United Nations AT/DEC/1219

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1219

Case No. 1311: GROSSMAN Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Brigitte Stern, Vice-President, presiding; Mr. Spyridon Flogaitis; Mr. Dayendra Sena Wijewardane;

Whereas at the request of Nancy Grossman, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 May 1998 and periodically thereafter until 30 June 2003;

Whereas, on 30 June 2003, the Applicant filed an Application requesting the Tribunal, inter alia:

> "10. … [T]o order:
>
> (a) the Respondent to return, without delay, those monies recovered from [the Applicant] as alleged overpayment of Mission Subsistence Allowance [(MSA)] received while on annual leave spent within the mission area during [the Applicant's] respective assignments to [the United Nations Protection Force (UNPROFOR)]; and
>
> (b) … [That] the starting date for UNPROFOR's new annual leave policy [will be] 15 July 1994, when UNPROFOR International Staff Members were officially informed of the new policy implemented under UNPROFOR Information Circular [UNPROFORIC/328]".

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 January 2004;

Whereas the Respondent filed his Answer on 28 January 2004;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

> "***Summary of Facts***
>
> [On 1 May 1992, the Applicant was temporarily assigned to UNPROFOR.]
>
> Upon her arrival in the UNPROFOR mission area, UNPROFOR's Office of Personnel informed her, orally, of UNPROFOR's policy … that annual leave days, including weekends, spent without the mission area would be deducted from the accrued MSA leave balances of staff members, whereas for annual leave days including weekends, spent within the mission area, MSA would be paid to staff members. Indication of UNPROFOR's policy was confirmed through the leave form used by UNPROFOR.
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> …
>
> [Following an audit of UNPROFOR conducted in late 1993, on] 31 January 1994, the Internal Audit Division (IAD) [issued its report indicating] that UNPROFOR had not been in compliance with staff rule 107.15 (e) [in that] … 'the Civilian Personnel Section … has not reduced payments of MSA for periods of annual leave taken within the mission area', and that '[a]s a result, UNPROFOR has made MSA payments to staff members for more leave days than were permitted under the rules which must now be recovered or deducted from the staff member's MSA leave balances'. …
>
> …
>
> [On] 17 June 1994, … [the] Chief, Field Operations Division (FOD), Department of Peace-keeping Operations DPKO, informed … UNPROFOR [that]:
>
> > 'The upper limit on payment of MSA during periods of annual leave is one and a half days for-each month of completed mission assignment regardless of where the leave is spent. … [Y]ou are requested to take immediate steps [to] review all leave records and determine the number of annual days taken by UNPROFOR staff members within the mission area and take following action:
> >
> > …
> >
> > > "B. For those staff members in deficit MSA leave positions, the number of days to be deducted should be communicated to [the] Finance Section [for] retroactive recovery action. Overpayments to regular United Nations staff members who have since returned to their official duty stations should be communicated to Headquarters for recovery through payroll deductions and in the case of mission appointees who may have concluded their assignments, either from final pay or through invoicing". …

> By information circular UNPROFOR/IC/328, dated 15 July 1994, [the CAO, UNPROFOR] informed all UNPROFOR international staff members [of the above.]
>
> …
>
> … [The Applicant was] included in a list of 73 staff members who were in deficit of MSA and from whom the overpayments were to be recovered …
>
> …
>
> [On 16 December 1994, the Applicant was informed that the overpayments to her would be deducted, beginning with her January 1995 salary.]

On 15 February 1995, the Applicant requested the Secretary-General to review the administrative decision to recover from her "alleged overpayments of MSA".

