



**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 986

Case No. 1084: STEINER ET AL.

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Ms. Marsha A. Echols;

Whereas at the request of Ismat Steiner, a staff member of the United Nations (the named Applicant), along with 30 other staff members and former staff members (the Applicants\*\*), the President of the Tribunal, with the agreement of the Respondent, successively extended until 31 May, 31 August, 30 November 1998, 28 February and 31 May 1999 the time-limit for the filing of an application with the Tribunal;

Whereas, on 31 May 1999, the Applicants filed an application containing the following pleas:

"8. With respect to competence and procedure, the Applicants respectfully request the Tribunal:

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\* Re-issued for technical reasons.

\*\* K. Josseph, K. Kennedy, Ching-Man Lee, T. Machan-Aquino, P. Maponga, A. Masithela, I. Minta, M. Olayan, S. Rweyemamu, O. Sergienko, W. St. Rose, J. Thompson, D. Wilke, V. Zhagora, K.L. Lim, M. Ndulo, F. Zai, J.G. Janssen, S. Liu, R. Martineau, B. Donelan, V. Potapov, M. Anzivina, K.E. Barton, C. Baylon, G. Blake, P. Boyle, R. Cline-Thomas, A. Cubeiro, V. Guthrie.

(C) To order the Respondent to give each staff member joined in this application a complete breakdown of the amounts taken from them for any days during the period from 11 September 1992 to 28 February 1993 for alleged overpayments: the breakdown should indicate which of those alleged overpayments came 'by misapplication of the currency of payment of MSA [mission subsistence allowance], or by non-implementation of reductions after 30 days';

(D) On a preliminary basis, to return to staff members, without delay, any amounts taken from them attributable to the first month of their arrival on mission, with interest - recovery was implemented from the EOD [entry on duty] dates;

(E) At the conclusion of the hearing, to return to those staff members, with interest from the date the amount was deducted from the staff members' salary, or repaid in any other manner, the amounts taken from them as overpayments on the grounds that they were deducted illegally and in contravention of normal practice not to implement changes in financial practices retroactively (in the most egregious case, the alleged overpayments for a period of approximately 5 ½ months);

(F) In the alternative, to return to the staff members, with appropriate interest, all alleged overpayments which were recovered after 2 years;

(G) An appropriate amount to be decided by the Tribunal to compensate the staff members for the delay of ten months on the part of the Administration refusing to implement the positive recommendation of the JAB to suspend all recovery - then replying that it could not suspend on the ground that the recovery had already been effected."

Whereas the Respondent filed his answer on 14 March 2000;

Whereas the Applicants filed written observations on 21 June 2000;

Whereas the facts in the case are as follows:

The Applicants are staff members or former staff members of the Organization, who served with the United Nations Observer Mission in South Africa (UNOMSA) during the time period 13 September 1992 to 28 February 1993.

In resolution 772 (1992), on 17 August 1992, the Security Council authorized the Secretary-General to deploy United Nations Observers in South Africa. On 9 September 1992, the Chief, Compensation and Classification Service, Staff Administration and Training Division, Office of Human Resources Management (CCS/SATD/OHRM), wrote a memorandum to the Assistant Secretary-General, OHRM, stating that a uniform mission subsistence allowance (MSA) of "Rand 400 (i.e. US\$143)" per day should be paid to UNOMSA personnel, and noted that this rate should be provisionally approved for the first thirty days of the Mission until such time as an MSA survey

could be completed. On 17 September 1992, the Assistant Secretary-General, OHRM, approved these measures. On 25 September 1992, the Chief, Field Personnel Section, Field Operations Division (FPS/FOD), advised the UNOMSA administration of the provisional approval of a uniform MSA of "Rands 400 i.e., US dollars 143 per day applicable throughout the mission area payable in Rands repeat Rands ... applicable for [the] first 30 days of [the] mission operation pending receipt of up-to-date information on living expenses incurred by mission personnel". On 6 October 1992, the Chief, CCS/SATD/OHRM, advised the Chief, FPS/FOD, that "an after-30-day MSA of Rand 300 (i.e. \$105 at the current operational exchange rate of R.2.85 to \$1) should be payable from the 31<sup>st</sup> day of arrival in South Africa".

