**United Nations** **AT**

**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1079

Case No. 1139: MACNAUGHTON-JONES
NG
RAO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Mr. Julio Barboza, Vice-President; Ms. Marsha Echols;

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), with the agreement of the Respondent, filed an Application in direct submission under article 7 of the Statute of the Tribunal against a decision to characterize certain mission subsistence allowance (MSA) payments paid to UNIKOM staff as overpayments and to recover them as such.

Whereas, on 20 November 1998, the Tribunal rendered Judgement No. 902, *MacNaughton-Jones, Ng and Rao*. The Tribunal considered that "direct submission should only be made if the application concerns solely issues of law and if no material facts are in dispute". As the Tribunal found that the parties disagreed on a number of material facts, it "remanded [the case] to the [Joint Appeals Board (JAB)] for consideration on the merits".

Whereas, on 31 May 2000, the Applicants filed an Application containing pleas which read as follows:

"Section II: PLEAS

1. The Applicants request the Tribunal to rule that:

(i.) There was no excess of authority on the part of [the Chief Administrative Officer, UNIKOM,] to make …. MSA payments in respect of weekends, public holidays and days in lieu of weekends worked which fell during Applicants' period of annual leave.

(ii.) The payments in question did not violate staff rule 107.15( e).

…

(iv.) The MSA payments were not recoverable under staff rule 103.18 (b).

(v.) Even if the MSA payments were recoverable, the two-year recovery rule is applicable to limit such recovery to the last two years from the date of notice to recover.

(vi.) The adoption of General Assembly decision 51/440 of 16 December 1996 and resolution 51/234 of 13 June 1997 did not restrict the competence of the Tribunal to determine the validity of the recovery of the MSA payments, including the application of the two-year recovery rule.

..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 October 2000 and periodically thereafter until 31 August 2001;

Whereas the Respondent filed his Answer on 28 August 2001;

Whereas the Applicants filed Written Observations on 15 November 2001, and the Respondent submitted comments thereon on 4 June 2002;

Whereas the facts in the case were set forth in Judgement No. 902.

Whereas the JAB adopted its report on 2 November 1999. Its conclusions and recommendations read, in part, as follows:

"***Conclusions and Recommendations***

109. In conclusion, the Panel *unanimously agrees* that [the Chief Administrative Officer, UNIKOM,] exceeded his authority … when he authorized payment of MSA to the [Applicants] for annual leave for which no MSA leave credits had accrued, for official holidays and official non-working days which fell during their annual leave for which no MSA leave credits had accrued, and for [compensatory time off] taken outside the mission area in conjunction with annual/home leave for which no MSA leave credits had accrued.

110. The Panel also *unanimously agrees* that the MSA overpayment represented a windfall to the [Applicants], who were not legally entitled to the money even with the passage of time, that the Organization remained the rightful owner of the MSA overpayments, and that it had the right to reclaim those overpaid public funds from the [Applicants].

111. The Panel *unanimously agrees* that there was no adequate evidence indicating that the [Applicants] had not received the MSA overpayments in good faith, and that consequently the two-year recovery rule applied to the present case. …

112. The Panel also *unanimously agrees* that, in respect of the MSA overpayments paid to the [Applicants] for less than two years of their UNIKOM service, considerations of equity and fairness call for reimbursement to them for the expenses incurred during their authorized time-off without MSA credits, equal to an amount of fifty per cent of the recovered MSA overpayments. …

113. Applying the above conclusions to the present case, the Panel *unanimously recommends* that, with respect to [the Applicant Ng] and [the Applicant Rao], who served in UNIKOM for less than two years and would not benefit from the two-year recovery rule, the Administration reimburse them fifty per cent of the recovered MSA overpayments. This would appear to amount to $3,120 for [the Applicant] Ng, and $3,450 for [the Applicant] Rao.

114. As for [the Applicant MacNaughton-Jones], who served for more than two years, the Panel *unanimously recommends* that the Administration (a) return to her the full amount of the recovered MSA overpayments relating to the period from 26 April 1991 through 28 October 1991, and (b) reimburse her fifty percent of the recovered MSA overpayments for the expenses incurred during her authorized time-off without MSA credits relating to her service in UNIKOM between 29 October 1991 through 28 October 1993.

