Registry's translation, the French text alone being authoritative.

101st Session **Judgment No. 2565**

The Administrative Tribunal,

Considering the fourth complaint, which is an application for execution of Judgment 2354, filed by Mr H.B. against the Customs Co-operation Council (CCC), also known as the World Customs Organization (WCO), on 24 November 2004 and corrected on 15 December 2004, the Organization's reply of 4 April 2005, the complainant's rejoinder of 12 July and the WCO's surrejoinder of 19 September 2005;

Considering the fifth complaint filed by the complainant against the WCO on 11 April 2005, the Organization's reply of 1 August, the complainant's rejoinder of 10 November 2005 and the Organization's surrejoinder of 20 February 2006;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings in the context of his fifth complaint;

Considering that the facts of the cases and the pleadings may be summed up as follows:

A. Facts relevant to this dispute are given in Judgment 2354, delivered on 14 July 2004, concerning the complainant's third complaint, in which he challenged the decision to suppress his post and to terminate his appointment. In that judgment, the Tribunal stated, under 11, that it did not consider the reinstatement of the complainant to be appropriate but decided that the Organization was to pay him, "in view of the unlawful actions of the Organization [and] in compensation for injury under all heads, an amount equivalent to two years' salary and allowances, without deducting the terminal allowance he [had] already received". Reference should also be made to Judgment 2483 (delivered on 1 February 2006), concerning the application by the Organization for interpretation of Judgment 2354.

In a letter of 26 August 2004, which constitutes the decision impugned in the fourth complaint, the Head of the Division of Administration and Personnel sent the complainant a breakdown of the amount the Organization would pay him in execution of Judgment 2354. He also reminded him of the wording of the relevant passage of Rule 18.4 of the Staff Regulations dealing with the terminal allowance:

"(ij) 1. Basis of calculation for an official appointed before 1 July 2002 :

(i) Where on termination of his/her service an official settles:

(a) in the country of which he/she is a national, or

(b) in the country of which his/her spouse is a national,

he/she may opt for the salary and contributions referred [to] in paragraph (c) [concerning the amount of the allowance in question] to be computed as if they had been determined in accordance with the Co-ordinated Organizations' salary scale applicable to that country."

The Head of the Division of Administration and Personnel explained that the terminal allowance paid to the complainant had been calculated on the basis of the assumption that he would settle in France at the end of this contract, "as [he had] indicated in [his] note of 30 January 2002 opting for the scale applicable to France". It had been ascertained, however, that his main residence was still in Belgium and that the allowance should therefore have been calculated on the basis of the scale applicable to that country. Considering that the complainant had received an overpayment of 87,495.39 euros, the Organization would deduct this sum from the amount it was required to pay him in execution of Judgment 2354.

On 2 September 2004 the complainant wrote to the Secretary General asking him to withdraw his decision of 26 August. On 20 September the Secretary General asked him to explain the subject of and reasons for his request. In a letter of 23 November 2004, the complainant replied that he viewed the decision of 26 August as comprising two decisions. The first concerned the alleged overpayment of 87,495.39 euros mentioned earlier, a matter that he had taken up in his letter of 2 September 2004; on this issue he was requesting that the Appeals Board be convened, on the basis of two arguments that he put forward. The second decision was the decision to recover the sum concerned by offsetting it against the compensation due to him in execution of Judgment 2354, and is the decision challenged in his fourth complaint.

In a letter of 11 January 2005, which constitutes the decision impugned in the fifth complaint, the Secretary General notified the complainant that he had referred his request for the convening of the Appeals Board to the Board's Chairman and explained that, since what he was claiming was "the same as one of the claims he had brought before the Tribunal", he considered that it was unnecessary to proceed any further with the internal procedure and authorised him to appeal directly to the Tribunal.

B. In his fourth complaint, the complainant alleges that the Organization has disregarded the *res judicata* authority of Judgment 2354 and failed to discharge its corresponding obligation to execute that judgment. He argues that the deduction made had the effect of reducing the amount of compensation which was to be paid to him in execution of that judgment or, at least, of delaying full payment thereof pending completion of the proceedings he was obliged to initiate. He feels that if the Tribunal were to condone such actions, it would be opening a "substantial breach in the *res judicata* authority" of its judgments, insofar as the execution of a pecuniary award against an organisation would depend on a more or less discretionary decision of the administration, and on the official's determination to challenge that decision. In his view, the Organization could equally have recovered the alleged overpayment by other means.

