if the sick leave is not certified by the UN Medical Services Department, absence shall be treated as unauthorized absence in accordance with Staff Rule 5.1 (b)(ii). *However, if the staff member belatedly submits the required medical certificate or report and establishes to the Secretary-General's satisfaction that the late submission was attributable to circumstances beyond his or her control, the absence may be charged to sick leave upon certification by the UN Medical Services Department.*

Section 3

Relationship of sick leave to other entitlements

Exhaustion of sick leave entitlement

3.1 When the entitlement to sick leave has been exhausted, further certified sick leave shall be charged to annual leave. When the entitlements to sick leave and annual leave have been exhausted, the staff member shall be placed on special leave without pay.

72. Because the notion of abandonment of post contained in the ISA Staff Rules is vague and there is no other provision in the ISA legal framework, it is necessary to resort to ST/AI/400 in order to supplement the gaps in the law. Contrary to the ISA Secretary-General's arguments, this method of application and interpretation of ISA Staff Rules is explicitly allowed by its Staff Rule 13.2, which provides that:<sup>44</sup>

In applying the Staff Rules of the Authority, and in the absence of any administrative instruction or directive issued by the Secretary-General for implementation of the Staff Rules of the Authority, *the Secretary-General shall be guided by the administrative instructions, directives and practices of the United Nations to the extent that such administrative instruction, directives and practices relate to the implementation of Staff Rules of the Authority similar to those provisions contained in the United Nations Staff Rules.*

73. Moreover, according to Article 11 of the Agreement concerning the relationship between the United Nations and ISA of 14 March 2017, the use of the United Nations legal instruments by the Agency aims at harmonizing the “standards of international employment and to the extent feasible, *common personnel standards, methods and arrangements designed to avoid unjustified differences in terms and conditions of employment* and to facilitate interchange of personnel in order to obtain the maximum benefit from their services”.<sup>45</sup> In turn, ISA Staff Regulation 12.5 confirms this general guideline, by providing that “[i]n cases where the [ISA] Secretary-General is authorised by these Regulations to establish, prescribe or determine terms or conditions, these should be based on those applicable to the United Nations staff”.

74. Having established that it is proper and reasonable for the Appeals Tribunal to rely on ST/AI/400 in resolving the present case, it is now necessary to review its content to the extent that it is relevant to the facts at hand. In this regard, paragraphs 5 and 6 of this Administrative

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<sup>44</sup> Emphasis added.

<sup>45</sup> Article 11(1) of the Agreement concerning the relationship between the United Nations and ISA of 14 March 2017 (emphasis added). Article 11(2) of this Agreement prescribes:

To this end, the United Nations and the Authority agree:

(a) To consult together from time to time concerning matters of common interest relating to the terms and conditions of employment of offers and staff, with a view to securing as much uniformity in these matters as may be feasible;

(b) To cooperate in the interchange of personnel, when desirable, on a temporary or a permanent basis, making due provision for the retention of seniority and pension rights;

(c) To cooperate in the establishment and operation of suitable machinery for the settlement of disputes arising in connection with the employment of personnel and related matters.

Instruction provide that the absence of a staff member from work, unless properly authorised as leave, may create a “reasonable presumption of intent to separate” from service unless the staff member is able to give satisfactory proof that such absence was involuntary and was caused by forces beyond his or her control. Seeking outside employment while on unauthorised absence or extended sick leave may also create a “presumption of intent to separate”, in which case the presumption would be drawn in the light of all the surrounding circumstances.

75. Paragraphs 9 to 12 of ST/AI/400 establish that in cases of unauthorised absence, a procedure should be observed in order to ascertain whether or not the staff member abandoned the post leading to his or her separation on this ground. These provisions read as follows:

Procedure

9. Supervisors must report all unauthorized absences to the relevant executive or administrative officer, or the local personnel office in offices away from Headquarters, not later than the end of the fourth day of such absence. The executive or administrative officer should then endeavour to contact the staff member concerned by telephone or by any appropriate means, failing which a written communication should be addressed to the staff member at his or her last known address requesting him or her to report for duty or to provide a plausible explanation for his or her absence. In cases of claimed illness, the executive or administrative officer should call the staff member’s attention to the requirements of subparagraphs (v)-(vii) of staff rule 106.2 (a) (see para. 13 below).