..."

On 12 November 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicants and informed them as follows:

"…

[Letter to the Applicant MacNaughton-Jones] The Secretary-General is in agreement with the … conclusions of the Board. He cannot, however, accept the Board's view that, in view of the fact that you received the MSA overpayment in good faith, the "two-year recovery rule" applies to your case. The Secretary-General notes that the two-year policy, which has never been promulgated as a rule to date, is superseded by the General Assembly decision 51/440 of 16 December 1996 and General Assembly resolution 51/234 of 13 June 1997, which do not limit recovery to a two-year period, but encompass all overpayments of MSA made to UNIKOM staff. The Secretary-General is obligated to implement the decision of the General Assembly and cannot, therefore, accept the Board's recommendation that you be reimbursed the amount of the recovered MSA relating to the period from 26 April 1991 through 29 October 1991.

The Secretary-General can also not accept the Board's recommendation that you be reimbursed fifty percent of the recovered MSA overpayments during your last two years of service with UNIKOM. The Secretary-General considers that the reasons offered by the Board for this recommendation, namely, that you were not at fault for the overpayment and that you had spent it in good faith, do not justify such a recommendation which, not only exceeds what you and your co-[Applicants] requested in your appeal, but is based on essentially the same considerations as the two-year recovery policy and thus effectively reduces the limitation on recovery from two years to one year.

[Letters to the Applicants Ng and Rao] The Secretary-General is in agreement with the … conclusions of the Board. He has also noted the Board's conclusion that, as you served UNIKOM for less than two years, the two-year recovery policy is not applicable to your case. …

The Secretary-General cannot accept the Board's recommendation that you be reimbursed fifty percent of the recovered MSA overpayments during your service with UNIKOM. …

…"

On 31 May 2000, the Applicants filed the above-referenced Application with the Tribunal.

Whereas the Applicants' principal contentions are:

1. There was no universal rule regarding the payment of MSA applicable to all missions during the relevant period.

2. The JAB erred in finding that the Chief Administrative Officer, UNIKOM, exceeded his authority in approving the payments.

3. The two-year limit on recovery is applicable in the circumstances; the decision by the Respondent to recover payments for a longer period caused irreparable harm to the Applicants.

4. General Assembly decision 51/440 of 16 December 1996 and General Assembly resolution 51/234 of 13 June 1997 do not override the principles of equity regarding limitation of recovery. Further, the matter was *sub judice* when General Assembly decision 51/440 was taken.

Whereas the Respondent's principal contentions are:

1. The Applicants received payment of MSA during their service with UNIKOM in excess of their entitlements under staff rules 103.21 and 107.15(e).

2. The Respondent has full authority and is obligated to recover overpayments made to staff members. Further, the Respondent is required to do so pursuant to General Assembly decision 51/440 of 16 December 1996 and General Assembly resolution 51/234 of 13 June 1997.

3. The Applicants did not acquire title to the amounts paid to them in error, retention of which would result in unjust enrichment.

4. The policy of equitable limitation of recovery to the last two years of overpayments is not applicable to the present case, and was precluded by the General Assembly's directives to the Secretary-General.

5. The Applicants should not be compensated on the grounds that recovery of the overpayments was arbitrary and caused the Applicants some hardship.

The Tribunal, having deliberated from 3 to 26 July 2002, now pronounces the following Judgement:

I. This case is a dispute concerning payments made to the Applicants as mission subsistence allowance (MSA) while they were on mission with UNIKOM. The Respondent sought the recovery of certain MSA payments and obtained reimbursement. The Applicants interpret the Staff Regulations and Rules, as well as the complex and largely incomprehensible

series of memoranda and communications on the subject, to mean that there was no overpayment and argue that, if they are incorrect, the two-year recovery rule applies.

II. UNIKOM was established by the Security Council in accordance with its resolutions 687 of 3 April 1991 and 689 of 9 April 1991. It was designated as a special mission as contemplated by staff rule 103.21. The mission staff worked under extremely difficult conditions, as described in the 1991 field audit report. Civilian staff in UNIKOM were paid MSA for annual leave for which MSA credits had not accrued, for holidays that fell during periods of annual leave and for compensatory time off outside the mission area during their annual leave, in part to compensate them for the harsh conditions. There was a great deal of criticism of payment rules and procedures, for their costliness and complexity.

A 1993 field audit of UNIKOM found a number of discrepancies from standard and correct procedures, in particular that the civilian staff at UNIKOM had been paid MSA for annual leave, for weekends and holidays which fell during the period of annual leave and for compensatory time off, for which no credit balances had accrued. The auditors recommended that UNIKOM conduct a review and recover the overpayments of MSA. Not until September 1996 did the Respondent give the Applicants notice that they were required to repay several payments made to them between April 1991 and October 1993. Following a hearing by the JAB on a request for the suspension of the recovery action, recovery was suspended until 31 December 1996 to allow an in-depth administrative review of the proposed action. Illustrating the controversy surrounding MSA payments in general, in its decision 51/440 of 16 December 1996 and resolution 51/234 of 13 June 1997, the General Assembly requested the Secretary General to recover overpayments of MSA paid during UNIKOM missions and to review the policies regarding MSA.

III. The JAB in its 1999 report described MSA as a

> "daily fixed allowance representing the total contribution of the Organization towards expenditures incurred by staff members in the field in connection with their assignment to a special mission … Since conditions at most missions differ, application of a fixed set of guidelines for setting MSA rates would not be practical and therefore a variable standard is used."

This situation is reflected in staff rule 103.21 (b), which authorizes the Secretary General to "set the rates and conditions for the mission subsistence allowance payable on each such assignment". This authority was delegated in ST/AI/234/Rev. 1 of 22 March 1989, entitled "Administration of the Staff Regulations and Staff Rules", and amplified in ST/AI/1997/6 of 20 October 1997, "Mission Subsistence Allowance". However, staff rule 107.15 (e) limits the entitlement to 1½ days of leave with MSA earned for each month of completed special mission service.

ST/AI/234/Rev. 1 authorizes the Office of Human Resources Management to interpret the staff rule. As described by the JAB, the Field Administration and Logistics Division (formerly Field Operations Division) provides field mission administrators with direction, advice and guidance, administers the Staff Regulations and Rules for field staff, and is ultimately responsible for compliance. A mission Chief Administrative Officer is responsible for day to day operations and administration, including implementing MSA policies. Those policies were generally agreed to be opaque and difficult to administer. This is made clear by the factual findings in the 1999 JAB report.

IV. The Tribunal addressed the issue of recoveries in Judgement No. 986, *Steiner et al.* (2000). There it was said that

> "it is a general principle of law that monies paid by mistake … are recoverable pursuant to the doctrine of unjust enrichment … Further, under staff rule 103.18 (b) (ii) overpayments of the kind made in this case [MSA payments] can legally be recovered by deduction from salaries because there was an 'indebtedness to the United Nations', occasioned by the Applicants' unjust enrichment."

V. However, the right to recover is tempered by equitable considerations. As stated in Judgement No. 887, *Ludvigsen* (1998), the "true intent or justification for the doctrine of equitable limitation on recovery is to strike a fair balance between the interest in minimizing any hardship to an innocent recipient of overpayments and the interest in preventing misuse of public funds".

The Tribunal has varied the basis of its analysis of the proper equitable balance, citing, for example, equitable doctrine (*Ludvigsen*) or undue delay (*Steiner*). The Tribunal also considered in *Steiner* whether the procedure followed by the Respondent might have been flawed

or unfair. Thus, in applying an equitable test, the Tribunal can bar a claim when an unreasonable delay in pursuing the claim might have prejudiced the party against whom relief is sought. Moreover, any delay by the Respondent must be balanced against the short maximum one-year recovery period allowed to staff under staff rule 103.15 (ii).