The complainant also points out that in Judgment 2354 the Tribunal ruled that the Organization should pay him compensation "without deducting the terminal allowance he [had] already received". Yet in fact it recovered part of it. He feels that he is "once again the victim of the vindictiveness" of the Organization and reiterates one of the pleas he had put forward in his third complaint, on which the Tribunal had not ruled, to the effect that the suppression of his post and the decision to end his appointment really arose from a desire to get rid of him. He further contends that the impugned decision is tainted with several irregularities and refers to the arguments in this respect that he put forward in his letter of 23 November 2004.

The complainant seeks the annulment of the decision of 26 August 2004, payment of the 87,495.39 euros withheld by the Organization, interest on that sum at the rate of 8 per cent per annum as from 15 August 2004, the date at which that sum should have been paid to him, and compensation for moral injury in the amount of 108,743.76 euros, which is the equivalent of "one year of his latest salary and allowances". Lastly, he claims costs.

In his fifth complaint, the complainant contends that the WCO misinterpreted some provisions of Rule 18.4 (ij) by considering that he was obliged under that rule to resettle in his country of origin as soon as his appointment ended, whereas according to Rule 17.1(d) the reimbursement of removal expenses is subject to the condition that the removal must occur within two years of the official leaving the service of the Organization. The complainant argues that in his case the two years did not begin to run on 30 March 2002, when his appointment was terminated, but on 14 July 2004, the date at which Judgment 2354 was delivered.

He submits that, contrary to the views expressed by the Head of the Division of Administration and Personnel, he did not state in his note of 30 January 2002 that he was going to settle in France, even though that was implicit and is still his intention despite the difficulties he has been experiencing. According to him, the Organization generally does not check whether former officials have really moved and, in cases where the removal has not taken place, it even abstains from recovering any overpaid allowance. On this point, he asks the Tribunal to order the disclosure of certain documents concerning colleagues who, like him, were dismissed, are not Belgian nationals, requested the application of the scale of the country of which either they themselves or their spouses are nationals for the calculation of their terminal allowance and have continued to reside in Belgium, but who were not asked by the Organization to refund any overpayment, even though the latter was perfectly aware of their situation.

The complainant further alleges a breach of Regulation 20 and of the general principle of the recovery of undue payments. He contends that the Organization made the payment in full knowledge of the facts and claimed the refund regardless of time limits, since it waited nearly 29 months before doing so, even though it was aware,

particularly because he was still affiliated to the health insurance scheme, that he had not settled in France.

The complainant lastly asserts that the administration's decision of 26 August 2004 constituted misuse of authority since it was aimed not at recovering an undue payment but rather at causing him harm and avoiding full execution of Judgment 2354.

The complainant asks the Tribunal, prior to judgment, to order the Organization to disclose: the breakdown of the calculation of the terminal allowances of several former colleagues; the "requests for contributions to the health insurance scheme which the WCO sent them in 2005"; and "the WCO's bank statements showing the payments of those contributions and the refund of medical or pharmaceutical expenses to the officials concerned in the course of that same year". In the case of two of those colleagues, he calls for disclosure of "documents relating to the payments made to them by the WCO in 2005 in return for services they provided as freelance employees". The complainant also requests the quashing of the decision of 26 August 2004 and, if necessary, that of 11 January 2005. He claims a refund of the 87,495.39 euros withheld, interest on that sum as from 26 August 2004, 108,743.76 euros in compensation for moral injury and costs.

C. In its reply to the fourth complaint, the Organization points out that the precise reasons for its decision to recover the overpaid amount by offsetting it were given in the application for interpretation of Judgment 2354 which it filed with the Tribunal on 18 January 2005. It asserts that it has no intention of challenging the *res judicata* authority of Judgment 2354 and is confident that it discharged its obligations under that judgment "with all due celerity".

Pointing out that the complainant does not deny that he has kept his main residence in Belgium, the Organization contends that, since he did not settle in France, his terminal allowance, according to Rule 18.4, had to be calculated on the basis of the scale applicable to Belgium, which is less advantageous than that for France. The Organization considers that it was entitled and even had a "statutory obligation" to recover the overpayment, and that offsetting the amount was the quickest and least prejudicial way of doing so.