10. Unless the executive or administrative officer receives a medical certificate or plausible explanation for the absence within 10 working days he or she shall refer the matter to the appropriate personnel officer, who should address a further written communication, by registered mail, personal delivery, or other appropriate means, calling the staff member’s attention to the earlier attempts to contact him or her and the absence of an appropriate response. The communication should remind the staff member of the provisions of staff rule 105.1 (b) (ii), under which payment of salary and allowances shall cease for the period of unauthorized absence. It should allow a further period of up to 10 working days for reporting to duty or submission of a medical certification or plausible explanation, and should warn the staff member that failure to do so would be considered abandonment of post and would lead to separation on that ground.

11. It is the responsibility of staff members to inform their supervisors of absences, whether owing to illness or injury or any other cause. It is also the responsibility of staff members to keep the Organization informed of their current address and the person to



be notified in case of accident or emergency. If, despite due diligence on the part of the Organization, the staff member cannot be reached or contacted, either in person, by registered letter or other reliable form of communication to the address most recently provided by the staff member, or through family or friends, receipt of such notice will be deemed to have occurred.

12. If by the end of the specified period the staff member has failed to comply with the warning to report for duty or to provide a plausible explanation or medical certificate, the Director, Staff Administration and Training Division, or the head of office at duty stations away from Headquarters, will submit a presentation to the Assistant Secretary-General for Human Resources Management, recommending separation for abandonment of post. The effective date of separation will be the date of the decision of the Assistant Secretary-General for Human Resources Management to treat the staff member's conduct as repudiation of the contract of employment, or the date of expiry of the fixed-term appointment, whichever comes sooner.

Alleged incapacity for reasons of health

13. Where a staff member claims that his or her absence is the result of incapacity for reasons of health, his or her attention should be called to the provisions of staff rule 106.2 (a) (vi), which require the production of a certificate from a duly qualified medical practitioner stating the nature and probable duration of the illness. If the staff member fails to produce such certification or if the certification produced is not acceptable to the Medical Director and sick leave is not certified, the executive or administrative officer shall immediately advise the staff member, with a copy to the personnel officer, that sick leave has been refused and that the staff member must report for duty immediately or be separated for abandonment of post. If the staff member disputes the decision, he or she may request that the matter be referred to an independent practitioner or to a medical board under the terms of staff rule 106.2 (a) (viii). Pending a final decision following the report of the medical board, the period following the date of notification that sick leave has been refused should be compensatable. However, should it be decided not to consider the period in question as sick leave, the remuneration received by the staff member during this period shall be recovered by the Organization.

14. The determination as to whether or not the staff member had a valid excuse for failing to submit evidence of incapacity, or a plausible explanation for the absence, within the prescribed or reasonable time limits, lies with the Office of Human Resources Management.

76. The plain reading of the provisions of ST/AI/400 cited above makes it clear that the Agency did not follow the principle that any endeavour to contact Mr. Webster should have occurred once the *unauthorised* absence had taken place (and not *during* the *authorised* sick leave). Therefore, all attempts to contact him between April and 18 June 2017, while he was still on certified sick leave, were inconsequential for the purposes of the present case. The relevant contact was the

phone call held on 22 June 2017, to which Mr. Webster responded and during which he agreed to obtain the necessary documentation for the extension of his sick leave.

77. On this matter, there is no dispute that there were delays in obtaining the medical certification for the period beyond 18 June 2017. There were issues with Mr. Webster obtaining the required reports, firstly because, on 12 July 2017, he submitted a report from a psychotherapist, which was rejected by the MSD on 19 July 2017, and secondly because he alleged that his doctor was on holiday. After the submission of the medical certificate, the MSD certification was delivered on 10 August 2017, *retroactively* from 19 June to 30 September 2017, the date on which Mr. Webster was eventually separated from service. Despite all the correspondence that was ongoing with Mr. Webster, the contested decision was taken by ISA on 14 July 2017.

78. The Agency did not observe the two-letter procedure as provided by ST/AI/400, which would have been necessary to establish the abandonment of post. A first letter would have been required to request Mr. Webster to report for duty or to provide a plausible explanation for his absence (which, incidentally, Mr. Webster had already provided on the phone call on 22 June 2017, during which he also committed himself submitting a medical certificate—which he later did). A second letter would also have been essential to allow him a further period of up to 10 working days for reporting to duty or submitting a medical certification or plausible explanation, and to warn him that failure to do so would be considered abandonment of post and would lead to separation on these grounds. Although, as discussed above, prior to this Judgment we issue today, ISA was not strictly required to follow ST/AI/400, we note that the two-letter procedure reflects a fundamental principle of providing a staff member notice and opportunity to be heard before taking the drastic measure of separation on the grounds of abandonment of post. There is no evidence in this case that ISA provided any such due process.

