**EIGHTY-SEVENTH SESSION**

# *In re* Gera

## Judgment 1849

The Administrative Tribunal,

Considering the complaint filed by Mr Om Parkash Gera against the World Health Organization (WHO) on 13 April 1998 and corrected on 28 April the WHO's reply of 6 August, the complainant's rejoinder of 24 August and the Organization's surrejoinder of 26 November 1998;

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

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, an Indian national who was born in 1938, joined the staff of the WHO on 26 March 1980 in the Regional Office for South-East Asia (SEARO) in New Delhi as a clerk/typist. When he retired on 31 March 1998, he had reached grade ND.5.

On 26 July 1992, the complainant was seconded to the United Nations Interim Force in Lebanon (UNIFIL). His contract, which was initially for a period of one year, was extended on several occasions and his assignment came to an end on 22 July 1996.

By a fax letter of 10 May 1993, SEARO's Budget and Finance Officer informed the chief of the Field Personnel Section of UNIFIL in New York of the amount of the salary to be paid to the complainant. By a letter of 22 August 1994 the Finance Section of UNIFIL informed the complainant that it had verified and approved the amount in question for the period from 25 July 1992 to 30 June 1994. Throughout the complainant's secondment his remuneration was advanced by the WHO and then reimbursed to the WHO by the United Nations.

At the end of his secondment the complainant requested the payment of the allowances owed to him amounting to a total of 4,857.91 United States dollars. By a memorandum of 30 September 1996, the Administration of SEARO informed him that, due to a miscalculation of his post adjustment, his salary had been overpaid during his assignment. The overpayment, calculated to be $11,912.11, had to be reimbursed to the WHO. The Administration informed him that the amount of $4,857.91 referred to above would be used for the reimbursement of part of the overpayment and left to the complainant the choice of methods for the settlement of the remaining part. Negotiations did not produce a solution. By a memorandum of 4 February 1997, the Administration confirmed that his allowances would be used for the partial reimbursement of the overpayment and added that, as from February 1997, $100 would be deducted from his net salary every month until the day of his retirement. The balance ($5,654.20) would have to be paid at the end of his contract.

On 10 March 1997, the complainant filed two requests. In the first, addressed to the Regional Director of SEARO, he asked that the overpayment not be recovered. In the second, addressed to the Budget and Finance Officer, he reiterated this request and explained that Staff Rule 380.5 did not authorise deductions from from salaries for the reimbursement of an overpayment, which did not constitute indebtedness to the Organization. The Administration replied by a memorandum dated 26 March that its position remained unchanged. Having considered the case, the regional Board of Appeal issued its report on 22 August. It considered that Staff Rule 380.5.2, which allows for a deduction from salary" for indebtedness to the Organization", had been wrongly applied and recommended that the Administration should strictly apply the established rules and procedures for the recovery of an overpayment.

By a letter of 1 October 1997, the Regional Director considered that Staff Rule 380.5.2 had been correctly applied and that an overpayment represented a debt to the WHO. He also affirmed that the deduction of $100 a month was "just and equitable" for both parties, but stated that he would not require the repayment of the remaining amount of the overpayment. The complainant lodged an appeal against this decision with the headquarters Board of Appeal. This latter Board issued its report on 23 February 1998, in which it confirmed the principle of the reimbursement of an overpayment. However, it recognised that in the present case full repayment would cause undue hardship to the

appellant and recommended that the decision of the Regional Director of 1 October 1997 be maintained. In a letter of 27 March 1998, which is the impugned decision, the Director-General accepted this recommendation.

B. The complainant denies being overpaid as the emoluments paid to him were certified as correct and accepted by both UNIFIL and the WHO. Furthermore, the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances (hereinafter called Inter-Organization Agreement) provides that the seconded staff member shall be subject to the Staff Regulations and Rules of the receiving organisation. He says that without the explicit authorisation of the United Nations, the WHO had no authority to effect recovery. Having been fully reimbursed by the United Nations, the WHO had no grounds for requesting reimbursement from him.

The complainant contends that the monthly deductions decided upon by the Administration under Staff Rule 380.5.2 are illegal. He submits that the overpayment cannot be considered a debt owed to the WHO, that this practice is contrary to the principles laid down in Judgment 53 (*in re* Wakley) of the Tribunal and that no rule allowed the Administration to withhold the allowances to which he was entitled or the $122.66 which it owed to him in respect of his within-grade increase.

The complainant contends that by withholding the allowances due to him without consulting the Director-General the WHO did not respect Financial Rule 106.4.

