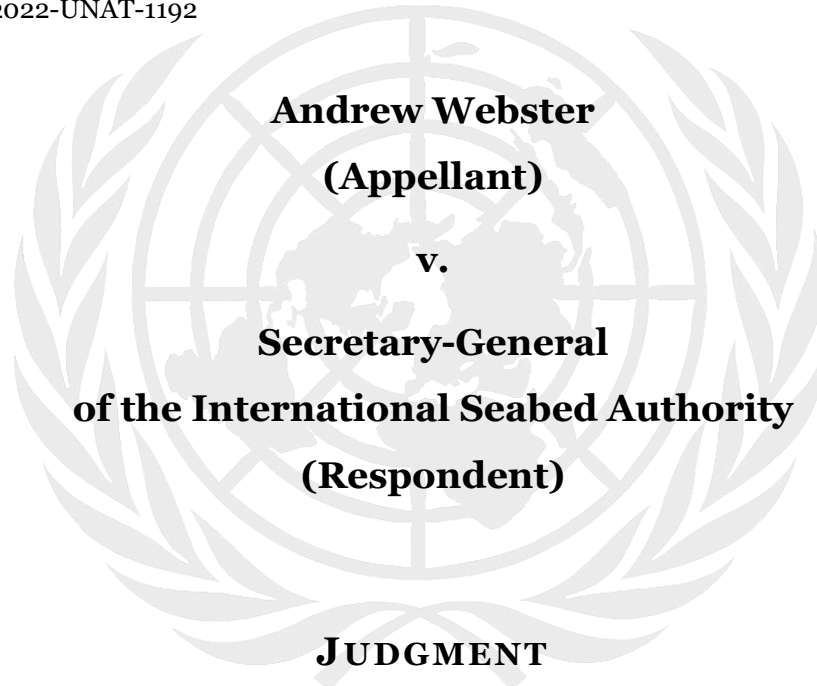




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2022-UNAT-1192



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

Case No.: 2021-1526

Date: 18 March 2022

Registrar: Weicheng Lin

Counsel for Appellant: David Stolow, Esq.

Counsel for Respondent: Alfonso Ascencio-Herrera/Cristián Gimenez Corte

JUDGE MARTHA HALFELD, PRESIDING.

1. This is the second appeal by Mr. Webster, this time, from the report of a panel of the Joint Appeals Board (JAB Panel) of the International Seabed Authority (ISA). The JAB Panel had been re-established to review his case on remand; it dismissed Mr. Webster's appeal on the merits, and affirmed ISA's decision to separate him from service on the ground of abandonment of post.

2. Mr. Webster appealed the JAB Panel report to the United Nations Appeals Tribunal (Appeals Tribunal or UNAT). For the reasons set out below, we remand the case to the JAB to ensure compliance with the jurisdictional requirements of Article 2(10) of the Appeals Tribunal Statute.

Facts and Procedure

3. Mr. Webster joined ISA on 30 March 2015 in Kingston, Jamaica, as a Budget and Internal Oversight Officer at the P-4 level on a two-year fixed-term appointment (FTA), which was subsequently extended for three years through 29 March 2020.

4. On 15 April 2017, Mr. Webster was attacked and robbed in Kingston. He left Jamaica for New York on 21 April 2017 on an authorized trip to seek further medical treatment for his conditions from the aftermath of the attack. Thereafter, Mr. Webster took successive periods of certified sick leave, which carried him through 18 June 2017.

5. While he was on certified sick leave, the ISA Administration attempted numerous times to contact Mr. Webster, by phone or e-mail, for an update on his conditions, but to no avail. On 22 June 2017, three days after the expiry of his certified sick leave, the Director of the Office of the Administrative Services, ISA, managed to speak with Mr. Webster by phone. He reminded Mr. Webster that the latter needed to request an extension of his certified sick leave.

6. However, the United Nations Medical Services Division (MSD) certified Mr. Webster's sick leave only on 10 August 2017 retroactively from 19 June 2017 through 30 September 2017, because Mr. Webster had not been able to provide a medical progress report by his treating doctor to the MSD until 5 August 2017. It appears that Mr. Webster did not communicate his difficulties in obtaining the medical report to ISA.