79. Furthermore, Mr. Webster's temporary unjustified absence from work could not be *automatically* considered as abandonment of post, without any inquiry about his *intention*. The *objective* element of unauthorised absence must be interpreted in the context of the *subjective* component of the staff member's action or inaction. In this regard, the Appeals Tribunal has already established that mere unauthorised absence is not enough to establish that the staff member had effectively abandoned his post. In *Agha*,<sup>46</sup> the staff member "did not

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<sup>46</sup> *Agha v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-916, paras. 22-23.

report for duty after being advised that [his] leave was not approved. Moreover, [he] also failed to respond in a timely manner to a request regarding [his] continued absence.” In that case, the Appeals Tribunal reversed the UNDT Judgment and concluded that the evidence clearly established that the separation decision was solely based on Mr. Agha’s unauthorised absence from duty. Accordingly, an unauthorised absence from work should be assessed together with other elements on the file. Mr. Webster’s case shows that, as previously mentioned in this Judgment, in the e-mail dated 30 May 2017, he had clearly advised his supervisor of his medical situation, as well as of his “*hope to recover soon and return to work*”.<sup>47</sup>

80. This clear statement that Mr. Webster did not want to abandon his post was later corroborated by the phone call of 22 June 2017, when he agreed to obtain an extension of his certified sick leave, and by the fact that he requested a medical report from his doctor on that same date.<sup>48</sup> Two days after, Mr. Webster advised the MSD that his doctor was away and that he would send a report from his psychotherapist as soon as it was made available, which he did on 12 July 2017.<sup>49</sup>

81. During the following days, on 19 and 20 July 2017, after the contested administrative decision was taken, Mr. Webster exchanged e-mails with his supervisor and/or the ISA HRO regarding the medical certificate required to certify his sick leave, even though his doctor was on vacation.<sup>50</sup> However, a reiteration of the decision to separate Mr. Webster from service was made on 1 August 2017, a few days before his sick leave was finally retroactively certified on 10 August 2017, with effects up to 30 September 2017, the date when the separation became effective.

82. The plain reading of the facts above leaves no doubt that: i) at the time when the contested decision was taken, there was no willingness of abandonment of the post by Mr. Webster; ii) despite his poor mental health condition that was *medically certified*, Mr. Webster was, at the time when the contested decision was taken, undertaking reasonable steps to comply with the requirements for the certification of the extension of his sick leave; iii) his sick leave was subsequently retroactively certified to encompass the period from 19 June to 30 September 2017,

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<sup>47</sup> E-mail of 30 May 2017 from Mr. Webster to the Administration (emphasis added).

<sup>48</sup> E-mails of 22 June 2017 from Mr. Webster to the Administration and to his doctor.

<sup>49</sup> E-mail of 12 and 15 July 2017 from Mr. Webster to the MSD.

<sup>50</sup> *Webster v. Secretary-General of the International Seabed Authority*, Judgment No. 2020-UNAT-983, para. 12. See also e-mails of 19 and 20 June 2017 from Mr. Webster to the Administration.

including the date when the contested administrative decision was taken (14 July 2017); and iv) the certification of *retroactive* medical leave is lawful and had been used in the past at least once, on 2 May 2017, for the period from 18 April 2017 to 18 May 2017, when Mr. Webster took his first sick leave after the attack.

83. In light of the above, ISA did not provide Mr. Webster with any opportunity to respond to the risk of being considered to have abandoned his post. Since there was a lack of communication with Mr. Webster during certain periods, providing him official notice of this risk to his ongoing employment status was necessary to avoid any doubt or to obtain further assurance as to his intention to abandon the post. While the Agency was not explicitly bound in its Staff Rules to follow the procedures in ST/AI/400, the fact that it totally ignored the basic principles of notice and opportunity to be heard prior to a declaration of abandonment of post, was inexcusable. ISA issued a hurried decision to separate Mr. Webster on grounds that are legally insufficient to establish any abandonment of post.

84. Therefore, the JAB Panel erred in fact and in law when it did not consider all the elements on the file and wider body of law when it reached its conclusion. Unlike in *Harris*,<sup>51</sup> where the staff member absented himself from duty for about 3.5 months, ignoring requests to either produce a medical certificate or report for duty, Mr. Webster produced a medical certificate which was later certified by the MSD. In addition, as already stated in *El Shaer*, concerning abandonment of post in UNRWA, such a finding is a draconian measure:<sup>52</sup>

... Area Staff Rule 109.4 is an exceptional deeming provision that allows the Agency to deem a staff member separated from service by reason of abandonment of post in certain circumstances. It applies only where five conditions precedent have been met (...).