Referring to the case law of the Tribunal, the complainant submits that he received his pay and allowances in good faith, that the negligence based on the "miscalculation" was entirely on the part of the Administrations of the WHO and the United Nations and that the reimbursement of this overpayment would cause him acute hardship, for which reasons he says the WHO should waive the reimbursement of the overpayment.

Finally, he contends that he has already spent the money and that he cannot be requested to reimburse it.

The complainant asks the Tribunal to quash the Regional Director's decision of 1 October 1997 and the Director-General's decision of 27 March 1998; to order that the deductions of $100 a month made between February 1997 and March 1998 be refunded to him; to order the Administration to pay him the sums of $4,857.91 and $122.66 withheld from him with interest at 18 per cent per annum from the date on which such amounts became payable up to the date of payment; and to order the WHO to pay $50,000 for moral injury and $2,500 in costs.

C. In its reply, the Organization recognises that it is jointly responsible with the United Nations for a miscalculation, but submits that an overpayment constitutes a debt which must be repaid to the Organization.

Citing the Inter-Organization Agreement, it contends that a seconded staff member, even if he is subject to the staff regulations and rules of the receiving organisation, still remains a member of the staff of the releasing organisation. In the material case, the WHO was responsible for the payment of the complainant's salary and other emoluments. It is therefore entitled to reclaim the reimbursement of the overpayment. It adds that it had a "fiduciary duty" vis-à-vis the United Nations in that it remained responsible for the accuracy of the charges born by the latter. Since the discovery of the overpayment was made after the complainant had returned to SEARO, only the WHO could undertake recovery.

Basing itself on the case law of the Tribunal, the WHO submits that its decision to claim the reimbursement of the overpayment is within its discretionary power. Since the complainant had a debt towards the Organization it correctly relied on Staff Rule 380.5.2 and claimed reimbursement of it. The reference made by the complainant to Judgment 53 is not pertinent, as that Judgment was pronounced in 1961 and Rule 380.5.2 has been introduced since. Based on the reports of the two Boards of Appeal, it submits that Financial Rule 106.4 is not applicable to the case. It justifies its decision to withhold the complainant's allowances by the fact that he had refused during the negotiations to reimburse the overpayment.

D. In his rejoinder, the complainant contends that the WHO has no discretionary authority in this matter. He emphasises the contradictory stand adopted by the WHO, which first says it has to recover payment from him because of its "fiduciary duty" towards the United Nations and then says it has the discretionary power to waive recovery of part of the sum.

He submits that the WHO "ignored" the conclusions of the Boards of Appeal. He rejects its interpretation of the Inter-Organization Agreement. He says that the United Nations had to check all the payments made by the WHO

on its behalf and, conversely, endorse any reimbursement. He considers that the WHO took the initiative of making recoveries in order to hide its carelessness from the United Nations.

He points out that the WHO is silent on the issue of withholding the $122.66.

E. In its surrejoinder, the WHO observes that the Boards of Appeal both recognised that the complainant had to reimburse the overpayment and that it had full authority to recover the amounts in question. It denies that it contradicted itself and says that its fiduciary duty vis-à-vis the United Nations was distinct from its discretionary authority vis-à-vis its staff members. It contests the receivability of the claim concerning the withholding of the $122.66 on the grounds that all the internal means of resisting the decision were not exhausted.

## CONSIDERATIONS

1. The complainant was a staff member of the WHO's Regional Office for South-East Asia (SEARO) from March 1980 until his retirement on reaching the age of 60 in March 1998.

2. He was seconded to the United Nations Interim Force in Lebanon (UNIFIL) from July 1992 to July 1996. His salary and allowances (post adjustment, mobility and hardship) were calculated, authorised and paid by SEARO's Budget and Finance Officer, verified later by the United Nations and reimbursed by the latter to the WHO.

3. However it transpires that, according to the Organization the complainant's post adjustment had been wrongly calculated by the Budget and Finance Officer which resulted in an overpayment of 11,912.11 United States dollars over the period of four years. This was not discovered until the complainant had returned to work at SEARO.

4. He was invited to discuss a repayment plan and when negotiations proved unsuccessful the Organization notified the complainant on 4 February 1997 of its intention to retain an amount due to him of $4,857.91 for assignment grant and travel expenses to offset part of the debt and to deduct $100 per month from his net salary until he retired on 31 March 1998 when he would pay the balance of $5,654.20 as a lump sum.