7. In the interim, on 14 July 2017, the ISA Secretary-General informed Mr. Webster by a letter that as his certified sick leave had expired on 18 June 2017, and neither ISA nor the MSD had heard from him regarding his condition despite several attempts to contact him by phone and e-mail, his continued absence was deemed as abandonment of post, and his absence from 19 June 2017 onwards was deemed unauthorized. Nevertheless, the ISA Secretary-General also informed Mr. Webster that he would remain an ISA staff member if the MSD would certify his absence as sick leave, before 20 July 2017.

8. On 1 August 2017, the ISA Secretary-General informed Mr. Webster of the decision to separate him from service, though the latter would remain an ISA staff member solely for administrative purposes and on humanitarian grounds.

9. As noted above, the MSD certified Mr. Webster's sick leave retroactively only on 10 August 2020.

10. On 16 August 2017, ISA advised Mr. Webster that, notwithstanding the MSD's retroactive certification, he would still be separated from service on the basis of abandonment of post, but the effective date of his separation would be delayed to 30 September 2017 to coincide with the last day of his newly-approved certified sick leave.

11. Mr. Webster contested the separation decision by first requesting a review and then filing an appeal with the JAB.

12. In its report dated 21 March 2019, the JAB Panel dismissed Mr. Webster's appeal, finding that his failure to report for duty or take other necessary steps after the expiration of his certified sick leave despite the repeated efforts by the ISA Secretariat to contact him over an extended period of time justified the decision to separate him from service on the ground of abandonment of post. The ISA Secretary-General agreed to the JAB's recommendation and took no further action.

13. Mr. Webster appealed the decision of the ISA Secretary-General to take no further action in respect of the separation decision to the Appeals Tribunal.

14. In Judgment No. 2020-UNAT-983 dated 27 March 2020, the Appeals Tribunal remanded Mr. Webster's case to the JAB for reconsideration and decision by a neutral first instance process. In the view of the UNAT, the JAB was not such a neutral first instance

process, because its report was not a decision, but an opinion or a recommendation to the ISA Secretary-General, who has discretion to adopt or ignore it. The Appeals Tribunal found that the UNAT-ISA Special Agreement and the resulting ISA Staff Rules did not comply with the UNAT Statute. In the Judgment, the Appeals Tribunal did not go into the merits of the case, though it agreed to the JAB's conclusion that Mr. Webster's appeal was receivable and not time barred.

15. On 14 October 2020, the JAB Panel re-established to review Mr. Webster's case on remand issued its report, in which it dismissed Mr. Webster's appeal on the merits. The JAB Panel concluded that the basic facts of the attack and robbery on Mr. Webster had not been put into question, and that there was no serious evidence of Mr. Webster engaging in other employment. However, the JAB Panel found that the Respondent had made the case that Mr. Webster's failure to report for duty upon the expiration of the second approved period of sick leave justified ISA's decision of 14 July 2017 to separate him from service on the ground of abandonment of post. The JAB Panel issued the decision on the assumption that it was empowered to act as directed by the UNAT and take a decision binding on the ISA Secretary-General. In addition to taking a decision to dispose of Mr. Webster's appeal, the JAB Panel recommended that the statutory provisions be amended as soon as reasonably possible so as to bring them in line with the UNAT case-law as appropriate.

16. On 15 December 2020, Mr. Webster appealed the JAB Panel report to the UNAT. On 22 April 2021, the ISA Secretary-General submitted an answer to the appeal.

17. On 17 February 2022, in preparation of the case file for review by the Judges, and noting that both parties have provided the 2011 version of ISA's Staff Regulations and Rules as an attachment to their respective submissions, and further noting the JAB Panel's recommendation to the ISA Administration to amend ISA's statutory provisions, the Registry asked the parties whether any action has been taken in respect of the JAB Panel's recommendation.