Following a field review mission conducted from 22 to 29 January 1993, on 18 February 1993, the Chief, CCS/SATD/OHRM, reported to the Director of Personnel, OHRM, recommending that a uniform MSA of Rand 400 for the first 30 days and Rand 285 thereafter, payable "in local currency, the South African Rand", be established as of 1 March 1993. The Director of Personnel's approval of this uniform MSA rate was cabled to the Chief of Mission, UNOMSA, on 26 February 1993. On 31 March 1993, the Chief, CCS/SATD/OHRM, and the Director of Personnel, OHRM, faxed the Chief of Mission, UNOMSA, stating "MSA rates for UNOMSA have been established from the outset of the mission in South African Rand and not repeat not in USDLR [US dollars]. The MSA ... is intended to compensate for local expenses in local currency and it should continue to be paid in that currency".

From 8 to 17 March 1993, an audit was conducted on UNOMSA, the results of which were reported to the Director, FOD, by the Deputy Director and Officer-in-Charge, Internal Audit Division, Department of Administration and Management, on 14 June 1993. Section C (vi) of that report noted that mission personnel were paid a fluctuating MSA in Rand equivalent to the MSA rate in US dollars (US\$143), rather than the fixed rate of Rand 400 per day. As the value of the Rand varied against the US dollar, the amount of the MSA paid had varied correspondingly.

On 8 December 1993, the Acting Director, FOD, wrote to the Deputy Controller, requesting that, as the overpayment was "due to misinterpretation of the relevant Headquarters instruction", recovery of the overpayment be waived. On 10 December 1993, the Chief, CCS/SATD/OHRM, wrote to the Deputy Controller, confirming that the MSA rate was a fixed rate payable in Rand irrespective of the exchange rate and reminding him that after 30 days the MSA was set at Rand 300, and "strongly recommend[ed]" recovery of any overpayment. On

17 December 1993, the Chief, FPS/FOD, advised UNOMSA that "[the] Deputy Controller was unable to approve waiver of recovery of overpayment of [MSA] made by UNOMSA, either by misapplication of the currency of payment of MSA or by non-implementation of reductions after 30 days, for the period 13 [September] 1992 through 28 [February] 1993", and requested the immediate initiation of recovery procedures. On 31 May 1994, the Auditor, Audit and Management Control division, Office of Internal Investigations, wrote to the Chief Administrative Officer, UNOMSA, observing that no action had been taken to effect recovery and advising him that further analysis of the audit had disclosed that the after-thirty-day MSA rate had not been implemented during the period in question. He estimated that UNOMSA had overpaid mission personnel by approximately US\$280,000 and recommended immediate recovery action.

On 9 June 1994, the Chief, FPS/ FOD, wrote to the Director of Accounts Division, requesting immediate action to recover the overpayment and recommended that the recovery be effected in instalments and that staff members be advised prior to the implementation of the recovery procedures. On 5 December 1994, the Chief, Payroll Unit, Disbursement Section, Accounts Division, advised the named Applicant that the latter had received \$7,552.17 in overpaid MSA and that this would be recovered through monthly payroll deductions of \$1,258.70 for a period of six months. On 14 December 1994, the named Applicant on behalf of the other Applicants and other UNOMSA personnel wrote to the Secretary-General requesting an administrative review of the decision to recover the overpayments as well as a Joint Appeals Board (JAB) recommendation to suspend recovery until the case could be heard on its merits and the Secretary-General's decision on the appeal. The Applicants sent a copy of this letter to the JAB on 15 December 1994. The JAB conducted a summary hearing on the request for suspension of action on 20 December 1994 and, on 23 December, recommended that the request be granted. On 27 October 1995, the Under-Secretary-General for Management advised the Applicants that the request for suspension of action had been denied by the Secretary-General who noted that the decision had already been implemented, and that "there is no irreparable harm since [the Applicants could] submit [their] case[s] on the merits and [recover] monies if valid legal grounds are established".

On 10 May 1996, the Applicants lodged an appeal with the Joint Appeals Board (JAB). The JAB submitted its report on 10 September 1997. Its considerations and recommendations read as follows:

### ***"Considerations***

32. The Panel first considered the contention raised by the Respondent that the Staff Regulations and Rules do not provide for class action litigation, as understood in national legal systems. The Panel held that the appeals of thirty-one out of fifty-eight Appellants were properly before the JAB as those Appellants had written to the Secretary-General requesting a review of the administrative decision challenged, as required under the Staff Rules.

33. The Panel agreed with the Respondent that only those appeals which met the requirements of Chapter IX of the Staff Rules were receivable by the JAB. The Panel felt, however, that because of the nature of the case and the number of staff members involved, it would be difficult to restrict the consideration of the decision of the Secretary-General to those thirty-one staff members, only.

...

