United Nations AT

Administrative Tribunal

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20 November 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 902

Case No. 984: MACNAUGHTON-JONES
NG
RAO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza; Mr. Kevin Haugh;

Whereas, on 17 July 1997, Viorica Macnaughton-Jones, Maria Luisa Ng and Michael Antony Rao, staff members of the United Nations who had served with the United Nations Iraq-Kuwait Observation Mission (hereinafter referred to as UNIKOM), filed an application requesting the Tribunal:

"1. ...[T]o rule that:

(i) The policy under which UNIKOM staff was paid mission subsistence allowance (MSA) for weekends, public holidays and days in lieu of weekends worked which fell during a staff member's period of annual leave did not violate rule 107.15(e) or cables sent from Field Administration and Logistics Division (FALD) to UNIKOM;

(ii) There was no overpayment of MSA in connection with weekends, public holidays and days in lieu of weekends worked taken during annual leave;

(iii) Even if there was an overpayment of MSA which is recoverable under

* Re-issued for technical reasons.

rule 103.18(b), such recovery should be limited to the last two years;

(iv) The adoption of General Assembly decision 51/440 did not create rights which the Respondent did not have vis-à-vis the Applicants nor did it extinguish any defences available to the Applicants.

2. ... to order the Respondent to rescind forthwith the decision to recover the payment in question and that the amounts of salary previously recovered be returned to the Applicants. Should the Tribunal find that the payments received by the Applicants were recoverable, to order that the decision concerning MSA payments appealed from be rescinded except with respect to recovery of overpayment from the Applicants for the last two years of MSA overpayment."

Whereas the Respondent filed his answer on 12 December 1997;

Whereas the Applicants filed written observations on 6 January 1998;

Whereas the Respondent filed a reply to the Applicants' written observations on 17 February 1998;

Whereas the Applicants submitted further written comments on the Respondent's reply, as well as further documents, on 16 June 1998;

Whereas the Respondent filed an additional document on 26 June 1998;

Whereas the Applicants filed an additional document on 1 July 1998;

Whereas, on 17 July 1998, the Tribunal requested the parties to submit a new agreed statement of facts, having found that the agreed "Statement of Facts" in the application constituted a mere record of the dispute between the parties, rather than an agreement concerning the material facts in the case;

Whereas, on 20 July 1998, the parties jointly submitted a memorandum requesting that the case be removed from the calendar and that the Tribunal grant an extension of time to submit a new statement of facts;

Whereas, on 6 August 1998, the Tribunal granted such an extension until 11 September 1998;

Whereas, on 11 September 1998, the Respondent informed the Tribunal that the parties were unable to agree on a new statement of facts and requested that the case be remanded to the Joint Appeals Board (JAB);

Whereas, on 14 September 1998, the Applicants requested the Tribunal, inter alia, to proceed with its consideration of the case and to hold oral proceedings pursuant to article 15 of the Tribunal's rules;

Whereas, on 16 September 1998, the Respondent submitted comments on the Applicants' 14 September submission and again requested that the case be remanded to the JAB;

Whereas, on 3 November 1998, the Tribunal held a meeting, pursuant to article 17 of the Rules of the Tribunal, with counsel for the parties, to discuss the parties' failure to submit a new agreed statement of facts;

Whereas, on 4 November 1998, the Tribunal requested the parties to submit a statement listing the facts upon which the parties agreed and the facts that remained in dispute between the parties, no later than 16 November 1998;

Whereas, on 13 November 1998, the Respondent informed the Tribunal that "certain aspects of this matter have become the subject of review within the Secretariat" and that as a result, "counsel for the Respondent will not be able to participate in the preparation of the statement of agreed and unagreed facts which the Tribunal has requested";

Whereas, on 16 November 1998, the Applicants submitted additional documents to the Tribunal, on which the Respondent submitted comments and objections on 17 November 1998;

Whereas, on 20 November 1998, the Applicants submitted a reply to the Respondent's comments and objections;

Whereas the facts in the case are as follows:

The Applicants Macnaughton-Jones, Ng and Rao entered the service of the United Nations on 14 February 1966, 12 October 1989, and 3 September 1985, respectively. The Applicant Macnaughton-Jones served with UNIKOM from 24 April 1991 to 28 October 1993; the Applicant Ng served with UNIKOM from 11 May 1992 to 28 June 1993; and the Applicant Rao served with UNIKOM from 22 April 1991 to 27 October 1992. At the time of this judgement, the Applicant Macnaughton-Jones held a G-4 post as Secretary, Department Public Information; the Applicant Ng held a G-5 post as Secretary, Department of Humanitarian Affairs; and the Applicant Rao served with DPKO, on detail to UNPREDEP, as Computer Systems Assistant at the G-6 level.