18. On 21 February 2022, the Senior Legal Officer of ISA advised that the JAB Panel assumed it was empowered to act as directed by the UNAT and take a decision binding on the ISA Secretary-General. Pending the final disposition of the present appeal, there have been no amendments to the ISA Staff Rules and that, subject to the outcome of this case, the ISA Administration will review any need to amend its Staff Rules.

Submissions

Mr. Webster's Appeal

19. Mr. Webster requests that the Appeals Tribunal vacate the JAB Panel report, rescind the decision to separate him from service on the ground of abandonment of post, order ISA to pay him his salary and entitlements from July 2017 to the end of his FTA in March 2020. Moreover, he requests that the Appeals Tribunal order ISA to pay him six months' net base salary as moral damages, 31,551.10 Canadian Dollars¹ as his legal costs, and an unspecified amount of compensation for the abuse of process by the ISA Secretary-General.

20. Mr. Webster states that the ISA Secretary-General's decision to separate him from service on the ground of abandonment of post is factually unsustainable, unreasonable, procedurally deficient and unlawful, because he did not abandon, or intend to abandon, his post. The ISA Staff Regulations and Rules do not define what constitutes an abandonment of post, nor do they set forth any procedure to be followed.

21. Between 19 June 2017 and 14 July 2017, Mr. Webster was in contact with the Director of the Office of the Administrative Services of ISA and was acting reasonably in attempting to get the required medical report for a new sick leave certification. His communication with the Director clearly establishes that his absence was due to his need for ongoing treatment, and that further certification of sick leave was dependent on when his medical professionals were able to prepare the necessary reports required by the MSD. The delay in obtaining a new sick leave certification does not mean that Mr. Webster abandoned his post. He took reasonable steps to obtain the necessary medical report and kept in contact with ISA to advise it of those steps.

22. There is an inherent contradiction and irreconcilability in the ISA Secretary-General's actions deeming that Mr. Webster had abandoned his post while recognizing the jurisdiction of the MSD and its third sick leave certification for him. Having accepted the MSD's jurisdiction, ISA was required to respect the MSD procedures and was bound by the MSD's conclusions.

¹ As of 18 March 2022, the exchange rate between the US Dollar and the Canadian Dollar stood at 1: 1.26.

23. The ISA Secretary-General failed to adhere to basic procedural fairness and the mandatory procedure in ST/AI/400 in respect of abandonment of post. ISA has not adopted any administrative instructions, rules or procedures in respect of abandonment of post. The ISA Secretary-General failed to adhere to the spirit of administrative instruction ST/AI/400 or any corresponding basic notion of procedural fairness as expressed in that administrative issuance by the United Nations. Contrary to ST/AI/400, which applies to ISA, and which requires the sending of two letters to the concerned staff member, the ISA Administration did not send Mr. Webster any prior written notice warning him about the risk of abandonment of post (the first letter), prior to the ISA Secretary-General's 14 July 2017 letter (the second letter). Furthermore, the ISA Administration did not give Mr. Webster any opportunity to respond or provide further assurances of his intention to return to work.

The ISA Secretary-General's Answer

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

25. The ISA Secretary-General submits that the JAB Panel was composed of independent and recognized jurists, which ensured its impartiality and independence. It issued a binding decision on both parties. Mr. Webster recognized the jurisdiction of the JAB Panel as the neutral first instance process, did not challenge its composition and accepted its decision as final and binding.

26. The ISA Secretary-General also submits that the appeal is factually and legally deficient, as Mr. Webster has not explained the legal basis of his appeal, and he has not identified any of the five grounds of appeal as referred to in Article 8(2) of the UNAT's Rules of Procedure. He has merely reiterated the arguments made in his application to the JAB, which has already considered and dismissed them.