37. The Panel considered that it was established that the payment of the above-mentioned MSA was an error made by the Organization. Had the Organization properly calculated the MSA, the Appellants would not have been overpaid. The Panel considered that the Appellants had no legal right to be paid incorrectly calculated amounts of MSA. By keeping monies that belonged to the Organization, they became the Organization's debtors. The Panel believed that the same rule in reverse would apply in cases of underpayment resulting from miscalculations.

38. Based on the above, the Panel considered that the overpayments in this case could be recovered under staff rule 103.18 (b) (ii), which states that deduction from salaries might be made for 'indebtedness to the United Nations'.

39. At this juncture, the Panel examined the Appellants' reliance on Judgement No. 410, *Noll-Wagenfeld* (1988), which was raised by the Appellants in support of their contention that the Organization was barred from recovering overpayments made more than two years earlier. In that case, the Respondent had called to the attention of the Tribunal a communication dated 30 July 1987, announcing a determination by the Under-Secretary-General for Administration and Management to review the Policy regarding recovery of overpayments to staff members, and pending elaboration of such policy 'to limit to two years recovery of overpayments made to staff members in cases where such overpayments are due to action of [the] Administration and not of [the] recipient and to suspend recovery beyond two years ...' The above-mentioned policy was reiterated by the Administrative Tribunal in Judgement No. 517, *Van Branteghem* (1991), para. VIII.

40. The Panel was puzzled as to the meaning of the above-mentioned policy. The Panel found that it could be interpreted in two ways as follows: (a) that the statute of limitation ran after two years and barred recovery of overpayments (this interpretation is subject to the understanding of the Panel that the two-year run, would start from the moment that the Organization discovered the overpayments), b) that the two-year rule

related to the period of overpayment to be recovered by the Organization and did not [establish] a time bar to the right of the Organization to seek recovery of overpayment, regardless of how long such overpayment was made. The Panel considered that none of the interpretations of the policy mentioned above would benefit the Appellants, since the overpayment was discovered on 14 June 1993 by the Internal Audit Division and on 17 September 1993 the staff had been informed that waiver was not approved. All of this was well within the two years period starting from the date of the last overpayment made to them on around February 1993.

...

### ***Recommendations***

45. In the light of the above-mentioned considerations and conclusions of the Panel, as well as with view to the current discussions in the General Assembly on the enhancement of accountability of the Administration with regard to its actions, it is recommended that:

- (a) The Organization extend an apology to the Appellants for its administrative mishandling of the [MSA] and other actions which resulted in this appeal.
- (b) Attention should be given to the future scope of responsibilities granted to the person responsible for the error which led to the overpayments.
- (c) Future administrative actions, which may lead to salary deductions and which are the subject of a dispute, brought to the attention of JAB, should only be implemented after the settlement of the dispute.
- (d) The Administration should develop guidelines for imposing financial sanctions on those whose negligence cause the overpayment, e.g. by deducting from their salaries the interest the UN lost on the total amount of the overpayment."

On 9 December 1997, the Under-Secretary-General for Management transmitted a copy of the JAB report to the named Applicant and informed him as follows:

"... The Secretary-General has taken note of the Board's opinion that the overpayment which resulted from a misapplication of the currency of payment of MSA and from the non-implementation of recovery of the deducted balance of MSA after the first 30 days, implied an error on the part of the Administration. The Board, however, was of the view that, as a rule, overpayments did not give rise to acquired rights and that such an administrative error did not establish for you an entitlement to the overpayment. The Secretary-General has taken note of the Board's conclusion that the overpayments were legitimately recovered under staff rule 103.18 (b) (ii) which states that '... deductions from salaries, wages and other emoluments may also be made for "indebtedness to the United Nations"'. He has also taken note that the Board did not challenge the retroactivity of the recovery action and that the Board concluded that, although the recovery had adversely affected you, the appeal did not establish evidence of concrete and severe damage which could justify a financial compensation. The Secretary-General has decided to accept the conclusions of the Board.

Finally, the Secretary-General has taken note of the Board's recommendation that an apology be extended to you for the administrative mishandling of the MSA in this case. The Secretary-General regrets the errors made and the hardship caused to you as a result, but reiterates that the Administration had the obligation to recover overpayments in accordance with the Staff Rules.

The Secretary-General has taken note of the other recommendations provided under sub-paragraphs (b), (c) and (d) of paragraph 45 of the Board's report which extend beyond the immediate scope of your case. He has decided to take no further action in your case.

..."