Starting in the summer of 1991, a series of cables and faxes were exchanged between Headquarters and the Chief Administrative Officer (CAO), UNIKOM, concerning, inter alia, the appropriate rules for calculating the mission subsistence allowance (MSA) to be paid to UNIKOM staff for weekends, holidays and days of compensatory time off (CTO), falling during periods of annual leave.

The UN Internal Audit Division conducted an audit of UNIKOM and, on 9 November 1993, issued a report concluding, inter alia, that:

> "15. For staff serving in special missions, CTO can only be granted in exceptional circumstances as specifically directed to UNIKOM under cover of Cable K1009 from Headquarters. Yet UNIKOM routinely granted CTO to Professional, General Service and Field Service staff for weekend duties such as administrative duty officer and for all work in excess of the normal working hours ... We found that a large number of staff, including senior officials had accrued and utilized CTO on a recurring basis. In our opinion, this was improper, or at best a liberal interpretation of Headquarters directives that should be discontinued.
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> ...
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> 17. Our review included the accrual of MSA credit days which is governed by staff rule 107.15 and allows the payment of one and one half days of MSA for each

> completed month of mission service. Even after instructions from Headquarters had been received in April 1992, UNIKOM had not implemented a correct policy on the treatment of weekends and holidays during periods of leave from the mission. Indeed, it was not until June 1993 that UNIKOM enforced the directives from Headquarters.
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> 18. Since MSA overpayment to staff had occurred to those staff who had been paid for weekends and holidays for which no MSA credit balances had been earned, we recommended in our Audit Observation (...) that UNIKOM conduct a review and recover all overpayments. ..."

On 12 September 1996, the Chief, Personnel Management & Support Service, FALD/DPKO informed the Applicants that they had "been identified for recovery action by Payroll Unit due to overpayment of MSA which occurred during [their] assignment to UNIKOM ... [and that] recovery will be made by installments at 20% of [their] net monthly salary until full recovery is achieved." If, however, the staff member was on a fixed-term appointment, the "recovery period [would] be limited to the remaining duration of [the staff member's] contract."

On 8 October 1996, the Applicants and other former UNIKOM staff requested the Secretary-General to review the decision to recover alleged overpayments of MSA. Also on 8 October 1996, the Applicants and other former UNIKOM staff requested the JAB to suspend implementation of the contested decision pending the outcome of the JAB's review of the merits of the appeal.

On 25 October 1996, the JAB adopted its report and recommended as follows:

> "... [T]he Panel unanimously recommends that the request for suspension of action requested [sic] be granted and that nothing be done by the Administration to implement the decision to recover overpayments of MSA from any of the Appellants until the case has been heard on its merits and a decision has been made by the Secretary-General on the appeal."

On 14 November 1996, the Under-Secretary-General for Administration and

Management transmitted to the Applicants a copy of the JAB report and informed them as follows:

> "The Secretary-General has examined your request in the light of the Board's report and has noted its recommendation that your request be granted. However the suspension of action is now moot because, given the complexity of the case, the Department of Administration and Management has agreed to suspend recovery action on UNIKOM MSA overpayment until 31 December 1996 so that an in-depth administrative review can be carried out."

On 16 December 1996, the General Assembly adopted decision 51/440, which, inter alia:

> "[r]equested the Secretary-General to take immediate action to recover the overpayment relating to mission subsistence allowance, which is estimated at more than 844,000 dollars, and to report to the General Assembly, no later than 31 May 1997, on the results of the actions taken for its recovery, as well as on the comprehensive review of the policies of the Organization in respect of compensatory time off and mission subsistence allowance."

On 29 January 1997, the Under-Secretary-General for Administration and Management wrote to the Applicants, informing them as follows:

> "I wish to inform you that the Administration has now completed its review concerning recovery of overpayments of Mission Subsistence Allowance related to your service with UNIKOM.
>
> The Secretary-General has concluded that it would be inappropriate to waive recovery of the overpayments made to you since the rules on MSA were clear and known to those who served in Missions. The Secretary-General is bound to ensure that public money is expended only for its intended purpose and there is no reason why you should be permitted to retain those sums of MSA which were paid to you in error.
>
> We realize that a number of appellants seek to rely on a memorandum dated 20 July 1987 to limit recovery to the most recent two years. We note

> that this policy has never been promulgated and related to individual errors and not to systemic overpayments involving large numbers of staff over lengthy periods of time. Moreover, the General Assembly decision adopted on 16 December 1996 under item 125(a) (A/51/726) requested the Secretary-General to recover these overpayments. However, in order that this matter may be finally resolved as quickly as possible we are prepared to permit any appellant to appeal directly to the Tribunal if there is agreement on the Statement of Facts (...) and if there is no dispute as to the amount to be recovered. However, if you dispute the calculation which led to the amount to be recovered you will be given the opportunity to discuss what you may consider an error with a view to a possible resolution of the matter. If this cannot be resolved or if you dispute the Statement of Facts, you will have to submit your appeal to the JAB, the main role of which is to determine disputed facts.
>
> Should you wish to submit your appeal directly to the Tribunal you should attach a copy of this letter with your application which will establish that the Secretary-General has consented to the direct submission and the terms of that consent."

On 17 July 1997, the Applicants filed with the Tribunal the application referred to earlier, which included the "Statement of Facts" prepared by the Respondent.

Whereas the Applicants' principal contentions are:

1. The MSA paid to the Applicants was not an overpayment. It was in the amount to which they were entitled under rule 103.21. The cables sent from FOD to UNIKOM could not be the basis for recovery of the payments because they did not constitute administrative instructions.

2. If the Tribunal finds that overpayments of MSA were made to the Applicants, the Respondent should not be allowed to recover more than the last two years' worth of such overpayments.

3. The General Assembly's decision that overpayments to UNIKOM staff be repaid should not affect the outcome of the present appeal because the Administration's notice

to recover was served on the Applicants, and the Applicants challenged such notice, before the General Assembly adopted its resolution.

4. This case should be heard by the Tribunal now because further delays will cause injury to the Applicants.

Whereas the Respondent's principal contentions are:

1. The Applicants received payments of MSA during their service with UNIKOM in excess of their entitlements under staff rules 103.21 and 103.12 and under the conditions established by the Secretary-General pursuant thereto, and thus must refund the excess of such funds to the UN.

2. The Respondent's actions to recover overpayments of MSA to the Applicants should be upheld. The Respondent is required to recover the overpayments pursuant to General Assembly decision 51/440 of 16 December 1996 and resolution 51/234 of 13 June 1997. The recovery should not be limited to the last two years of overpayments, as the Applicants cannot claim that they were genuinely unaware of the error.

3. The case should be remanded to the JAB because the basis for the Secretary-General's agreement to the direct submission of the application to the Tribunal has been vitiated by the parties' failure to agree on the material facts.

The Tribunal, having deliberated from 16 July to 3 August 1998 in Geneva, and from 3 to 20 November 1998 in New York, now pronounces the following judgement:

I. This matter comes to the Tribunal by way of a direct submission under article 7 of the Statute of the Tribunal, which provides, inter alia, that "[a]n application shall not be

receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the staff regulations 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 Administrative Tribunal." The Tribunal considers that such direct submission should only be made if the application concerns solely issues of law and if no material facts are in dispute.

II. This application was made on the stated understanding of both parties that the facts had been agreed to. As part of the application, the Applicants submitted the agreed "Statement of Facts" in some 63 paragraphs.

When the Tribunal considered the matter during the 1998 Geneva session between 16 July and 3 August 1998, it determined that, on the basis of the pleadings and other documents before it, there was no sufficient agreement on the facts between the parties that would enable the Tribunal to discharge its functions. It further appeared to the Tribunal that the parties were in disagreement on many material matters of fact which would have to be determined before a judgement could be rendered.

III. By letter of 17 July 1998, the Tribunal requested the parties, through their respective counsel, to prepare a new statement of facts which should address, at a minimum, certain issues set out in that letter.

Thereafter, the Tribunal sought to facilitate an agreement between the parties on the relevant facts by further communications with the parties and, finally, by means of a meeting, requested by the Tribunal, with counsel, pursuant to article 17 of its Rules. This meeting was held on 3 November 1998.

IV. It is unfortunate that no positive progress towards an agreement on the facts appears to have been achieved, despite repeated deadlines and their extensions. In

the

circumstances, the Tribunal considers that it has no alternative but to order that the case be remanded to a joint appeals board for consideration of all issues involved and to determine all relevant facts and make a recommendation to the Secretary-General on the Applicants' case.

V. The Tribunal further requests that the JAB should make every effort to conclude the matter as quickly as possible. In spite of the Tribunal's numerous endeavours to expedite the appeals process, there has already been considerable delay in this case.

Accordingly, the Tribunal urges that the JAB be convoked with utmost dispatch and requests the JAB to make its recommendation as expeditiously as possible so that, if necessary, the Applicants can file their appeal to the Tribunal during 1999.

VI. For the foregoing reasons, the Tribunal orders that the case be remanded to the JAB for consideration on the merits.

(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Member

Kevin HAUGH
Member

New York, 20 November 1998

R. Maria VICIEN MILBURN
Executive Secretary