The defendant further points out that the Tribunal has recognised that the principle of recovery of undue payments applies whenever the administration on a mistaken assumption pays an official a sum to which he is not entitled. It goes on to argue that the principle applies *a fortiori* when the official himself has made false statements. While the Tribunal did rule that the compensation due to the complainant should be calculated "without deducting the terminal allowance he [had] already received", this necessarily referred to the allowance to which he was legitimately entitled and not the one he was wrongly paid on the basis of his false statements.

Lastly, the defendant contends that it is "totally artificial" to construe the decision of 26 August 2004 as two decisions. In its view, that decision was lawful and calls for no compensation. It considers, moreover, that the sum claimed by the complainant for alleged moral injury is completely out of proportion.

In its reply to the fifth complaint, the Organization contends that the said complaint is vexatious and irreceivable insofar as the complainant draws "an unacceptable distinction between two indissociable aspects of one same decision", and that the grounds put forward in each of the cases before the Tribunal are identical. It asks the Tribunal to join those cases.

The Organization recognises that it would be unreasonable to require officials leaving the service to settle immediately in the country of which either they or their spouses are nationals, and adds that a reasonable period of time must be allowed. In the present case, however, that period, which cannot be longer than two years, has been exceeded. It explains that it claimed a reimbursement only after 29 months because it considered it was "absurd" to ask for proof of resettlement in France before a reasonable period of time had elapsed.

The defendant contends moreover that the documents to which the complainant wishes to have access serve no purpose insofar as, even if his former colleagues were treated differently, he could not according to the Tribunal's case law claim the benefit of a mistake made in their favour. It further denies any misuse of authority.

D. In his rejoinder on his fourth complaint, the complainant argues that the Organization, by merely asserting that part of his terminal allowance was unduly paid, has not replied to his pleas, and he emphasises that he did not intend that complaint to focus on the issue of whether or not he received an overpayment. Should the Tribunal consider that the issue of overpayment is indissociable from that of the execution of Judgment 2354, then he agrees

that his fourth and fifth complaints should be joined.

According to the complainant, the decision of 26 August 2004 was legally unfounded and the deduction made was not the least prejudicial way of obtaining repayment as far as he was concerned. He regrets that the possibilities of recovery by instalments and remission mentioned in Regulation 20 were never considered.

He submits lastly that the sum he is claiming for moral injury is proportionate to the seriousness of the irregularities committed by the Organization and takes into account the harassment he has suffered since June 2000.

In the rejoinder submitted in the context of his fifth complaint, the complainant argues that the distinction he has drawn between the different aspects of the decision of 26 August 2004 is based on "objective differences"; his fourth and fifth complaints therefore differ as far as their cause and subject are concerned.

He produces a statement, drafted by the former accountant of the Organization on 8 April 2005, which according to him supplies the proof he needed regarding the WCO's practice of not checking whether a removal has indeed taken place. He therefore withdraws his request for the disclosure of documents.

He adds lastly that, if the two-year period he was allowed for resettling in France did indeed begin on 14 July 2004, that would leave him enough time to complete his removal as intended.

E. In its surrejoinder to the fourth complaint, the defendant contends that it was entitled to recalculate the amount of the terminal allowance paid to the complainant and to recover the overpaid amount at the time when it paid him the compensation it owed pursuant to Judgment 2354.

In its surrejoinder to the fifth complaint, it reiterates its request for the cases to be joined.

CONSIDERATIONS

1. The complainant began working for the WCO in September 1975 as a translator. In a letter of 30 November 2001 he was informed that, as part of the restructuring of the Secretariat, his post was being suppressed and that his appointment would be terminated on 30 March 2002.

In a note of 29 January 2002 he asked the Organization to pay him the terminal allowance to which he was entitled. In a further note dated 30 January 2002, he added that the allowance should be calculated on the basis of the "scale applicable to France". This note referred implicitly to the provisions of Rule 18.4(ij) of the Staff Regulations. These provisions, which concern the basis of calculation of the allowance in question, stipulate in particular that, when on termination of his/her service an official settles in the country of which he/she is a national or of which his/her spouse is a national, he/she may opt for the salary and contributions referred to in the paragraph concerning the amount of the allowance "to be computed as if they had been determined in accordance with the Co-ordinated Organizations' salary scale applicable to that country".