5. When the Regional Director failed to respond to his request that there should be no recovery of monies, the complainant appealed to the regional Board of Appeal which agreed that the overpayment should be recovered. On 22 August 1997 it recommended that in recovering the "overpayment" the Administration should follow established rules and procedures and that the claim for moral and material injury and legal expenses had no basis. The Regional Director proposed on 1 October 1997 that the reimbursement arrangement should continue until retirement but the complainant would not be required to repay the remaining amount of the overpayment.

6. The complainant appealed to the headquarters Board of Appeal which agreed in its report of 23 February 1998, with the exception of one member, that as a matter of principle an overpayment should always be reimbursed. The dissenting member held the view that each case should be considered on its merits. They agreed that the decision to withhold the sum of $4,857.91 was arbitrary and that sum should not have been retained. The Board considered that paying $100 per month until retirement was reasonable and recommended that the solution proposed by the Regional Director of SEARO be maintained and rejected his other claims for redress. The Director-General accepted those recommendations in his decision of 27 March 1998. That is the decision impugned.

7. The relief claimed by the complainant is for the quashing of the decision of 27 March 1998, the return of the deductions from salary, the payment of $4,857.91 and $122.66 withheld by the Administration with interest at 18 per cent per annum, $50,000 for moral injury and $2,500 towards legal costs.

8. The complainant argues that there was abuse of authority and the decision to withhold payments was unauthorised in that, as stated in Annex A of WHO Manual section II.5, when he was on secondment he was subject to the staff regulations and rules of the receiving organisation. Any payment has to be reckoned and certified by the United Nations in New York. Therefore recovery of an overpayment has to be governed by the regulations and rules of the United Nations not the WHO. The statement was sent month by month to the Chief of the Field Personnel Section of the United Nations without any objection being raised and was accepted by that Organization. The complainant received the payments in good faith. SEARO was making payments on behalf of the United Nations and had no authority without express sanction from the latter to recover any overpayment. The entire amount was reimbursed to SEARO by the United Nations and SEARO has no *locus standi*, especially as the amounts were certified correct by the United Nations.

9. The complainant further argues that there was a mistake of law in that the deductions were ordered under Staff Rule 380.5 which states that salaries are subject to deductions only in certain cases, one of which, under 380.5.2, is: "for indebtedness to the Organization" and payment by mistake does not create a debt.

10. The complainant also alleges a procedural flaw in that before withholding the sum of $4,857.91 SEARO's Budget and Finance Officer failed to refer the matter to the Director-General as stipulated in Financial Rule 106.4:

"Should Budget and Finance feel there is any reason why payment of any claim should be withheld, such claims shall be referred to the Director-General."

An assignment grant comprises a daily subsistence allowance and a lump-sum payment to facilitate setting up house and the costs of relocating. It is by its very nature an ad hoc allowance and non-payment is bound to cause hardship. The reassignment travel claim is for reimbursement of expenses already incurred. There is no rule which allows the withholding of an assignment grant or reassignment travel claim.

11. An additional amount of $122.66, payable to the complainant for arrears of within-grade salary increment was withheld without any authority.

12. The complainant alleges that the Organization failed to take essential facts into account. There was agreement that he received the payments in good faith and the overpayments were due to the negligence of the Administration in both the WHO and the United Nations. He says his net monthly salary during his secondment in June 1996 was $4,977.55. On return to SEARO in August 1996 it was $633.50. After deduction of $100 in February 1997 it was $533.50. It should have been clear that acute hardship would be caused and that all factors favoured complete waiver.

13. The complainant says he cannot be required to pay if he is no longer in possession of the sum overpaid. He received pay and allowances in good faith over four years. He spent the money available to him on his household and on the marriages of his two sons and two daughters during his secondment.

14. The Organization argues that a staff member is entitled only to emoluments and benefits payable under the rules. The receipt of any sums not due constitutes unjust enrichment and a debt on the part of the recipient. The general principle of law whereby the payer is entitled to recover from the payee sums paid erroneously is applicable to the present case: see Judgments 53 (*in re* Wakley), 497 (*in re* Anderson) and 1195 (*in re* Najia Zayed).

15. The WHO maintains that it has authority to recover the debt. The complainant remained a staff member and SEARO remained responsible for the regularity of the payments. Therefore SEARO was not divested of the authority to recover the overpayments. The Organization continued to have a *locus standi* since it has a "fiduciary duty" to the United Nations and is responsible for the accuracy of the charges invoiced to it and consequently the reimbursement of money charged in error.