An inordinate delay in beginning to recover overpayments might be unfair, especially when the staff member had left service before the recovery began, as the Tribunal has stated in several judgements. It found four years from the event giving rise to the claim for overpayment to be an "excessive delay" in Judgement No. 517, *Van Branteghem* (1991) ("such a course of action was not appropriate") and found a similar period of delay to be unjustifiable in Judgement No. 410, *Noll-Wagenfeld* (1988) ("negligence").

V. The Applicants contest the attempt by the Respondent to recover payment that had been made five years previously, relying on the Respondent's two-year rule.

The Applicants received their notices of recovery on 12 September 1996, years after the Applicants had left UNIKOM. The Applicant MacNaughton-Jones served with UNIKOM from 26 April 1991 through 28 October 1993; the Applicant Ng from 11 May 1992 through 28 June 1993; and the Applicant Rao from 24 April 1991 through 27 October 1992.

The Respondent contends that the two-year rule is inapplicable because the Applicants were aware of the error or, at least, on notice that the recovery might be sought based on correspondence between the UNIKOM administrators that mentioned that the staff were "extremely concerned" about at least one of the methods for computing entitlements. The Tribunal does not agree.

As stated by the JAB, it was "doubtful that [the Applicants] could appreciate the meaning of the technical MSA rules … given the fact that even the managers differed in their interpretations of those rules". The Tribunal will not hold the staff accountable for, and knowledgeable about, an error made by the Administration while it sorted out a highly complex and difficult to understand policy. Like the Applicant in Judgement No. 124, *Kahale* (1968), they "relied on [the Administration's] construction … assuming in good faith that the allowance was properly paid (and in spending it)".

VI. The Tribunal has often referred to the two-year rule applied by the Respondent, when considering the validity of recoveries. The rule was published in a 30 July 1987 memorandum from the Controller, who announced that

> "the Under-Secretary-General for Administration and Management has decided, until an appropriate policy is elaborated, 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".

A subsequent 1995 memorandum from the Director, Financial Management Office, limited this policy to cases in which the staff member was genuinely unaware of the error.

The policy is interpreted by the Respondent to mean that the recovery will be limited to the last two years of overpayment, regardless of how ancient the claim. The Tribunal has accepted this interpretation, when it refers to the rule. According to the Tribunal in *Steiner*, "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."

Consequently, the Tribunal finds that the circumstances limit the possible recovery of the Respondent to the amounts, if any, that could be recovered under its own two-year rule.

VII. The Respondent also argues that the General Assembly demanded the recovery without regard to the two-year rule. The General Assembly certainly intended for the decision to be implemented under conditions that were fair to the staff concerned, who had served the Organization and its goals under difficult circumstances.

VIII. The dispute becomes one of whether equity bars the Respondent's claims in any way or whether the delays justify compensation for the Applicants.

In 1998, OIOS stated that the overpayments to UNIKOM staff, which had begun in 1991, were identified in a 1993 internal audit, "however, it was not until after a second field audit in 1995 that corrective measures were taken to revise payment procedures and initiate recovery actions". UNIKOM was noted for its tardy reaction to the report.

It is obvious that the Administration's confusion caused the overpayment. However, it is the conclusion of the Tribunal that equity does not require the Respondent to forego its right of recovery so long as it applies its own two-year rule.

IX. As explained herein, the Tribunal considers the equity of the recovery, even when the two-year rule applies and when it is implemented properly. *Steiner* stands in part for the view that delays, beyond those of the actual recovery period, may warrant compensation because of the harm and prejudice caused to the Applicants by the time gap between discovery and recovery. In this case the delay was almost twice as long as in *Steiner*. As we did in *Steiner*, the Tribunal finds the delay here was "difficult to justify" and it was unfair to the Applicants. This requires that the Applicants be compensated.

X. For the foregoing reasons and having considered the pleas, contentions and record, the Tribunal:

1. Decides that the two-year rule applies and that all recoveries should be limited to the last two years of overpayment, and orders that, therefore, the Applicants be reimbursed any amounts recovered in excess thereof;
2. Orders the Respondent to pay each Applicant $1,000 in compensation because of the delay described above; and,
3. Rejects all other pleas.

(Signatures)

Mayer GABAY
President

Julio BARBOZA
Vice-President

Marsha ECHOLS
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG
Executive Secretary