

2023-UNAT-1369, Andrew Webster

UNAT Held or UNDT Pronouncements

The UNAT held that the JAB made considerable internal changes in its law to satisfy the requirements of Article 2(10) of the Appeals Tribunal Statute. It found that the JAB no longer provided only advice or mere recommendations to the ISA Secretary-General, but rather final decisions and, therefore, was a neutral first instance process.

The UNAT found that the plain reading of the facts left no doubt that: i) at the time when the contested decision was taken, there was no willingness of abandonment of post by the Appellant; ii) despite his poor mental health condition that was medically certified, the Appellant 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, including the date when the contested administrative decision was taken (14 July 2017); and iv) the certification of retroactive medical leave was 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 the Appellant took his first sick leave after the attack.

The UNAT held that ISA did not observe the United Nations Administrative Instruction ST/AI/400 (Abandonment of post) which established that in cases of unauthorised absence, a two-letter 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. It further noted that this two-letter procedure reflected 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 and that there was no evidence in this case that ISA provided any such due process. The UNAT concluded that 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.

Furthermore, it held that the Agency did not follow the principle that any endeavour to contact the Appellant should have occurred once the unauthorised absence had taken place (and not during the authorised sick leave) and that, therefore, all attempts to contact him while he was still on certified sick leave, were inconsequential for the purposes of the present case. It further concluded that since there was a lack of communication with him 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.

In light of the above, the UNAT held that ISA did not provide the Appellant with any opportunity to respond to the risk of being considered to have abandoned his post and rather issued a hurried decision to separate him from service on grounds that were legally insufficient to establish abandonment of post.

The UNAT partially granted the appeal and reversed the JAB Decision of 22 September 2022 in Case No. ISA/JAB/2017/01. It ordered that the Appellant's salary from July to 30 September 2017, including all related benefits and entitlements, if not already paid under the status of sick leave, be paid to him. It further held that the ISA Secretary-General might elect to pay instead compensation *in lieu* in an amount equivalent to two years' net base salary. It denied all the other remedies requested by the Appellant.

Decision Contested or Judgment/Order Appealed

The Appellant, a former staff member of the International Seabed Authority (ISA), contested the decision of the Administration to separate him from service on the grounds of abandonment of post (contested decision). In its Decision of 22 September 2022 in Case No. ISA/JAB/2017/01, the Joint Appeals Board of the ISA (JAB) confirmed that the Appellant was attacked and robbed in April 2017, which led him to take successive periods of sick leave and that there was no serious evidence that he had engaged in (or sought to engage in) other employment during his absence. However, it further found that the Appellant 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. The JAB held that such a failure was not affected by the sick leave certification issued *a posteriori* by the United Nations Medical Services Department (MSD). Therefore, it concluded that the Administration's decision was lawful and that the

ISA Secretary-General was not required to review his decision to separate the Appellant from service.

Legal Principle(s)

Pursuant to Article 2(10) of the Appeals Tribunal Statute, in order to establish the UNAT's jurisdiction, an agency, Organisation or entity must utilize a neutral first instance process that includes a written record and a written decision providing reasons, fact and law. The head of an agency or organization whose decision is under appeal cannot be the final decision-maker of that first instance process.

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 the United Nations Administrative Instruction ST/AI/400 (Abandonment of post) in order to supplement the gaps in the law. The use of the United Nations legal instruments by an 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.

A staff member'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. A mere unauthorised absence is not enough to establish that the staff member had effectively abandoned his or her post.

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.

There is no law which obliges the Agency to provide a satisfactory letter of reference.

According to Article 9(2) of the Appeals Tribunal Statute, a finding of manifest abuse of the appeals process by the Agency is a requirement for the award of costs and reimbursement of legal fees against it.

Outcome

Appeal granted in part

Outcome Extra Text

The contested decision of separation from service is rescinded; compensation in lieu of reinstatement set at two years' net base salary.

Full judgment

[Full judgment](#)

Applicants/Appellants

Andrew Webster

Entity

ISA

Case Number(s)

2022-1744

Tribunal

UNAT

Registry

New York

Date of Judgement

1 Aug 2023

President Judge

Judge Halfeld

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Benefits and entitlements

Sick leave

Compensation

In-lieu compensation

Jurisdiction / receivability (UNAT)

Separation from service

Abandonment of post

Applicable Law

Agreements, conventions, treaties (etc.)

- ISBA/ST/AI/2017/2
- ISBA/ST/SGB/2020/1/amend 1

ISA Staff Regulations and Rules

- Rule 11.1
- Rule 11.2
- Rule 11.3
- Rule 5.1
- Rule 6.2
- Rule 9.1

UNAT Statute

- Article 2.10
- Article 9.2

Related Judgments and Orders

2020-UNAT-983
2019-UNAT-957
2021-UNAT-1148
2022-UNAT-1217
2019-UNAT-916
2019-UNAT-897
2019-UNAT-942
2019-UNAT-899
2017-UNAT-712