27. The ISA Secretary-General further submits that the JAB Panel correctly established the fact that Mr. Webster did not report for duty or take other required steps after the expiration of his sick leave. He did not communicate with the ISA Administration for 59 consecutive days, in particular for 31 days after the exhaustion of his certified sick leave, despite several warnings and numerous attempts to contact him. Before the expiration of his sick leave, he should have contacted the ISA Administration, produced an additional medical certificate and requested

an extension of the sick leave authorization by 18 June 2017, as he had done for the previous sick leave requests. The ISA Administration was not informed that the late submission of the new sick leave certificate on 10 August 2017 was attributable to circumstances beyond his control. The present case is distinguishable from *El Shaer*.² There was a clear and inexcusable negligence on Mr. Webster's part. It is worth noting that while he was allegedly sick to work for ISA, Mr. Webster appeared to be engaged in an outside occupation without authorization, as he signed his messages not as an ISA staff member, but as an employee associated with an accounting and audit company.

28. The ISA Secretary-General further submits that the JAB Panel correctly found that the ISA Administration had properly applied the applicable and mandatory rules and procedures to the separation of Mr. Webster from service. On 14 July 2017, in view of Mr. Webster's continued and unjustified absence, the ISA Administration issued him a formal letter advising him that his unauthorized absence had been deemed as an abandonment of post. And on 1 August 2017, the ISA Administration issued another letter to Mr. Webster reiterating the decision to separate him from service on the ground of abandonment of post.

29. The ISA Secretary-General maintains that the JAB Panel's binding decision was properly based on ISA's Staff Regulations and Rules. Contrary to Mr. Webster's allegation, as correctly established by the JAB Panel, the United Nations Administrative Instruction ST/AI/400 is not an ISA administrative instruction and is therefore not applicable to ISA, as the United Nations and ISA are two different autonomous international organizations and ISA is not in law bound to comply with the United Nations administrative instructions. If a United Nations rule or regulation is to be applied to ISA, there should be a formal adoption of that rule or regulation, following ISA's own law-making process. Consequently, for ST/AI/400 to be applicable in ISA, an express reference to it in the ISA rules is required.

30. The ISA Secretary-General also maintains that the JAB Panel correctly established that the certificates issued by the MSD do not apply retroactively, and that they do not have the effect of overturning a decision by the ISA Secretary-General. Contrary to Mr. Webster's allegations, the MSD does not have the authority or power to grant sick leaves to ISA staff members or to overturn the ISA Secretary-General's decision. Only the ISA Secretary-General can approve sick leaves for ISA staff members in accordance with ISA's Staff Rule 6.2(a).

² *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.

Mr. Webster has not demonstrated any extraordinary circumstance that may justify an exception to this ISA Staff Rule.

Considerations

31. In the previous judgment in this case,³ 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 between the United Nations and the International Seabed Authority executed on 11 February 2010 (the Special Agreement). As a result, it remanded the matter to the JAB to ensure compliance with the Special Agreement and Article 2(10) of the Statute of the Appeals Tribunal. In its reasoning, the Appeals Tribunal established the following:⁴

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

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

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

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

³ *Webster v. Secretary-General of the International Seabed Authority*, Judgment No. 2020-UNAT-983.

⁴ *Ibid.*, paras. 36-43 (Internal citations omitted; emphases in original).

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

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

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

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

32. The Appeals Tribunal then remanded the matter to the JAB and determined that the Appellant’s appeal to the JAB should be reconsidered and decided by a neutral first instance process which would produce a written decision and record which would include a statement of the relevant facts and law, with written reasons and analysis, in order “to ensure compliance with the jurisdictional requirements of the Special Agreement and Article 2(1) of the Statute”.⁵

33. The ISA’s Staff Regulations and Rules promulgated in 2011 (Second edition) in force at the time of the Appeals Tribunal Judgment have not changed since then. Both parties have filed them as an annex in their respective submissions to the Appeals Tribunal. In pertinent parts, they stipulate that:

⁵ *Ibid.*, para. 44.

ARTICLE XI

APPEALS

Regulation 11.1

There shall be a two-tier formal system of administration of justice.

Regulation 11.2

The Secretary-General shall establish a neutral first instance process with staff participation to take a decision upon any appeal by staff members against an administrative decision alleging the non-observance of their terms of appointment, including all pertinent regulations and rules.

Regulation 11.3

The United Nations Appeals Tribunal shall, under conditions prescribed in its statute, hear and pass judgment upon applications from staff members alleging non-observance of their terms of appointment, including all pertinent regulations and rules.