The Organization paid the terminal allowance in two instalments: on 11 February and 31 March 2002.

2. In the third complaint he filed with the Tribunal the complainant challenged the validity of the suppression of his post and his dismissal. In Judgment 2354 delivered on 14 July 2004, the Tribunal held that the impugned decisions were unlawful. However, it considered that reinstatement of the complainant would be inappropriate and ordered the Organization to pay him, "in compensation for injury under all heads, an amount equivalent to two years' salary and allowances, without deducting the terminal allowance he [had] already received" (under 11).

On 26 August 2004 the Head of the Division of Administration and Personnel wrote to the complainant informing him that the compensation granted by the Tribunal amounted to 217,487.52 euros, but that the sum of 87,495.39 euros, which according to the WCO the complainant had unduly received when he was paid his terminal allowance, was to be deducted from that compensation. The terminal allowance should in fact have been calculated not on the basis of the scale applicable to France but on the basis of the scale applicable to Belgium, since the complainant had not transferred his residence to France – a condition for the applicability of the French scale to his case – but had maintained his residence in the Belgian commune of Auderghem.

3. On 2 September 2004 the complainant asked the Secretary General to withdraw that decision. On 23

November 2004 he wrote to the latter asking for the Appeals Board to be convened and suggesting that the Board should recommend quashing the decision of 26 August 2004 as well as the "implicit decision to reject [his] request of 2 September 2004". On 24 November 2004 he filed his fourth complaint with the Tribunal, in which he requests, inter alia, the quashing of the decision of 26 August 2004.

On 15 December 2004 the Secretary General forwarded the complainant's request that the Appeals Board be convened to the Chairman of the Appeals Board. On 11 January 2005 he notified the complainant that since what he was claiming was "the same as one of the claims he had brought before the Tribunal", he had decided that the Organization would not object to the receivability of his fourth complaint. Taking the view that it was therefore unnecessary to pursue the internal procedure any further, he authorised the complainant to appeal directly to the Tribunal. The complainant did so by filing a fifth complaint on 11 April 2005, in which he requests, inter alia, the quashing of the decision of 26 August 2004 and, if necessary, that of 11 January 2005.

4. The two complaints raise the same issues of fact and of law and seek the same redress. They shall therefore be joined, since contrary to the defendant's assertions they are both receivable, and the Tribunal will rule on them by a single judgment.

5. The complainant accuses the defendant of having disregarded the *res judicata* authority of Judgment 2354 by failing to execute it, or at least by not executing it in due time. He contends that the Organization should have paid him the full amount of the compensation granted by the Tribunal in Judgment 2354, without deducting the 87,495.39 euros which in the defendant's view he had been unduly paid.

This plea is irrelevant. In Judgment 2483, under 5 and 7, the Tribunal, ruling on an application for interpretation lodged by the defendant, stated that Judgment 2354 did not in principle preclude deducting the amount the complainant was supposedly overpaid on his terminal allowance from the sum he was owed in compensation for injury. It follows that, if the defendant had indeed paid the complainant by mistake, in February and March 2002, an amount in excess of the terminal allowance it owed him, it was entitled either to seek reimbursement or to offset the overpaid amount against the compensation the Tribunal had ordered it to pay him in Judgment 2354.

6. The complainant contends that he was entitled to the whole of the terminal allowance paid to him, since it has always been his intention to settle in France, his country of origin, even though he has not yet succeeded in doing so, owing to material problems which he is still trying to solve.

Rule 18.4(ij), subparagraph (1)(i), applies only to an official who on termination of his/her service settles in the country of which he/she is a national or of which his/her spouse is a national. The parties admit quite rightly that this rule cannot be given a literal interpretation whereby an official intending to take advantage of it would be obliged to transfer his residence to his country of origin immediately when his service is terminated. In view of its underlying purpose, this rule is on the contrary to be interpreted as meaning that it will suffice that the removal takes place within a reasonable period of time following the termination of service. Whether this condition is met will depend on the circumstances of each case.