On 22 May 1995, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 25 July 1997. Its considerations, conclusions and recommendations read, in part as follows:

> ***"Considerations***
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> …
>
> 28. The Panel determined that the issue before it is whether the organization was justified in recovering from the Appellants, as overpayments, MSA which they received while on annual leave spent within the mission area during their assignments to UNPROFOR.
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> …
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> 30. The Panel noted that the Respondent has not denied what the Appellant claimed was UNPROFOR's policy prior to [the January 1994] audit.
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> ...
>
> 34. … The Panel determined … that staff rule 103.21 (b) is not determinative of the issue of whether the Appellants were entitled to MSA payments while on annual leave spent within the mission area during their assignments to UNPROFOR.
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> 35. The Panel noted, also, that while staff rule 107.15 (e) deals with Travel Subsistence Allowance [(TSA)], there is provision in the current Field Administration Handbook of 1974 [(ST/OGS/L2/Rev.3)] which makes staff rule 107.15 (e) applicable to MSA.
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> …
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> 39. The Panel noted that this is not an isolated case where the UNPROFOR administration paid one staff member, *by mistake*, more MSA than she was entitled to. Rather, this is a case where the UNPROFOR administration, acting on behalf of the Secretary-General, informed staff members arriving in the mission area of UNPROFOR's policy regarding calculation and entitlement of MSA annual leave days spent without the mission area and leave days spent within the mission area, and based upon that policy, all staff members, including the Appellants, were accordingly paid. The

> Panel was of the view that, if two years later, as the facts in this case reveal, the Respondent decides that the policy adopted by the UNPROFOR administration was based upon an erroneous application of the Staff Rules, it is not a case of overpayments against the staff members; rather, it is a case of incorrect instructions, possibly negligence, on the part of the UNPROFOR administration …
>
> *Conclusions and Recommendation*
>
> 40. In view of the foregoing, the Panel *unanimously agreed* that while the Field Administration Handbook, para. 4, and staff rule 107.15 (e) provided some guidance on the rules regarding calculation of MSA, there were ambiguity with respect to what are 'non-working' days and lack of clarity regarding the Appellants' MSA entitlements.
>
> 41. The Panel *unanimously agreed* that this is not as much a case involving overpayments of MSA to the Appellants as it is a case of incorrect instructions on the part of the UNPROFOR administration.
>
> 42. The Panel *unanimously recommends* that the Appellants be reimbursed the amounts which were recovered from them as overpayments of MSA which they received while on annual leave spent within the mission area during their respective assignments to UNPROFOR.
>
> 43. The Panel *unanimously agreed* to make no further recommendation in support of the appeal".

On 13 November 1997, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

> "To the extent that there was ambiguity regarding the term 'non-working' days in the Handbook, it was nevertheless clear that, in case of doubt, the provision of staff rule 107.15 (e) had to prevail and be applied. Since the erroneous interpretation of the rules led to incorrect instructions and resulted in overpayments of MSA, the Organization had the obligation, under staff rule 103.18, to recover such overpayments.
>
> The Secretary-General has therefore decided not to accept the Board's recommendation that you be reimbursed the amounts which were recovered from you. He has decided to take no further action in your case".

On 30 June 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent erred in applying staff rule 107.15, which deals with TSA to this case, which deals with conditions governing MSA.

2. There is no Staff Rule or written directive from the Secretary-General defining the conditions governing MSA for UNPROFOR regarding annual leave; therefore, there could be neither erroneous interpretation nor improper application of

rules dealing with MSA on annual leave by the UNPROFOR Administration. The policy of UNPROFOR, defining the conditions for MSA while on annual leave for UNPROPOR international staff members, as authorized by the Chief Administrative Officer, and enforced by the Chief Civilian Personnel Officer and the Chief Finance Officer, was legitimate.

3. In the absence of any contravening staff rule or administrative instruction defining the conditions for MSA while on annual leave, the Respondent should be bound to the conditions set by the administration of UNPROFOR, until officially changed on 15 July 1994.

Whereas the Respondent's principal contentions are:

1. The only Applicant in this case is Nancy Grossman.

2. The central issue in this case has already been decided by the Administrative Tribunal in Judgement No. 1079, *MacNaughton-Jones et al.* (2002).