... Area Staff Rule 109.4 is nonetheless draconian in that it allows for separation from service on the grounds of absence without the Agency being required to determine the validity or reasonableness of the reason for absence. The rule is a sensible and rational one, as it provides an expedient mechanism to deal with staff members who have absconded or deserted posts. It will apply most often when the whereabouts of the absent staff member are unknown. The exceptional and draconian nature of the rule, however, requires that it be construed restrictively and purposively and applied strictly in accordance with the stipulated conditions precedent.

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<sup>51</sup> *Harris v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-897, paras. 15-20 and 22-25.

<sup>52</sup> *El Shaer v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-942, paras. 29-30.

85. In light of all the above, the JAB Panel erred in finding that the Administration's decision to separate Mr. Webster from service on the grounds of abandonment of post was lawful, since Mr. Webster did not abandon his post.

86. It follows that the contested administrative decision of separation on grounds of abandonment of post is rescinded and all references to an abandonment of post should be removed from Mr. Webster's personnel record. His salary from July to 30 September 2017, including all related benefits and entitlements, if not already paid under the status of sick leave (due to the retroactive certification) should be paid as a result of this Judgment.

87. The ISA Secretary-General may elect, instead of reinstating Mr. Webster, to pay compensation in lieu. This is because the purpose of in lieu compensation is to place the staff member in the same position he or she would have been in, had the unlawful decision not been made.<sup>53</sup> Although the Appeals Tribunal exercises discretion in establishing the amount of in lieu compensation, it shall ordinarily give some justification and set an approximate amount that it considers is an appropriate substitution for rescission, following a principled approach. The determination of the amount of in lieu compensation will depend on the circumstances of each case, but some relevant factors that can be considered, among others, are the nature of the post formerly occupied, the remaining time to be served by a staff member on his or her appointment, and his or her expectancy of renewal.<sup>54</sup> Given the circumstances of the present case and the amount Mr. Webster would have obtained for the remaining period of his fixed-term appointment including all related benefits and entitlements had his fixed-term appointment not been terminated, the compensation in lieu is fixed at the amount equivalent to two years' net base salary.

88. On another note, there is no law which obliges the Agency to provide a satisfactory letter of reference. In the same sense, despite the two remands for adequacy of the JAB Panel Reports No. 1 and No. 2, its laconic and mostly erroneous Reports and the reversal of its "decision" which has led to the partial granting of Mr. Webster's claims, there is no reason for a finding of manifest abuse of the appeals process by the Agency, which is a requirement for the award of costs and reimbursement of legal fees against it, according to Article 9(2) of the Appeals Tribunal Statute. Rather, the Appeals Tribunal firmly believes that ISA will benefit

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<sup>53</sup> *Ashour v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-899, para. 18.

<sup>54</sup> *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-712, para. 16.

from the present experience to improve its internal justice system at the first instance, in order to deliver adequate professional decisions with appropriate details and proper assessment of the relevant facts, possible surrounding circumstances and applicable law and jurisprudence. Mr. Webster's claims to this effect are accordingly dismissed.

89. Lastly, in light of the applicable law and jurisprudence which provides that no compensation for moral damages shall be awarded when there is no evidence whatsoever to sustain such harm or prejudice, the fact that Mr. Webster unlawfully suffered the harsh effects of losing his appointment, while deserving of sympathetic consideration, is insufficient basis for an award of moral damages.

**Judgment**

90. Mr. Webster's appeal is partially granted, and the impugned JAB Decision of 22 September 2022 in Case No. ISA/JAB/2017/01 is hereby reversed. The contested administrative decision of separation on grounds of abandonment of post is rescinded.

91. Mr. Webster's salary from July to 30 September 2017, including all related benefits and entitlements, if not already paid under the status of sick leave (due to the retroactive certification) should be paid to him as a result of this Judgment.

92. The ISA Secretary-General may elect to pay instead compensation in lieu in an amount equivalent to two years' net base salary.

93. If this amount is not paid within 30 days of the day on which this Judgment is published, the compensation amount shall bear interest at the US prime rate with effect from that date until payment. An additional five per cent shall be applied to the US prime rate 60 days from the date this Judgment becomes executable.

94. The other remedies requested by Mr. Webster are denied.

Original and Authoritative Version: English

Decision dated this 30<sup>th</sup> day of June 2023 in New York, United States.

*(Signed)*

Judge Halfeld, Presiding

*(Signed)*

Judge Raikos

*(Signed)*

Judge Knierim

Judgment published and entered into the Register on this 1<sup>st</sup> day of August 2023 in New York, United States.

*(Signed)*

Juliet Johnson, Registrar