On 31 May 1999, the Applicants filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal contentions are:

1. The decision to deduct amounts overpaid from their salaries as alleged overpayments of MSA was improperly and illegally assessed and in violation of normal practice against the retroactive implementation of financial rules.

2. The Respondent violated the Applicants' rights by intentionally failing to comply with the JAB's recommendation to suspend collection of the alleged overpayments pending the outcome of its hearing on the issue.

3. The Administration's policy precluded recovery of overpayments after a period of two years.

Whereas the Respondent's principal contentions are:

1. The rates and currency of payment of MSA during the period in question were established at the inception of the mission and there was no "retroactive" change of policy as alleged by the Applicants. The Applicants were overpaid MSA.

2. Overpayments are recoverable by the Organization under staff rule 103.18. Since the Applicants were overpaid, the Organization had a right, and a fiduciary duty vis-à-vis its Member States, to recover the amounts. Retention of overpayments would result in unjust enrichment.

3. The administrative policy of equitable limitation of recovery to the last two years of overpayment does not preclude full recovery in the present case.

4. The procedural due process rights of the Applicants were fully respected.

5. No rights of the Applicants were abridged by the Respondent's proceeding with the recovery action while the Applicants' request for suspension of action was pending before the JAB.

6. No rights of the Applicants were abridged due to the lapse of time between the JAB's recommendation on the Applicants' request for suspension of action and the Respondent's letter of 27 October 1995.

The Tribunal, having deliberated from 30 October to 22 November 2000, now pronounces the following judgement:

I. The case arises from the overpayment of MSA by the Administration to the Applicants during the period 13 September 1992 to 28 February 1993 and the recovery of such overpayment.

II. There are several issues that arise in this case. First, the Applicants argue that revised



MSA rates were retroactively applied. This is not the case. The rates and currency of payment of the MSA during the period of the mission in question were established at the inception of the mission and there was no "retroactive" change of policy or application of rates.

III. Second, it is a general principle of law that monies paid by mistake, whether by the Organization or a staff member, are recoverable pursuant to the doctrine of unjust enrichment. This principle has been recognized in ILOAT Judgement No. 53, *re Wakley* (1961). Further, under staff rule 103.18 (b) (ii) overpayments of the kind made in this case can legally be recovered by deduction from salaries because there was an "indebtedness to the United Nations", occasioned by the Applicants' unjust enrichment. Therefore, the monies were recoverable by the Organization

IV. Third, the reference to the policy decision by the Under-Secretary-General for Administration and Management which limited to two years "recovery of overpayments made to staff members" does not support the claims of the Applicants. It is clear that the decision refers to the recovery of overpayments relating only to the most recent two years. It does not state that recovery must begin no later than two years after the debt has been incurred. In any case, the debt was incurred over a period of about 5 ½ months and was recovered in instalments over a period of six to nine months. Needless to say undue delay (laches) in effecting the recovery could lead to the loss of the right to recover, but there was no undue delay in the period of recovery.

V. Fourth, while it is clear that the Applicants were under a legal obligation to return the overpayment of MSA and the Organization had a right to make a recovery of the full amount, the Tribunal must examine whether the procedure followed in making the recovery was in some way flawed or unfair to the Applicants. In this regard the Tribunal makes the following observations: the overpayment was discovered by an audit on 14 June 1993; on 8 December 1993, a request was made to the Deputy Controller to waive recovery. This request was denied on 17 December 1993; it was not until 5 December 1994 that the Applicants were notified officially of the intent to deduct

the overpayments from their salaries. It is difficult to justify a delay of almost 18 months between discovery and recovery.

On 14 December 1994, the Applicants requested a suspension of action and the JAB concurred on 23 December 1994. It took the Respondent almost ten months to inform the Applicants that he did not accept the JAB's recommendation. In fact, recovery of the overpayments had already been completed. Parenthetically, the Tribunal notes that no claim has been made that the deductions from the Applicants' monthly salaries were so high that they caused undue hardship.

VI. The Tribunal concludes that the undue delays in officially informing the Applicants of crucial decisions in connection with the recovery of the overpayments resulted in their being left in a state of uncertainty. This treatment caused them some hardship, was arbitrary and warrants some compensation.

VII. For the above reasons, the Tribunal:

- (a) Orders the Respondent to pay each of the Applicants the amount of \$800;
- (b) Rejects all other pleas.

(Signatures)

Julio BARBOZA  
Vice-President, presiding

Chittharanjan Felix AMERASINGHE  
Member

Marsha A. ECHOLS  
Member

New York, 22 November 2000

Maritza STRUYVENBERG  
Executive Secretary