The Tribunal, having deliberated from 4 to 24 November 2004, now pronounces the following Judgement:

I. The core issue in this case is whether the Respondent was entitled to recover the MSA payments which had been made to the Applicant when she served in the UNPROFOR peace keeping mission between 2 May 1992 and 18 May 1994. More specifically, the issue is whether the MSA paid during this period to the Applicant when she was on annual leave but remained in the mission area, was legally and correctly recovered by the Respondent as an overpayment of MSA to her. The Applicant claims that it was not and maintains that the amounts which have been recovered should be paid back. According to her, the recovery was not justified on the basis of the applicable rules and on account of the representations that the UNPROFOR administration had made to the mission staff including her. She maintains that if the Respondent were allowed to retain these recovered amounts it would be unfair, unjust and discriminatory.

II. The facts are not really in dispute. At the time the Applicant arrived in the mission, the established policy of the UNPROFOR administration for payment of MSA during annual leave was that it would not be for paid periods of annual leave taken outside the mission area but would be paid for annual leave taken within the mission area. In order that this policy could be given effect to, mission employees were asked in the leave application form to specify whether leave was being taken inside or

outside the mission area. Payments were effected according to this policy until an audit was conducted in January 1994 when it was decided that the practice was not borne out by the rules.

III. It is immaterial whether - as the Applicant claims and the Respondent denies - the Applicant was orally informed of the policy which was being implemented in the mission. It is also immaterial that, as the Respondent appears to suggest, it was not a policy which had been formally "promulgated". Both parties understood the policy exactly as described above and the question is whether the policy which the UNPROFOR administration had implemented, until it was instructed by Headquarters to do otherwise, was in accordance with the Staff Rules and other applicable instructions. If it was not, the recovery of payments from the Applicant would be justified, in principle, according to the applicable legal regime. Whether it is unfair, unjust or discriminatory is quite another question.

IV. Staff rule 103.21 (b) provides that "[t]he Secretary-General shall set the rates and conditions for MSA on each … assignment". The rule does not impose an obligation on the Secretary-General to set out the rates and conditions in a single comprehensive document, desirable as that might be in an ideal set of circumstances. The obligation is to ensure that there is a discernible regime in accordance with the Staff Regulations and Rules which is also applied in a non-discriminatory and fair manner. The Secretary-General is bound by the terms of this provision to set a "rate" for payment of MSA for designated "special mission assignments" in terms of staff rule 103.21 (a) and there is no dispute that this has been done. It is clear that as far as UNPROFOR was concerned the regime for the payment of MSA was not set out in a single document and that the system rested on several provisions, the interpretation and application of which has proved controversial.

V. An area of disagreement is the extent to which, if at all, the provisions in staff rule 107.15 (e) relating to the application of TSA to staff members on leave, are also applicable to the payment of MSA. The Applicant argues that these provisions have nothing to do with the payment of MSA and that rule 107.15 (e) was erroneously interpreted to refer to MSA in the absence of a specific rule on MSA.

The Tribunal has some difficulty in understanding the Applicant's argument in this regard for two reasons. Whilst the TSA and MSA are two separate allowances, a clear link has been established in the application of the rules. This "bridge" is

provided for in the 1974 Field Administration Handbook which has been used ever since as a reference guide for peace keeping missions. Paragraph 4 of the section headed "General Financial Administration" on page C-42 states as follows:

> "The rules regarding the calculation of mission subsistence allowance i.e., calculation in half days, etc., will be the same as those governing the calculation of travel subsistence allowance. In general, mission subsistence allowance payments will be calculated at the rate per day multiplied by the number of days the staff member is on duty and shall include payment for non working days, as long as the staff member is in the mission area."

Indeed, it is by reference to these very provisions relating to TSA, that a staff member on leave, whether within or without the mission area, is entitled to credit for one and a half days MSA for each completed month of service.

It is apparent that for the period she served in the mission, the Applicant has also taken the benefit of the credits flowing from the application of staff rule 107.15 (e). In the Tribunal's view, a staff member cannot take the benefit of a Staff Rule for selective purposes. The Applicant cannot legitimately argue that she is entitled to the credits under the rule but not accept the disadvantages that may flow from the application of the same staff rule. She cannot therefore in the same breath maintain that those provisions of the staff rule relating to annual leave are not applicable to her. For these reasons, the Tribunal rejects the contention of the Applicant that staff rule 107.15 (e) is irrelevant and has no application to the payment of MSA.