34. The ISA's Staff Rules provide in relevant parts that:⁶

Rule 11.2

Appeals

(a) A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing.

(i) If the Secretary-General replies to the staff member's letter, he or she may appeal against the answer within one month of the receipt of such reply;

(ii) If the Secretary-General does not reply to the letter within one month, the staff member may appeal against the original administrative decision within one month of the expiration of the time limit specified in this subparagraph for the Secretary-General's reply.

(b) At any time after a request for review has been submitted, but before a panel of the Joint Appeals Board has been constituted to hear an appeal, conciliation may be sought on the issues involved at the initiative of the Secretary-General, the staff member or the Chairman of the Joint Appeals Board. The conciliation procedure shall be as set out in Chapter XII of the Staff Rules. This procedure is without prejudice to the right of the staff member to pursue an appeal under the provisions of this rule if the issues cannot be resolved through conciliation.

⁶ Emphases added.

(c) Neither a request for administrative review under paragraph (a) above nor the filing of an appeal under paragraph (d) below shall have the effect of suspending action on the contested decision.

(i) However, the staff member concerned may request a suspension of action on such decision by writing to the Joint Appeals Board under paragraph (d) below. The request shall set forth the relevant facts and indicate how implementation would directly and irreparably injure the staff member's rights;

(ii) Upon receipt of such a request, a panel of the Board shall be promptly constituted and shall act expeditiously. If, after considering the views of both parties, the panel determines that the decision has not been implemented and that its implementation would result in irreparable injury to the appellant, it may *recommend* to the Secretary-General the suspension of action on that decision:

- a. Until the time limits specified in subparagraph (a)(i) or (ii) have passed without any appeal having been filed; or
- b. If an appeal is filed, until a decision on the appeal is taken;

(iii) *The Secretary-General's decision on such a recommendation is not subject to appeal.*

(d) An appeal pursuant to paragraph (a) or a request for suspension of action pursuant to paragraph (c) above shall be filed with the Joint Appeals Board which shall forthwith submit a copy of the appeal or the request to the Secretary-General.

(e) (i) For the consideration of each appeal, the Chairman of the Joint Appeals Board shall *constitute a panel of the Board, composed as follows:*

- a. *A panel chairperson, which shall be either the Chairman or one of the members of the Board;*
- b. *A member selected from among those appointed by the Secretary-General;*
- c. *A member selected from among those elected by the staff;*

(ii) No person who has assisted the Secretary-General in a conciliation procedure referred to in paragraph (b) shall serve on a panel established to consider an appeal relating to the same case;

(iii) Before a panel undertakes consideration of an appeal, the parties shall be notified of the proposed composition thereof. The Chairman of the Board may, at the request of either party, disqualify the panel chairperson or either member if, in the opinion of the Chairman, such action is warranted to ensure impartiality. He or she may also excuse the panel chairperson or either member from serving on the panel;

(iv) Subject to the principles set out in subparagraphs (i) to (iii), *the Chairman of the Board shall fill any vacancies arising on the panel.*

(f) An appeal shall not be receivable unless the time limits specified in paragraph (a) above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal.

(g) The Secretary-General, or his designated representative, shall submit a written reply within one month following the date of receipt of the appeal.

(h) Proceedings before a panel shall normally be limited to the original written presentation of the case, together with brief statements and rebuttals, which may be made orally or in writing, in one of the working languages of the Secretariat.

(i) A staff member may arrange to have his or her appeal presented to the panel on his or her behalf by counsel, at his or her own expense.

(j) Where the competence of the Joint Appeals Board is in doubt, the panel constituted for the appeal shall decide.

(k) In the case of termination or other action on grounds of inefficiency or relative efficiency, the panel shall not consider the substantive question of efficiency but only evidence that the decision was motivated by prejudice or by some other extraneous factor.

(l) The panel shall have authority to call members of the Secretariat who may be able to provide information concerning the issues before it and shall have access to all documents pertinent to the case.

(m) In considering an appeal, the panel shall act with the maximum dispatch consistent with a fair review of the issues before it.