The complainant considers mistakenly that this reasonable period did not start to run until the delivery of Judgment 2354, in which the Tribunal gave a final ruling on the validity of his dismissal. According to Article VII(4) of the Statute of the Tribunal, the filing of a complaint shall not involve suspension of the execution of the decision impugned. The filing of his third complaint did not therefore obviate the need for the complainant to take the necessary steps to settle in his country of origin if he wished to take advantage of the provisions of Rule 18.4(ij). It may be assumed both from his note of 30 January 2002 and from his statement regarding the steps he has taken to change residence that he was in no doubt as to his obligation to move.

The complainant left the Organization on 30 March 2002. Thus, by 26 August 2004, almost two and a half years had passed and he had still not transferred his residence to the country of which he is a national. Yet that is what he implied he would do in his note of 30 January 2002 by requesting that the scale applicable to France be used to calculate his terminal allowance. While the difficulties he may have faced in seeking to transfer his residence should not be underestimated, it must be recognised that the facts to which he refers do not explain why it took him so long to move. Failing any special circumstances, such a long delay cannot be equated with the reasonable period of time which an official has for transferring his residence to the country of which he is a national, in accordance with Rule 18.4(ij). The conclusion is that the main requirement of that provision has not been met by the complainant and he was therefore not entitled to part of the terminal allowance he received in February and March

2002.

7. The complainant nevertheless contends that as from 26 August 2004 the defendant was no longer entitled to recover the amount overpaid.

(a) According to a general principle of law, whoever has paid a sum mistakenly is entitled to recover it within a reasonable time provided the person can prove that the sum was paid in the mistaken belief that it was owed (see Judgments 497, under 6, and 1195, under 3). It is this principle which is enshrined in particular in Regulation 20 of the Staff Regulations, which stipulates essentially that any sum paid in error to an official shall be recovered from subsequent monthly pay and that, if the amount is substantial, the Secretary General may authorise recovery by instalments.

(b) It is clear that it was by mistake that the Organization applied the scale applicable to France when it paid the terminal allowance in February and March 2002. On receiving the note sent by the complainant on 30 January 2002, it was justified in believing that he would transfer his residence to France within a reasonable period, which, as we have seen, did not occur.

(c) A claim for recovery of undue payment is not imprescriptible and must be brought in reasonable time (see Judgment 53, under 4). The complainant considers that the defendant has failed to recover the amount overpaid within such a timescale.

The decision to recover the undue payment was taken more than two years after the excess amount had been paid. The complainant does not cite any provision of the Staff Regulations and Rules whereby the recovery of undue payment is subject to a prescription period as short as that upon which he appears to rely. In the absence of any such provision, it would be excessively strict to consider that the right to recover the undue payment had been extinguished by prescription by 26 August 2004. That could not be so unless it were shown by the submissions that, throughout the procedure which ended only on that date, the defendant had given the impression either that it was not interested in recovering the undue payment or that it had waived its right to claim reimbursement. It must therefore be concluded that the claim was not extinguished by prescription at the time the defendant informed the complainant of its decision to recover the amount overpaid by offsetting it against the sum it owed him.

His plea therefore fails.

8. The complainant lastly contends that he is the victim of misuse of authority on the grounds that the decision of 26 August 2004 was intended not to recover an undue payment but to cause him harm. According to him, the defendant did not treat other former officials in the same way, since despite being in the same situation as he was they were supposedly not asked to refund the amounts overpaid to them.

The first of these accusations is pure speculation, since there is no evidence in the file to support it. The second accusation, on the other hand, is not relevant and the Tribunal is not at all convinced by the statement of 8 April 2005 produced by the complainant as an annex to his rejoinder of 10 November 2005 in his fifth complaint. The complainant cannot rely on the fact that the defendant may have decided not to require that some of his former colleagues reimburse sums it had unduly paid to them. This is because no right to equal treatment can arise where the treatment in question is unlawful (see Judgments 1366, under 10; and 1080, under 10).

The plea of alleged misuse of authority must therefore fail.

9. The claims for the quashing of the decision of 26 August 2004 and, if necessary, that of 11 January 2005 must therefore be dismissed. The same applies to the claims for compensation for the moral injury allegedly suffered by the complainant as a result of the unlawfulness of those decisions.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 17 May 2006, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 21 July 2006.