16. The Organization claims that the decision of the Director-General was a reasonable exercise of discretionary authority which is subject to limited review by the Tribunal. Judgment 1111 (*in re* Durand), which is a case involving overpayment, sets out that the factors to be taken into account: the staff member's good or bad faith; the sort of mistake made; the organisation's or the staff member's negligence; and the inconvenience to which the staff member would be put because of the organisation's own oversight. The Organization claims it fully respected the applicable rules in deducting $100 each month and offsetting the complainant's credit for $4,857.91 for the assignment grant and reassignment travel. It claims that the salary deduction was made under Staff Rule 380.5.2 for indebtedness to the Organization and it deducted a reasonable amount.

17. Concerning the complainant's credit of $4,857.91, the WHO submits that Financial Rule 106.4 does not apply here. That rule is relevant only to cases where the Budget and Finance Division is not going to settle a claim because of some irregularity. There was no irregularity in the complainant's claim here. It had been correctly approved and the corresponding amount appropriated and held to his credit. The Organization claims that the Administration was justified in using the complainant's credit to offset part of the overpayment: it acted reasonably in so doing and in making a modest deduction from his salary. The retention of the within-grade salary increment was first raised before the headquarters Board of Appeal and therefore the complainant did not exhaust the internal means of redress.

18. The Tribunal considers that, in accordance with its jurisprudence, if an official receives an overpayment by mistake it should be reimbursed. Nevertheless, the Organization should take into account any circumstances which would make it unfair or unjust to require repayment. In this case the payment of the complainant's monthly salary and allowances was made by SEARO on behalf of the United Nations which reimbursed it in full. SEARO is therefore owed no money. The WHO claims it did not sever all connection with the complainant while he was on secondment as he retained his right of employment in the Organization, which is true. But this does not make the overpayment a debt due to the Organization. It argues that it was responsible for recovering the overpayment. This might have been true if the Organization had not been paid in full by the United Nations. It claims *locus standi* by virtue of its fiduciary relationship with the United Nations, claiming it was accountable for the accuracy of the amounts charged to it and the reimbursement of money paid in error. While the Organization was responsible for the correctness of the calculations, it should be noted that they were certified as accurate by the United Nations. Also, while the WHO would be responsible for reimbursing any money it recovered as part of an overpayment to the United Nations, it is not clear whether there is an obligation for reimbursement where no money has been recovered. However, the Tribunal considers that the Organization's authority to demand repayment of money in the absence of any express authority from the United Nations, which is the actual creditor, is not established. As the complainant points out, the WHO's claim to be acting in a fiduciary position vis-à-vis the United Nations is contradicted by its decision to forgo almost 50 per cent of the overpayment.

19. In the Tribunal's opinion there is no indebtedness by the complainant to the Organization. It was responsible for making payments on behalf of the United Nations, but has been fully reimbursed. The Organization therefore, was not entitled to withhold the grants due or make deductions from salary under Rule 380.5.2 since the complainant was not indebted to it.

20. As the complainant is entitled to succeed on these grounds, there is no necessity to consider the interpretation of Financial Rule 106.4 or whether all the essential facts were taken into account by the Director-General when making his discretionary decision.

21. With regard to the withholding of the arrears of the salary increment of $122.66, this claim was not made until the matter was dealt with by the headquarters Board of Appeal. Accordingly, the complainant failed to exhaust the internal means of redress and this part of the claim is therefore irreceivable.

22. The complainant is entitled to have the decision of 27 March 1998 quashed and to have an order for payment of the grants amounting to $4,857.91 and the $100 per month retained by the Organization.

23. While he claims interest at 18 per cent per annum, the Tribunal will only grant 8 per cent from the date payment was due from the Organization to date of payment. The Tribunal refuses the complainant's claim for moral damages as he has benefited by the overpayment.

24. The complainant is entitled to a sum for costs which the Tribunal sets at $2,000.

DECISION

For the above reasons,

1. The decision of 27 March 1998 is quashed.

2. The Organization shall pay the sum of $4,857.91 and the $100 per month retained by the Organization.

3. The Organization shall pay interest at 8 per cent per annum on the said sum of $4,857.91 and the sum of $100 per month from the date payment was due by the Organization to the date of payment.

4. The Organization shall pay the sum of $2,000 in costs.

5. His other claims are dismissed.

In witness of this judgment, adopted on 7 May 1999, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Michel Gentot
Mella Carroll
James K. Hugessen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 7 July 2000.