(n) Within 14 days of the date on which the consideration of an appeal has been completed, *the panel shall, by majority vote, adopt and submit a report to the Secretary-General. The report shall be considered as constituting a record of the proceedings in the appeal and shall include a summary of the reasons, fact and law as well as all recommendations that the panel considers appropriate.* Votes on the recommendations shall be recorded, and any member of the panel may have his or her dissenting opinion included in the report.

(o) *The final decision on the appeal will normally be taken by the Secretary-General within 14 days after the panel has forwarded its report, and shall be communicated to the staff member, together with a copy of the panel's report.*

(p) To enable staff members to exercise their right to make application to the United Nations Appeals Tribunal, *the Joint Appeals Board shall, at the request of the staff member, communicate to him or her the report of the panel if the Secretary-General has not made a decision on the report within a period of 14 days after the date on which the report was submitted to him or her.*

Rule 11.3

United Nations Appeals Tribunal

Jurisdiction

(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.

Receivability

(b) An appeal may be filed by either party within 90 calendar days of the receipt of the *decision* by the Secretary-General based on the report of a panel of the Joint Appeals Board, or within 90 calendar days of the receipt of the report of a panel of the Joint Appeals Board if the Secretary-General has not made a *decision* on the report within a period of 14 days after the date on which the report was submitted to him or her. An appeal shall not be receivable by the United Nations Appeals Tribunal unless the deadline has been met or has been waived or suspended by the Appeals Tribunal.

Suspensive effect

(c) The filing of an appeal with the United Nations Appeals Tribunal shall have the effect of suspending the execution of the decision that is contested.

Legal assistance

(d) A staff member shall have the assistance of counsel at his or her expense in the presentation of his or her case before the United Nations Appeals Tribunal.

Competence

(e) The competence of the United Nations Appeals Tribunal, as set forth in its statute, includes the authority:

(i) To decide, at its own initiative or at the request of either party, that exceptional circumstances require the proceedings to be closed;

(ii) To order an interim measure to provide temporary relief to either party to prevent irreparable harm and to maintain consistency with the decision taken at the first instance level.

...

Rule 13.2

Application and interpretation of Staff Rules

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.

35. As discussed, although the current legal framework mentions the establishment of a neutral first instance process with staff participation to take a decision upon any appeal by staff members against an administrative decision alleging the non-observance of their terms of appointment, including all pertinent regulations and rules,⁷ there is, to this date, no such neutral first instance process. According to the Staff Rules, the JAB Panel shall submit a report to the Secretary-General, who takes the final decision.

36. In the present case, the Respondent claims that the new JAB Panel responded to the previous Appeals Tribunal judgment by issuing a binding decision on both parties. Upon remand, the Chair of the JAB decided to submit the matter to the JAB Panel for reconsideration, after having appointed a new member to the JAB Panel since the previous member appointed by the ISA Secretary-General was no longer a member of that body. The new JAB Panel considered the following:⁸

... The Panel considers it necessary to set out its analysis of the relevant statutory provisions and the UNAT Judgment 2020-UNAT-983 as follows:

- a. Article 2(5) of the Agreement between the United Nations and the International Seabed Authority ('the special agreement') states that the

⁷ ISA Staff Regulation 11.2.

⁸ *Andrew Webster v. Secretary-General of the International Seabed Authority*, Report of the Panel of the Joint Appeals Board (on remand from the United Nations Appeals Tribunal), Case No. ISA/JAB/2017/01, paras. 18-19.

Appeals Tribunal shall not be competent to hear and pass judgement on an application filed by a staff member of the Authority, unless the applicant has previously submitted the dispute to the neutral first instance process provided for in the Staff Regulations of the Authority, and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Appeals Tribunal.

- b. Rule 11.1(a) of the Staff Rules of the Authority establishes the Joint Appeals Board as the appeals body to consider and 'advise' the Secretary-General regarding appeals of this nature pursuant to Staff regulation 11.1.3. Rule 11.2(o) provides that the final decision on the appeal will normally be taken by the Secretary-General within 14 days after the panel has forwarded its report to the Secretary-General, following which this decision is then communicated to the staff member together with a copy of the panel's report.
- c. The UNAT in its judgment was of the opinion that the JAB Report in the present case was only a written record without an analysis including specific findings of underlying facts and application of the law to those facts. At the same time, the judgment rightly stated that the report of the JAB was a non-binding recommendation to the ISA Secretary-General and not a 'decision' as contemplated under the special agreement. The case was therefore remanded by the UNAT to the JAB instructing that the appeal should be reconsidered and decided by a neutral first instance process that produces a written decision and record that includes a statement of the relevant facts and law, with written reasons and analysis.
- d. Notwithstanding that the process adopted by the panel in its final report was as established by the special agreement and the statutory regulations of the Authority, the panel has been instructed by the UNAT to review its report and provide a binding written decision.

... In light of this analysis, the Panel has assumed, for the purposes of the present report on remand, that it is empowered to act as directed by the UNAT and take a decision binding on the Secretary-General. The implication of this is however that if the JAB is vested with the power to make such a decision, conversely, the Secretary-General must have the power to appeal to the Appeals Tribunal.

37. The JAB then stated that the reasons for the previous recommendation were set out in the previous report and that the new information resulting from the previous Appeals Tribunal Judgment did not significantly affect the facts as they related to the merits of the case.⁹ The

⁹ *Ibid.*, paras. 20-21.

JAB went on and repeated the form, reasons and language of the previous report, which had been considered inadequate by the Appeals Tribunal. Similarly to what it had done in its previous report, the JAB Panel reached its conclusion as follows:¹⁰

... For the reasons set out above, the Panel of the Joint Appeals Board of the International Seabed Authority, upon reconsideration as directed by the United Nations Appeals Tribunal, unanimously:

- (1) adopts the present report on remand;
- (2) decides that the Secretary-General of the International Seabed Authority is not required to review his decision to separate Mr. Andrew Webster from service.

... In addition, the Panel recommends that the statutory provisions be amended as soon as reasonably possible, to bring them into line with the recent UNAT case-law as appropriate.

38. Despite the recommendation of the JAB Panel, there have been no amendments to the ISA's Staff Rules. Instead, the ISA Administration, in the e-mail exchange with the Registry of the Appeals Tribunal on 21 February 2022, announced that it was awaiting the outcome of this case before reviewing "any need to amend the Staff Rules".

39. The ISA's claim that the JAB Panel treated the present case differently is without merit. While it is true that the JAB "assumed, for the purposes of the present report on remand, that it is empowered to act as directed by the UNAT and take a decision binding on the [ISA] Secretary-General", this does not have the effect of transforming its "Report" into a judgment or decision, as is required by Article 2(10) of the Appeals Tribunal Statute. The Appeals Tribunal acknowledges the effort made by the JAB to comply with the Appeals Tribunal determination. However, jurisdiction must not be assumed or implied, even less so by means of an interpretation which is restricted to one case and, most importantly, against the current legal framework.

40. As previously held by this Tribunal in *Fogarty*,

[t]he requirement of authority is a fundamental precept of the constitutional principle of legality. The first principle of administrative law (and of the rule of law) is that the exercise of power must be authorised by law. It is central to the conception of the constitutional order that administrators in every sphere are constrained by the principle

¹⁰ *Ibid.*, paras. 30-31.

that they may exercise no power and perform no function beyond that conferred upon them by law.¹¹

41. More recently, in the full-bench deliberation, the Appeals Tribunal reinforced that “[t]he direction to the SAB to do what is legally necessary to comply with the jurisdictional requirements conferred no rights or additional powers on the SAB or the Secretary-General of IMO”,¹² and that “the assumption by the Secretary-General of IMO that the SAB acquired legal authority from the judgments of the Appeals Tribunal is at best doubtful”.¹³ It further held that “[i]f regulatory measures are required to empower the SAB to take action which engages the appellate jurisdiction, then the relevant body or functionary of IMO with the requisite authority must do the necessary to enable the SAB to render a decision rather than a recommendation.”¹⁴ This is because the authority of the JAB to make a decision is determined by the internal rules and regulations of ISA, enacted by the appropriately empowered rule-maker.