Having found that staff rule 107.15 (e) is pertinent to the payment of MSA, it becomes necessary for the Tribunal to examine its provisions in more depth. Subsection (e) provides as follows:

> "Except for leave taken at a rate not exceeding one and a half days for each completed month on which a staff member is in travel status on official business, travel subsistence allowance shall not be paid in any period of annual leave or special leave. It shall not, in any event, be paid in respect of leave taken at the conclusion of active duty on an assignment but prior to the staff member's return to his or her official duty station."

On the face of it, the provisions are relatively clear and comprehensible. A staff member should not be paid MSA when she is on annual or special leave. Furthermore, no payment is to be made if a staff member was for personal reasons to stay on in a mission area after the period of the mission. In this connection it is useful to recall that a staff member on mission is in receipt of salary and allowances such as post adjustment payable to him or her at the normal duty station.

VI. Another area of disagreement in this case is the interpretation of the second sentence of page C-42 in the Field Administration Handbook: "[i]n general, MSA payments will be calculated at the rate per day multiplied by the number of days the staff member is on duty and shall include payment for non working days, as long as the staff member is in the mission area". As stated above, this was initially interpreted by the UNPROFOR administration to mean that the MSA was payable to a staff member on annual leave within the mission area. The Applicant supports and relies on this interpretation. The Tribunal, however, considers the interpretation by the auditors and Headquarters to be correct. It is clear that "non working days" were meant to include weekends and holidays. It may even include emergency days where, for one reason or another, staff members in a mission are asked not to report to work. It is the Tribunal's view that it does not include annual leave days initiated by a staff member for his or her own reasons.

VII. A discrete issue is whether the manner in which the UNPROFOR administration implemented the MSA system gave rise to a claim of estoppel. Whilst no such claim has actually been pleaded, the Tribunal will treat the Applicant's contention that recovery of the money is unjust, unfair and discriminatory as amounting to a plea of estoppel and will deal with it accordingly.

In *MacNaughton-Jones*, the Tribunal decided that the fact that an overpayment arises from confusion on the part of the Administration does not give rise to any consideration of equity requiring the Administration to forego its right of recovery provided it applies its own two year rule. The two year rule is not in issue in this case. The Administration acted well within the set time limit. This Judgement cited the earlier Judgment No. 986, *Steiner et al.* (2000) in which the Tribunal stated:

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

Even independently of that principle, in dealing with public funds the starting point must be that transparency and accountability require that an overpayment should be recovered so that the funds may be applied to legitimate legal objectives pertaining to the mandate of the Organization. There must exist compelling reasons of equity to bar

the recovery of an overpayment. One such consideration is reflected in the two-year rule so that a recovery is time limited.

In the Tribunal's view, the claim that the Applicant was the innocent recipient of the overpayment which has been spent or committed does not by itself raise a sufficient equity in the circumstances of this case to prevent recovery of the overpayment. A claim that the Applicant had acted throughout in good faith is not good enough to bar recovery of what does not belong to the Applicant but to the Organization. Whenever a claim of estoppel is raised, considerations of equity and fairness must necessarily arise and be considered. As already stated above an Applicant invoking such considerations cannot seek to take the advantages and to ignore the disadvantages of a regime that has been held out as being applicable. The Staff Rules correctly interpreted must be effectively implemented. The Applicant has not claimed that she was discriminated in comparison to other staff members in the mission but makes a reference to things being done differently in another mission. In the Tribunal's view this, even if correct, is not pertinent to the decision in the case.

VIII. In view of the foregoing, the Application is rejected in its entirety.

(*Signatures*)

Brigitte **Stern**
Vice-President, presiding

Spyridon **Flogaitis**
Member

Dayendra Sena **Wijewardane**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary