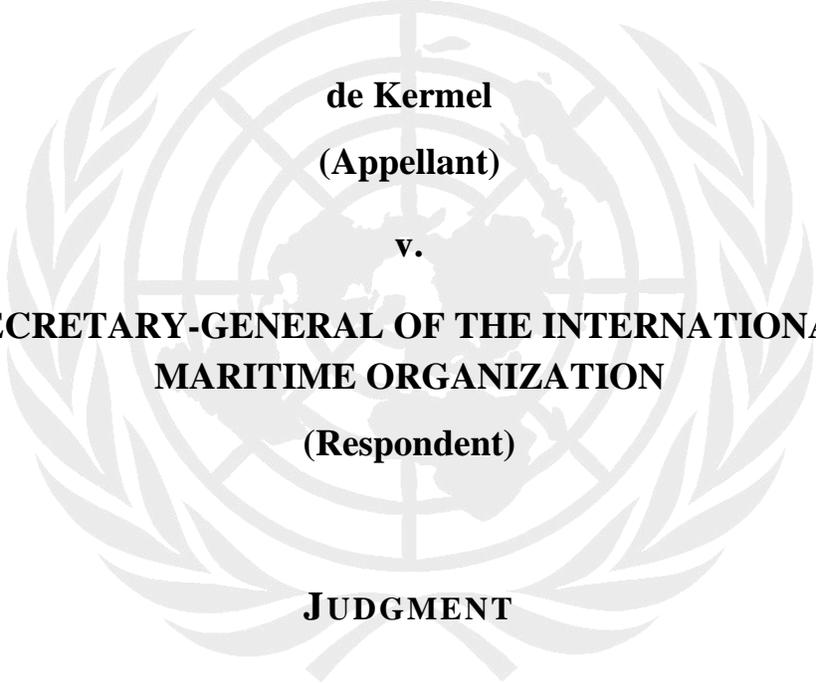




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-258



**de Kermel
(Appellant)**

v.
**SECRETARY-GENERAL OF THE INTERNATIONAL
MARITIME ORGANIZATION
(Respondent)**

JUDGMENT

Before: Judge Jean Courtial, Presiding
Judge Kamaljit Singh Garewal
Judge Luis María Simón

Judgment No.: 2012-UNAT-239

Date: 29 June 2012

Registrar: Weicheng Lin

Counsel for Appellant: Laurence C. Fauth

Counsel for Respondent: Christopher M. Young

JUDGE JEAN COURTIAL, Presiding

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal by Ms. Valérie de Kermel against the decision of the Secretary-General of the International Maritime Organization (IMO) to accept the conclusions of the Joint Appeals Board (JAB) in its report of 17 June 2011 in response to two appeals submitted by Ms. de Kermel

Synopsis

2. In this case, the Appeals Tribunal is seized of an appeal against an administrative decision dated 27 June 2011 taken by the Secretary-General of IMO on the advice of a JAB. The Secretary-General rejected Ms. de Kermel's appeal against the decision to place her on special leave without pay with effect on 16 April 2010, as well as the related decisions concerning, on the one hand, her annual leave and her return to IMO Headquarters at the end of her release to serve as General Secretary of the Federation of International Civil Servants Associations (FICSA) and, on the other hand, the views of IMO regarding an ongoing process of reaching agreement on an inter-agency cost-sharing arrangement.

3. The request does not raise legal issues so much as the matter of relations between an organization and a federation of staff associations in the context of inter-agency relations. Regardless of what the Tribunal may think of IMO policy in that regard, it is within the broad discretionary powers of the Organization's authorities as long as their decisions are not arbitrary, are not based on considerations other than those of good management and respect the rules of procedure. We believe that the decisions in dispute are not arbitrary and are not based on considerations other than those of good management. As regards respect for the rules of procedure, we find that the fact that the Secretary-General did not personally sign the decision to place applicant on special leave without pay was not sufficient, under the special circumstances of this case, to cause significant harm to Appellant. The appeal is rejected.

Statement of Facts and Procedure

4. Ms. de Kermel joined IMO in October 2000 on a fixed-term appointment at the G-5 level as Principal Secretary/Database Operator, first in the Conference Services Section, and then, as of February 2005, in the Translation Services Section. Beginning in July 2005, Ms. de Kermel worked as Principal Secretary/Database Operator in the Implementation and Coordination Section, Maritime Safety and Marine Environment Division.

5. Ms. de Kermel was elected as a staff representative on the IMO Staff Union, where she served from May 2003 to May 2007. In February 2005, she was elected as a member of the FICSA Executive Committee. Her duties with the IMO Staff Union and with FICSA did not require release time from her official IMO duties.

6. In early 2007, Ms. de Kermel informed IMO of her intention to stand for the office of General Secretary of FICSA. To this end, she also asked to be temporarily released from her duties at IMO if she was elected. After initially stating that the Organization would not be able to cover the costs arising from Ms. de Kermel's taking that office, IMO informed her that it would not oppose her submitting her candidacy for the office and that the Organization could foresee funding her release for a period of two years.

7. In September 2007, Ms. de Kermel was appointed as General Secretary of FICSA on an *ad interim* basis until January 2008, when she was elected General Secretary of FICSA to complete the term of the previous General Secretary, who had resigned. On 15 January 2008, the human resources office of IMO informed Ms. de Kermel that as of 1 January 2008, she would be assigned to FICSA in Geneva for a two-year period during which she would remain a staff member of IMO, and her salary, allowances and benefits would be paid in full until January 2010.

8. On 18 February 2009, IMO replied to a request from the President of FICSA to enable Ms. de Kermel to continue serving at FICSA until February 2011. In its reply, IMO indicated, in particular, that if Ms. de Kermel were to continue after January 2010, IMO would be unable to fund such an extension of her term at IMO, which would therefore depend on FICSA making suitable financial arrangements.

9. Following a meeting held in August 2009, during which IMO confirmed that it would be unable to fund the release of Ms. de Kermel beyond 1 February 2010, FICSA sought to obtain funding from the High Level Committee on Management (HLCM) at its eighteenth session, held from 29 to 30 September 2009. On 26 November 2009, the Secretary of HLCM informed the President of FICSA that it had not been able to reach an agreement on cost sharing. After considering other possibilities with the Human Resources Network (HR Network), HLCM confirmed, on 15 March 2010, that the cost-sharing proposal had been rejected.

10. On 2 October 2009, IMO contacted Ms. de Kermel to confirm that the Organization would not be able to fund an extension of her assignment and asked her what she intended to do at the end of January 2010, after completion of her two-year term at FICSA. On 14 January 2010, since IMO had not received a

reply from Ms. de Kermel, and she had not resumed her duties at the Organization as planned, IMO decided to place Ms. de Kermel on special leave without pay as of 1st February 2010. On 20 January 2010, Ms. de Kermel acknowledged receipt of the communication dated 14 January 2010 and the forms attached to it, and asked for additional information about special leave without pay. Taking into account the number of days of annual leave that she had accumulated, her special leave without pay took effect on 16 April 2010, after the exhaustion of her accumulated annual leave.

11. On 25 May 2010, Ms. de Kermel sought review of the decision to place her on special leave without pay with effect on 16 April and, on 27 May 2010, she lodged an appeal with the Joint Appeals Board (JAB). On 16 July 2010, after completion of the review whereby the decision was made to place her on special leave without pay was confirmed, Ms. de Kermel lodged a second appeal against that decision and asked that the two appeals to JAB be joined.

12. On 17 June 2011, JAB submitted its report, stating that it had considered the two appeals submitted by Ms. de Kermel. On 27 June 2011, the Secretary-General of IMO informed Ms. de Kermel that, pursuant to the conclusions of JAB, according to which: (1) IMO had acted in good faith; (2) there had been no breach of the relevant provisions of IMO Staff Regulations or Staff Rules; (3) the decision to place Ms. de Kermel on special leave without pay had been taken by the competent authority; (4) there had been no coercion or abuse of power, and (5) there had been no breach of freedom of association on the part of IMO, it had decided to deny the appeal and the claim for compensation.

13. Ms. de Kermel appealed against the decision of the Secretary-General of IMO on 27 September 2011, and the Secretary-General of IMO replied on 1 November 2011.

14. On 22 June 2012, following a request by Ms. de Kermel, the Appeals Tribunal held a public hearing at Geneva, Switzerland, which was attended by both parties.

Submissions

Ms. de Kermel's Appeal

15. Ms. de Kermel holds that it is not uncommon for smaller member organizations of FICSA to state that they are unable, for financial reasons, to release their staff members. When there are financial issues of this type, FICSA member organizations have agreed that they would share the costs involved and that, in the absence of an agreement, the releasing organization would be responsible for all costs. Ms. de Kermel

disputes the argument that the cost-sharing formula was rejected and claims that it was decided by consensus that IMO should cover the costs in question.

16. Ms. de Kermel states that the Secretary-General did not follow staff regulation 5.2 (annual leave and special leave), which provides that the Secretary-General may grant special leave only in exceptional cases, and under staff rule 105.2 (special leave), which refers to important reasons. Moreover, Ms. de Kermel claims that the Secretary-General did not act in good faith throughout this case.

17. Ms. de Kermel claims that on 20 January 2011, she did in fact reply to the communication of 14 January 2011 informing her that she had been placed on special leave without pay. She claims that her acknowledgement of receipt of that communication does not mean that she agreed to be placed on special leave without pay, and that she did not reply to the communication of 2 October 2009 because she wanted to obtain more information from the Director of Administration regarding other possible solutions. Ms. de Kermel points out that after receiving the communication informing her that she had been placed on special leave without pay, she requested annual leave from 1 February 2010 to 2 March 2010.

18. Ms. de Kermel holds that JAB committed a factual and legal error when it found that IMO had acted in good faith when in fact, it had only informed her on two occasions (18 February 2009 and 2 October 2009) concerning the matter of special leave without pay. Moreover, Ms. de Kermel claims that IMO had actually decided, before the possibility of cost sharing had been fully considered, to place her on special leave without pay, confirming that the question of financial resources was not a legitimate concern and that IMO had not acted in good faith. Ms. de Kermel also argues that the absence of a reply on her part to the communication of 2 October 2009 did not in any way mean that she accepted the content of the proposal.

19. Ms. de Kermel claims that under the rules currently in force, IMO was required to consult her before taking a decision, so that all pertinent facts, including any potential financial issues, could be taken into account. Likewise, not having consulted her, IMO never informed her that her services were needed in London. Ms. de Kermel claims that her absence during her term at FICSA should not be considered an unauthorized absence and that she had continued to represent the interests of IMO throughout her term. Ms. de Kermel claims therefore that IMO breached her right to due process by abusing the use of special leave without pay, which was tantamount to imposing a hidden sanction. There was no justification for taking such action in the absence of due process.

20. Ms. de Kermel therefore claims that the decisions to place her on special leave without pay, to recall her to London and to refuse her request for annual leave, which were taken in violation of staff regulation 5.2 by an incompetent authority who did not act in good faith, were the result of an abuse of power and/or were equivalent to a hidden sanction.

21. Ms. de Kermel argues that the staff regulations guarantee freedom of association for staff members and that, as noted by the Administrative Tribunal of the International Labour Organization (ILO),¹ IMO was required to consult the Staff Association before taking any decision that would affect its work. Ms. de Kermel says that, as a result of that decision, particularly as regards its change of position regarding cost sharing, IMO had undermined an important element of staff representation within the United Nations system, limiting the ability of FICSA to encourage members to elect the most qualified candidates to the highest positions. Moreover, by its action, IMO had breached the right of staff members to freely elect their representatives.

22. Finally, Ms. de Kermel claims that the delay of JAB in submitting its report on the review of her appeal had the effect of violating her right of appeal.²

23. Ms. de Kermel asks for damages and interest in reparation for the financial loss she suffered when she was placed on special leave without pay, as well as damages and interest for moral or non-pecuniary harm, in an amount equivalent to one year's net base salary. Ms. de Kermel also asks the Appeals Tribunal to consider the fact that the present case is one in which exceptional circumstances apply that would justify granting compensation of more than two years of net base salary.

Secretary-General's Answer

24. Before discussing Ms. de Kermel's appeal, the Secretary-General asks the Appeals Tribunal to explain the nature of the review to be conducted in this case. In particular, he asks the Tribunal to determine whether the measures decided by JAB are equivalent to those of the UNDT, which would limit the role of the Appeals Tribunal to the competencies described in article 2.1 of the Statute of the Appeals Tribunal or whether, on the contrary, the Appeals Tribunal is acting in this case as a jurisdiction of the first and last instance.

25. The Secretary-General argues that it is clear from the exchanges between IMO, on one hand, and Ms. de Kermel and FICSA, on the other, that IMO would fund Ms. de Kermel's assignment to FICSA for

¹ Administrative Tribunal of the International Labour Organization, Judgment No. 2662.

² *Assad v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-021.

two years, but that if she remained beyond that period, that would be under the sole responsibility of FICSA. Furthermore, IMO notes that Ms. de Kermel was advised, in very clear and precise terms, that her continuance at FICSA after 1 February 2010 would mean that she would be placed on special leave without pay. In particular, the Secretary-General claims that any decision on funding, whether initially or under a cost-sharing arrangement, is solely up to the releasing organization.

26. The Secretary-General claims that he never interfered with the work of FICSA, Ms. de Kermel's intention to stand for election or her freedom of association. On the contrary, it was the IMO Staff Union which had not supported Ms. de Kermel's second term at FICSA, in particular because of the budgetary constraints affecting the Organization at the time.

27. The Secretary-General claims that what was at issue was not the matter of freedom of association, which had always been fully respected, but rather it was the issue of Ms. de Kermel being placed on special leave without pay while she remained voluntarily at FICSA after completion of her secondment, which had been approved.

28. The Secretary-General claims that, in a memorandum dated 18 September 2007 approving the Ms. de Kermel's secondment to FICSA, a copy of which was sent to her, it was clearly stated that IMO would finance the assignment for a maximum of two years (the normal tenure of the post). He claims that when Ms. de Kermel was re-elected and requested an extension of the funding arrangement that had benefited her, she was informed by IMO, on 18 February 2009, that IMO would be unable to provide a further extension of her paid absence. As a compromise, IMO could, however, agree to grant a period of unpaid leave from January 2010 to February 2011, subject to FICSA making some suitable financial arrangements for this period.

29. The Secretary-General states that after this exchange, IMO contacted Ms. de Kermel, on 2 October 2009, to ask whether she intended to remain at FICSA on unpaid leave or to return to her post at IMO. He holds that Ms. de Kermel never replied to that request for information. Still, in an effort to reach an amicable solution, IMO went so far as to offer her the possibility of returning to her post within four weeks, in which case her full pay would be reinstated retroactively.

30. The Secretary-General points out that JAB concluded that while the method of communication with Ms. de Kermel when informing her that she had been placed on special leave without pay could have been more rigorous, it was not prejudicial in any respect. Nevertheless, despite the special nature of this

case, IMO took note of her observations and reviewed the case file in order to correct in future any problems brought to light by this situation.

31. The Secretary-General argues that the role of JAB and the Appeals Tribunal is to offer advice in cases of staff appeals against administrative decisions when there has been an alleged breach of the terms of employment, including of all applicable regulations, or against disciplinary measures. It does not concern decisions taken by inter-agency bodies. The Secretary-General claims that JAB was reluctant to undertake a review of inter-agency cost-sharing arrangements, over which IMO had no control, and he argues that this position should be confirmed by the Appeals Tribunal.

32. The Secretary-General argues that the question of freedom of association was duly considered by JAB and that JAB explicitly concluded that there had been no breach of that right. Moreover, the IMO Staff Union had stated that as far as it knew, there was no circumstance that would require the Organization to consult it regarding the assignment of staff members to external activities, in this case, at FICSA. The Secretary-General points out that the judgements of the ILO Administrative Tribunal mentioned by Ms. de Kermel are not pertinent to this case given that they are mainly concerned with the participation of staff members in internal bodies. In the case at hand, all IMO staff members have the right to be members of the Union and to be candidates for election as staff representatives; in this regard, Ms. de Kermel's freedom of association was never in jeopardy.

33. The Secretary-General claims that, as JAB had rightly found, IMO acted in good faith in all cases and applying special leave without pay was in no way a hidden sanction but rather the only solution the Organization could accept. He argues that on the contrary, Ms. de Kermel's lack of cooperation in this procedure would seem to indicate that she had not acted in good faith, for example, by not replying to certain administrative communications, which was the direct reason for the administrative decision to place her on special leave without pay.

34. The Secretary-General argues that although Ms. de Kermel complains about the delay of JAB in submitting its report, she was in fact well aware of the problems encountered by the Board owing to the complexity of the case. Ms. de Kermel was informed of these circumstances in a communication dated 3 June 2011; she was also informed that staff rule 111.1 allows for the time limit to be extended in exceptional circumstances.

35. The Secretary-General requests the Appeals Tribunal to confirm the conclusions of JAB and not to award Ms. de Kermel any form of compensation.

Considerations

36. The Appeals Tribunal is seized of an appeal against an administrative decision dated 27 June 2011 taken by the Secretary-General of IMO on the advice of a JAB. The Secretary-General rejected Ms de Kermel's appeal against the decision to place her on special leave without pay starting with effect on 16 April 2010, as well as the related decisions concerning, on the one hand, her annual leave and her return to IMO Headquarters at the end of her release to serve as General Secretary of FICSA and, on the other hand, the views of IMO regarding the ongoing process of reaching an inter-agency cost-sharing agreement.

37. In this case, the Appeals Tribunal is competent to consider the appeal insofar as administrative decisions are criticised for non-observance of the terms of employment or work contract of the appellant. It is not up to the Tribunal to settle disputes on questions of organizational policy unless those questions have a direct impact on the terms of employment or work contract of the appellant.