42. In this recent judgment, the Appeals Tribunal established that¹⁵

[t]he SAB (of IMO) has no power to amend the legislative document that authorizes it to make recommendations or merely to decide that its recommendations henceforth will be decisions. It is an administrative tribunal with quasi-judicial powers to determine appeals by staff members in relation to decisions affecting their rights. The law-making authority to establish and delineate its jurisdiction vests elsewhere. It too may exercise no power and perform no function beyond that conferred by the law (the SRSR). At risk of repetition, the express provisions of the SRSR confer upon the SAB a power to make a recommendation not a decision. If the SAB acts without legislatively authorised power its action will violate the principle of legality. Again, exercises of power must be authorised and exercised lawfully. As stated unambiguously in paragraph 30 of the *Fogarty* Judgment, the requirement of authority is a fundamental precept of the principle of legality.

43. The language in the JAB Panel Report under appeal reinforces the lack of legal authority of the JAB to issue a decision, as directed by the Appeals Tribunal in its previous

¹¹ *Margaret Mary Fogarty v. Secretary-General of the International Maritime Organization*, Judgment No. 2021-UNAT-1117, para. 30.

¹² *Margaret Mary Fogarty, Robert Sheffer, Monia Spinardi, Astrid Dispert & Minglee Hoe v. Secretary-General of the International Maritime Organization*, Judgment No. 2021-UNAT-1148, para. 56.

¹³ *Ibid.*, para. 62.

¹⁴ *Ibid.*, para. 57.

¹⁵ *Ibid.*, para. 67.

judgment, and this regardless of the fact that neither party opposed the composition of the JAB Panel, and that regrettably neither party will have a final decision on the merits of the case, since their agreement to subject themselves to the jurisdiction of the Appeals Tribunal does not give it such jurisdiction. The jurisdictional parameters of the Appeals Tribunal's authority are indeed exclusively prescribed in its Statute.¹⁶ Like in *Barbato*,¹⁷ even though the JAB Panel seemed to have dealt with all aspects of Mr. Webster's appeal and provided a written record with reasons, facts and law, it remains that the JAB did not issue a written decision but only a recommendation to the Secretary-General of the ISA. Here, the JAB Panel did not have the power to issue a decision binding on the ISA Secretary-General and it did not do so. To this date, the JAB has only legal authority to issue a recommendation under ISA's Staff Regulations and Rules in their present form. Thus, there has been no compliance with the terms of Article 2(10) of the Appeals Tribunal Statute. As the Appeals Tribunal is the second level of appeal, it cannot conduct a review without a decision from a neutral first instance process.

44. Lastly, it must be clarified that jurisdictional issues cannot be decided by the litigants. The consent, silence or even agreement of the litigants should not establish jurisdiction, namely power of a court or tribunal to dispense justice in a particular case. This is because lack of jurisdiction is a strictly legal matter which the Appeals Tribunal or any other tribunal can and should raise *sua sponte*, as it is not bound by the volition of the parties.

45. In light of the above, the change of conception in which justice should be delivered has not yet been provided in the first instance process within the ISA. Therefore, the Appeals Tribunal cannot consider the merits of the case.

¹⁶ *Van Khanh Nguyen v. Secretary-General of the International Seabed Authority*, Judgment No. 2021-UNAT-1089, para. 28.

¹⁷ *Andrea Barbato v. Secretary-General of the International Maritime Organization*, Judgment No. 2021-UNAT-1150, para. 67.

Judgment

46. The case is remanded to the JAB of ISA to ensure compliance with the jurisdictional requirements of Article 2(10) of the Appeals Tribunal Statute.

Original and Authoritative Version: English

Dated this 18th day of March 2022 in New York, United States.

(Signed)

Judge Halfeld, Presiding
Juiz de Fora, Brazil

(Signed)

Judge Raikos
Athens, Greece

(Signed)

Judge Knierim
Hamburg, Germany

Entered in the Register on this 14th day of April 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar