

Judgment No. 2023-UNAT-1369



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

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.¹³

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 ISAT under

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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.²¹

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 previourt-rt-rt-

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).²² These instruments stipulate, inter alia, the following:

Article 2 of the Appeals Tribunal Statute

...

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

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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”.²⁵ 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*,²⁶ 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*,²⁷ 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*,²⁸ 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”.²⁹ 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-

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and replaced, inter alia, in [ISA] Staff Rule 11.3(b), the term “

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.

sick leave” (and no longer under annual leave),³⁴ 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 2017.³⁵

63. The

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:⁴³

ISA Staff Rule 5.1

Annual leave

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(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 ayTT4 [Tc 0.0095.9 ((n)-30.003c 0.03d2

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

Instruction provide that the absence of a staff member from work, unless properly authorised

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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

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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.

85. In light of all the above, the JAB Panel err.881

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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