38. In this regard, we find that Ms. de Kermel has not shown that the Secretary-General of IMO was required, under the provisions of the IMO staff regulations and the staff rules, to make available to a federation of international staff associations from different organizations, an IMO staff member who was elected to a high office for all or part of the term. Nor have we identified any such provisions.

39. The principle of freedom of association is one of the principles of law that must be observed by the organizations of the United Nations Common System. It follows that it should be included in the terms of employment of a staff member of IMO.

40. However, on the one hand, we note that the reference in the appeal to staff rule 108.1, concerning election, composition and competencies of the staff committee does not apply in this case. Also, while the original decisions that are disputed may have had the indirect effect of hampering the day-to-day operations of FICSA, they cannot be regarded as hindering the exercise of freedom of association of the appellant personally.

41. As to the question of inter-agency cost sharing, we can only establish that this has to do with organizational policy, and it is not reflected in any contractual stipulations, staff regulations or staff rules or administrative instructions in force at the time of the events.

42. As far as the decision to place Ms. de Kermel on special leave without pay is concerned, she claims that it does not take into account staff regulation 5.2 and staff rule 105.2.

43. Staff regulation 5.2 provides that special leave may be granted by the Secretary-General in exceptional circumstances, and staff rule 105.2 adds that special leave may be granted with full or partial pay or without pay for such periods as the Secretary-General may prescribe.

44. Under these provisions, only the Secretary-General, or an official to whom he has delegated authority before the date of the decision, is legally qualified to place a staff member on special leave without pay.

45. In this case, it does not follow from the documents included in the case file that the decision to place Ms. de Kermel on special leave without pay was signed by the Secretary-General. JAB did indeed point out in its report that it was a well-known fact that HRS is authorized to take decisions on human resources but, in any event, it was not established that the Secretary-General had delegated his authority, in advance of the disputed decision, to Human Resources or whoever had in effect taken the decision. It followed that the decision to place Ms. de Kermel on special leave without pay was irregular.

46. It was clear, however, from a letter dated 18 February 2009 addressed to the President of FICSA by the Secretary-General of IMO that the Secretary-General would be unable to provide a further extension of Ms. de Kermel's paid absence but that as a compromise, he could agree to grant her a period of unpaid leave from January 2010 to February 2011. We infer from this letter, which Ms. de Kermel had seen, that the Secretary-General had been informed of the matter and that he had expressed his agreement in advance of the measure under dispute.

47. We note that since Ms. de Kermel had chosen at the time to continue in her post as General Secretary of FICSA, the decision to place her on special leave, even in the absence of a request on her part, was not legally questionable. The Secretary-General is under the obligation to place a staff member in a position envisaged by the staff regulations and the staff rules. A staff member's absence from his or her post, when authorized by the Secretary-General, to serve in a high office in a federation of staff associations, can be considered an exceptional circumstance in the sense and for the purposes of staff regulation 5.2.

48. The decision to place Ms. de Kermel in that position without pay is more debatable. The Secretary-General had a choice between special leave with full pay, with partial pay or without pay. But the legal framework in force at that time gave the Secretary-General broad discretionary power to decide on the matter. Now, as we have noted above, FICSA and Ms. de Kermel were informed in advance of the conditions under which she would be authorized to be absent from her job. The Appellant has not produced

sufficient evidence to lead one to seriously think that the Secretary-General did not exercise his discretionary power in good faith, much less that he was imposing a hidden sanction.

49. With regard to the argument that her right to defence was not respected because of the delay, we recognize that JAB could have submitted its report sooner, but the delay was not such that it could be regarded as a breach of the right to appeal.

50. In conclusion, we believe that the appeal does not so much raise legal questions as it refers to the relations between an organization and a federation of staff associations in the context of inter-agency relations. Whatever the Tribunal might think of IMO policy on the matter, it is within the context of the broad discretionary power of the authorities of the organization, when their decisions are not arbitrary, are not based on considerations other than those of good management and respect the rules of procedure. We believe that the decisions in dispute are not arbitrary, and they are not based on considerations other than those of good management. As regards respect for the rules of procedure, we find that the irregularity mentioned above is not sufficient, in the special circumstances mentioned, to have caused significant harm to the Appellant.

Judgment

51. The appeal is dismissed.

Original and Authoritative Version: French

Done this 29th day of June 2012 at Geneva, Switzerland.

(Signed)

Judge Courtial, Presiding

(Signed)

Judge Garewal

(Signed)

Judge Simón

Entered in the Register on this 12th day of September in New York, United States.

(Signed)

Weicheng Lin, Registrar