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

NINETY-NINTH SESSION

Judgment No. 2449

The Administrative Tribunal,

Considering the complaint filed by Ms J.C. against the International Labour Organization (ILO) on 17 June 2004 and corrected on 18 August, the ILO's reply of 1 November 2004, the complainant's rejoinder of 3 January 2005 and the Organization's surrejoinder of 28 February 2005;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

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

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

A. The complainant, an American citizen born in 1958, joined the International Labour Office – the ILO's secretariat – on 1 October 2001 under a two-year fixed-term contract as Ombudsperson at grade D.1. Her appointment, the duration of which is limited by the Staff Regulations of the Office to four years, has been renewed and is due to expire on 30 September 2005. At the time when she took up her functions, she informed the Human Resources Development Department (HRD) that she was single with two daughters. The Office grants her dependency benefits in respect of the latter.

On 30 May 2003 the complainant entered into a civil union with her same-sex partner in the State of Vermont (United States). She notified the Human Resources Operations and Development Branch (HR/OPS) of the change in her family status by a minute of 12 June 2003, enclosing a "Family status report and application for dependency benefits" form in which she designated her partner, Ms T., as her "spouse". Although she received no formal reply at that time, the complainant was informed orally by HRD officials that her civil union would not enable her partner to be considered as a "dependent spouse", since it was not a marriage within the meaning of the Staff Regulations of the ILO.

On 5 August 2003 the complainant and her partner were married in Vancouver (Canada), in the province of British Columbia. On 22 August the complainant sent HR/OPS an "addendum" to her family status report and application for dependency benefits, referring to her minute of 12 June and enclosing evidence of her marriage.

On 2 October 2003 the complainant's partner was admitted to hospital following the diagnosis of a cancerous brain tumour. Since she had no health insurance coverage, and since she was not eligible for health insurance coverage under the Staff Health Insurance Fund (SHIF) because she was not recognised by the Organization as a dependent spouse within the meaning of the Staff Regulations, the hospital required an immediate deposit of 25,000 Swiss francs. The Office agreed to advance the complainant an amount equal to three months' salary to enable her to pay the deposit.

In an e-mail sent to HRD on 6 October 2003, the complainant explained her partner's situation and stated that, in the absence of any response to her application for dependency benefits, she claimed SHIF medical coverage for her partner. The Chief of the Human Resources Policy and Administration Branch, who was also acting Executive Secretary of SHIF, replied on 8 October that although "HRD colleagues [were] examining this issue with the utmost care", her partner was not insured by SHIF.

Having been informed by the hospital that either a commitment to cover the cost of her partner's ongoing treatment or a substantial deposit was required, on 16 November 2003 the complainant sent an e-mail to the Chairman of the Staff Union and to the Director of the Office of the Director-General, asking them to expedite the processing of her claim for medical coverage. She then submitted a request for financial assistance from the Office by a minute of 20 November addressed to the Director of HRD. Noting that the amount already advanced by the Office to cover the initial deposit had been provided as a loan "on the understanding that a more sustainable solution was being sought", she asked how the Office intended to treat that amount as well as any further amounts provided in

response to her new request. She also enquired “how continuing care for [her] spouse [would] be handled by the Office”.

The Director of HRD replied by a letter of 27 November 2003. Before addressing the issue of the complainant’s request for financial assistance, he pointed out that, pursuant to the “longstanding practice in UN common system organizations that matters of family status are determined according to the law of the staff member’s nationality”, the Office was not in a position to recognise Ms T. as her legal spouse or domestic partner, because neither her British Columbia marriage nor her Vermont civil union were recognised under US federal law. With regard to her partner’s health insurance, the Director asserted that the Office was not responsible for continuing medical care for Ms T., who was not affiliated with SHIF. He noted in this connection that the Office had never offered her health coverage for her partner, and that it considered that she had been under no misapprehension as to the fact that, although the Office was studying the issue of recognition of same-sex marriages and domestic partners, the matter was still under consideration. However, he informed her that after consultation with the Officers of the Governing Body the Director-General had approved an *ex gratia* payment of 75,000 United States dollars, “solely for humanitarian reasons”, but that this was not intended to set a precedent. This amount was to be made available to the complainant via the Staff Union Assistance Fund.

Also on 27 November 2003, the complainant applied for voluntary coverage under SHIF for her partner. The acting Executive Secretary of SHIF replied, in a letter of 15 December 2003, that her partner was not eligible for voluntary coverage. He explained that SHIF’s Standing Subcommittee, which had examined her application, was unwilling to diverge from the ILO’s conclusion that her partner was not a spouse within the meaning of the Staff Regulations.

By a letter of 8 March 2004 to the Director of HRD, copied to the Director-General, the complainant requested a final administrative decision on the issue of whether the Office would acknowledge her partner as her spouse for the purpose of dependency benefits. Referring to Judgments 1715 and 2193, she asserted that the Tribunal had “moved beyond the test of family status [...] which discriminates on the basis of nationality”, and that her application for dependency benefits was well founded in law. If the Office felt that the matter required further consideration, she asked that her partner be recognised as her spouse on humanitarian grounds. She also sought permission to appeal directly to the Tribunal in the event of a negative or postponed decision on her application.

The Director of HRD replied, in a letter of 18 March 2004 which constitutes the impugned decision, that the Office had provided her with a final administrative decision on both her application for dependency benefits and the issue of her partner’s medical coverage in its letter of 27 November 2003. He added that whilst the Office had not granted her request for dependency benefits, it had responded favourably to her request for financial assistance. Having recalled the content of the letter of 27 November, he informed her that the Office had no objection to her appealing directly to the Tribunal.

B. The complainant contends that the final decision on her request for recognition of her spouse was conveyed to her in the letter of 18 March 2004. She reasonably understood the letter of 27 November 2003 as indicating that the matter was still “under consideration”. Indeed, at that time the Organization was pursuing its efforts not only to resolve the policy issue, but also to find a permanent solution to her personal case. She cites Judgment 2066, in which the Tribunal held that where an organisation hints that it may reconsider a decision affecting a staff member, it cannot reasonably expect the latter to challenge that decision.

According to the complainant, the issue of recognition of her partner as her spouse should be determined by reference to the criteria defined by the Tribunal in Judgments 1715 and 2193. She argues that in the absence of any definition of the term “spouse” in the Staff Regulations, the Tribunal should refer not to national law, but to the local laws governing her civil union and marriage, respectively, in order to ascertain whether she and her partner have the status of spouses. In her view, both her civil union and her marriage satisfy the criteria established by the cited case law.

Regarding the “longstanding practice” relied on by the defendant, the complainant points out that according to the case law an organisation’s pattern of conduct must be both consistent and lawful in order to give rise to a practice. She asserts that there is no written rule or policy reflecting the ILO’s alleged practice, and that the Organization does not systematically verify the validity of a claimed dependency relationship by reference to the law of the country of the staff member’s nationality. For marriages between partners of opposite sex, requests for recognition of a spouse are processed promptly and all “official-seeming” marriage certificates are accepted by HRD at face

value. By contrast, for partnerships or marriages between partners of the same sex, requests for recognition of a spouse are systematically referred for "a higher degree of scrutiny", causing unreasonable administrative delay, and are treated inconsistently by the Office. The complainant concludes that the way in which the Office deals with the recognition of same-sex partnerships and marriages is too inconsistent to constitute a practice, and that it is also unlawful, in that it amounts to differentiated treatment on the basis of irrelevant personal characteristics, namely sexual orientation and nationality.

Lastly, the complainant contends that the Organization incorrectly applied national law in determining whether to recognise the legal effects of her civil union and marriage. She submits that according to the case law, national law is applied by the Tribunal only if it is expressly or implicitly referred to in the organisation's rules or in the staff member's terms of appointment, or if there is an agreement on the point at issue between the organisation and the government of the State concerned. None of these conditions is met in the present case. Even if national law were applicable, she argues, the Tribunal should give it a non-discriminatory reading, or should not apply it on the grounds that it offends against fundamental principles of law by discriminating between staff members on the basis of irrelevant personal characteristics.

The complainant asks the Tribunal to order the Organization to recognise her partner as her "dependent spouse" for the purpose of granting dependency benefits, "including automatic health care coverage under SHIF, from 1 June 2003". She claims material damages in respect of the losses she has suffered as a result of the Organization's refusal to recognise her partner as a dependent spouse, a symbolic award of one dollar in moral damages, and costs.

C. In its reply the Organization submits that the complaint is time-barred. It argues that, since the Office did not take an express final decision within sixty days of the complainant's initial request of 12 June 2003, or indeed within sixty days of the amendment of that request on 22 August 2003, the complainant ought to have challenged the implied rejection of either the initial request or the amended request within the ninety-day time limit provided for in Article VII(3) of the Statute of the Tribunal. However, she failed to do so. Furthermore, the request for recognition of her partner as her spouse was explicitly rejected in the letter of 27 November 2003, which she likewise failed to challenge within the applicable time limit. The letter of 18 March 2004, sent in reply to her letter of 8 March, added nothing to the decision of 27 November 2003; it constituted a new decision only with regard to the procedural issue of allowing her to appeal directly to the Tribunal.

On the merits, the Organization submits that the practice whereby it determines the personal status of staff members by reference to the law of their nationality is followed by other United Nations (UN) organisations and is consistent with international administrative law. It considers that the status of spouse can only stem from a "registered or proved marriage". A civil union does not confer on the partners the same rights and privileges as a marriage, regardless of whether they are of the same or opposite sex. As for the complainant's marriage, it has no effect in the USA, where the Defense of Marriage Act 1996 provides that, for the purposes of any benefit under United States federal law, the word "marriage" means only a legal union between one man and one woman. The Organization emphasises that it is federal law, and not state law, that applies in this case. Consequently, the complainant's claim for recognition of her partner as a dependent spouse fails on the basis that the law of the State of Vermont cannot have the desired effect outside the boundaries of that state.

The Organization also considers that its practice in this domain is sound and consistent. Since it has no authority to determine the civil status of its officials, it recognises unions only if they are considered as marriages under the laws of the country of the official's nationality. Similarly, since 1 March 2004, it has recognised marriages between persons of the same sex provided that they are recognised by the country of the official's nationality.

The defendant denies that its practice is discriminatory. It submits that the principle of equality requires that persons in like situations be treated alike and that persons in substantially different situations be treated differently. It considers that the complainant is in the same position as unmarried individuals of opposite sex whose unions are not considered as marriages under the law of their home country. It has not discriminated against her on the grounds of her sexual orientation, since unmarried couples of opposite sex are treated in the same way as unmarried couples of the same sex.

With regard to the relief claimed by the complainant, the Organization recalls that the fact that her partner had no health insurance coverage was due to an error on the part of Ms T. and the complainant, as acknowledged by the latter in a letter to HRD. It points out that the financial assistance provided by the Office in the amount of 75,000

dollars was equal to the coverage that would have been provided by SHIF. It considers that there is no evidence to support her claim for moral damages, the Office having taken special care to address the particular circumstances of her case.

D. In her rejoinder the complainant argues at length in favour of the receivability of her complaint. Referring to Judgment 978, she submits that even if the letter of 27 November 2003 is considered to constitute the final decision on her request, she was entitled to bring a claim for ongoing discriminatory treatment at any time. In this connection she emphasises that she never waived her claims.

Regarding the issue of equal treatment, she asserts that her situation has been the same or similar to that of any other married official since the date of her civil union. She also points out that under US law, matters of civil status are governed by the law of the person's domicile, which is the law of one of the states. Therefore, if the Organization cannot interpret the federal Defense of Marriage Act in a non-discriminatory manner, it can nevertheless apply the non-discriminatory law of her domicile, Massachusetts. She notes that, in a judgment delivered in November 2003, the Supreme Judicial Court of Massachusetts held that same-sex individuals have a right to marry under the Massachusetts Constitution.

E. In its surrejoinder the Organization maintains its objection to receivability. Rejecting the argument that the complainant was entitled to bring a claim for ongoing discriminatory treatment at any time, it reiterates that she was treated in the same manner as any other staff member whose marriage is not recognised by their country of nationality.

Regarding the application of the law of her domicile, it submits that according to her personal file she has always been domiciled in Alaska, but that in any case it is national law which must be taken into consideration. It considers that, given its status as an international organisation and the composition of its staff, its reliance on the law of the staff member's nationality – a practice derived from the policy of the Consultative Committee on Administrative Questions – is appropriate and reflects the reality that there is no common understanding among the ILO's Member States as to the meaning of the word "spouse".

CONSIDERATIONS

1. The complainant is an American citizen who was recruited to serve as the Office's Ombudsperson at grade D.1 under a two-year fixed-term contract beginning on 1 October 2001, which was extended until 30 September 2005. After having entered into a "civil union" with her same-sex partner, Ms T., on 30 May 2003 in the State of Vermont (United States), she informed the Office's Human Resources Operations and Development Branch (HR/OPS) on 12 June of what she considered to be a change in her family status and applied, in respect of her partner, for certain benefits to which dependants are entitled under the Staff Regulations and the Regulations of the Staff Health Insurance Fund (SHIF). She received no written reply to this application, but was informed orally that such benefits could not be granted in the case of a civil union, which was not a marriage. Having later ascertained that Canadian law now recognised marriage between persons of the same sex, the two partners married in Vancouver on 5 August 2003 under the law of the Province of British Columbia. The complainant then sent an "addendum" to her family status report and application for dependency benefits on 22 August 2003.

2. Her partner having been admitted to hospital on 2 October 2003 suffering from a serious illness, the complainant informed HRD accordingly on 6 October and requested that the medical expenses be covered by SHIF. On 20 November 2003, following several inconclusive exchanges of correspondence, the complainant sent a minute to the Director of HRD in which, after pointing out that she had been informed that the issue of health insurance for same-sex married couples was still under consideration, she asked for financial assistance from the Office to cover the medical expenses incurred by her spouse since 24 September 2003 as well as the latter's continuing medical expenses. In closing, she expressed the hope that the issue of principle of providing dependency benefits to same-sex couples would be resolved positively by the Office.

3. In reply to the minute of 20 November 2003, the Director of HRD sent the complainant a letter dated 27 November 2003 comprising two parts. Firstly, he pointed out that, as she was aware, the Office followed the practice of the organisations belonging to the United Nations common system whereby matters of family status are determined according to the law of the staff member's nationality. The Office had at no time offered her any health coverage for Ms T. and it considered that the complainant had been under no misapprehension as to the fact that,

although the Office was studying the issue of recognition of same-sex marriages and domestic partnerships, the matter was still under consideration. Secondly, the Director added that, notwithstanding those considerations, the Director-General had approved an *ex gratia* payment of 75,000 United States dollars, to be effected via the Staff Union Assistance Fund, such payment being made "for humanitarian reasons" as a one-time offer which was not to be considered as setting a precedent.

4. In a letter of 8 March 2004 to the Director of HRD, the complainant again raised the issue of dependency benefits and, in particular, the problem of medical coverage for her partner, who, in her view, had been her "spouse" in all respects for 12 years. After expressing her gratitude to the Office for the measures it had taken, she emphasised that discrimination, whether on the basis of nationality or sexual orientation, had no place in the ILO and that the Tribunal's case law, as it emerged from Judgments 1715 and 2193 in particular, enabled both her civil union and her marriage to be considered valid. She concluded by asking that her letter be considered as a request for a final administrative decision on the issue of whether the Office would acknowledge Ms T. as her spouse for the purpose of applying the statutory provisions governing dependency benefits. She also sought permission to appeal directly to the Tribunal, without first lodging an appeal with the Joint Panel, in the event of a negative decision.

5. By a letter of 18 March 2004 the Director of HRD informed the complainant that an unequivocal reply to her request had already been given in the letter of 27 November 2003, which represented the Office's final administrative decision, and that the Office had no objection to her appealing directly to the Tribunal without exhausting the internal remedies.

6. The complainant challenges the decision contained in the letter of 18 March 2004, and asks the Tribunal to order the defendant to recognise her partner as a "dependent spouse" for the purpose of granting dependency benefits, including health insurance coverage, as from 1 June 2003. She asks the Tribunal to order the Organization to pay her compensation for material damages as well as one United States dollar for moral injury. She also claims costs.

7. The defendant objects to the receivability of the complaint on the grounds that the implied decisions rejecting the complainant's applications of 12 June and 22 August 2003 have become final, since they were not challenged within the applicable time limits. It submits that the letter of 18 March 2004 merely confirms the decision contained in the letter of 27 November 2003, which was likewise not challenged in due time.

8. The exchanges of correspondence – both official and unofficial – which occurred following the submission of the applications for dependency benefits in June and August 2003 show that the complainant could then have considered that those applications were being examined at the highest level of the Organization and that no final decision had been taken. However, the Tribunal is bound to observe that the letter of 27 November 2003 from the Director of HRD expressly rejected the request for coverage of medical expenses incurred, which the complainant had made on 20 November 2003. He indicated, as the reason for that decision, that the Office could not recognise Ms T. as her legal spouse or domestic partner because it followed the practice of the United Nations common system whereby matters of family status are determined by reference to the law of the staff member's nationality, which, in the complainant's case, is the federal law of the United States. The author of that letter emphasised that the Office had no responsibility for medical care for Ms T., and that it was purely on an *ex gratia* basis that the Director-General had approved the payment of 75,000 United States dollars, which was not to set any precedent. Although the letter stated that the issue of recognition of same-sex marriages and domestic partnerships was still under consideration, that statement could not be taken to mean that the decision to reject the complainant's request for health insurance coverage was provisional. It was then up to the complainant to resort to the internal appeal mechanisms within the statutory time limits or, if the Organization agreed, to file a complaint directly with the Tribunal within ninety days of the notification of the decision of 27 November 2003. She did not do so, but waited until 8 March 2004 to submit a new request for recognition of Ms T. as her spouse for the purpose of her entitlement to dependency benefits. This request contained nothing new in relation to the letter replied to on 27 November 2003, except that the complainant asked for a "final decision", which had in fact already been taken, and sought permission to appeal directly to the Tribunal, which was granted.

9. Firm precedent has it that a decision which merely confirms a final decision taken by an organisation cannot set off a new time limit for appeal (see for example Judgment 1304, delivered on 31 January 1994). The letter of 18 March 2004, which the complainant impugns, does no more than confirm, in the same terms, the decision of which she was notified in the letter of 27 November 2003, which was final. Consequently, the

defendant is correct in asserting that the complaint of 17 June 2004 was filed too late and is therefore irreceivable, it being noted that in the circumstances of the case, the complainant's argument that she never waived her claims is of no avail. Furthermore, whilst the complainant contends that she is entitled at any time to bring a claim for ongoing discriminatory treatment, she cannot on that basis challenge the final decision of 27 November 2003.

DECISION

For the above reasons,

The complaint is dismissed.

DISSENTING OPINION BY MR JUSTICE HUGESSEN AND MS JUSTICE GAUDRON

Original in English

The contention that the present complaint is time-barred raises two issues. The first is whether the letter of 27 November 2003 evidences a final decision on the complainant's request that Ms T. be recognised as her spouse for the purposes of dependent spouse benefits. The second is whether, if it does, that decision was communicated to the complainant by that letter.

The application for recognition of Ms T. as the complainant's spouse was made by a written communication dated 12 June 2003 which bore the heading "Change in Family Status and Application for Dependency Benefits". In that document, the complainant asked the ILO "to grant dependency benefits to [her] civil union partner [...] under the relevant ILO staff rules and rules of the Staff Health Insurance Fund" and concluded by saying that she "look[ed] forward to hearing from [HR/OPS] regarding [its] determination". On 22 August the complainant informed HR/OPS of her marriage to Ms T. on 5 August and stated that she "eagerly await[ed] word of the decision on [her] application".

No decision on the complainant's formal application had been taken by 4 November 2003 when, in the context of concerns as to medical expenses associated with Ms T.'s serious illness, she was informed by e-mail from a legal officer of the Human Resources Development Department that "a final decision ha[d] not been made" but that recommendations had been forwarded to the Office of the Director-General (CABINET) and "the decision now rest[ed] with them". The e-mail also contained the statement that "[a]t this time, however, [Ms T.] is not covered as your dependant under SHIF".

The letter of 27 November 2003 is, in terms, a response to a minute of 20 November from the complainant in which she explained the financial situation which had resulted from Ms T.'s illness and said:

"I have been informed by HRD that consideration of the general issue of whether the ILO will provide health coverage for legally married same-sex couples is still under consideration, and that therefore another approach needs to be found to address the issue of payment of the immediate urgent medical costs [...]."

The minute concluded:

"While I continue to hope that the issue of principle of providing dependency benefits to same-sex couples will ultimately be resolved positively by the Office, I am truly grateful for the efforts of you and your colleagues in trying to find a solution to my present urgent situation."

The letter of 27 November does not express itself to be a determination or a decision, as sought in the formal documents submitted by the complainant seeking recognition of Ms T. as her spouse. Rather, and as earlier

indicated, it expresses itself to be an answer to her request of 20 November for financial assistance which, the letter informed her, had been granted by way of an *ex gratia* payment. In a lengthy statement which sets out to refute statements made in the request of 20 November, it is stated:

"the Office is not in a position to recognize [Ms T.] as your legal spouse or domestic partner in that the federal law of the United States does not recognize either your British Columbia marriage or your Vermont civil union."

Some sentences later, it is said:

"Moreover, the Office considers that you were in fact under no misapprehension as to the fact that, although the Office is studying the issue of recognition of same-sex marriages and domestic partners, the matter is still under consideration. Therefore, in response to your query as to how continuing medical care for [Ms T.] will be handled by the Office, I am compelled to point out that the responsibility [...] does not rest upon the Office."

The words "the Office is not in a position to recognize [Ms T.] as your legal spouse or domestic partner", if they stood alone and were directed to the application made for recognition, could be construed as a polite refusal of that application. However, the words do not stand alone. They must be read in conjunction with the statement that the issue of same-sex marriages and domestic partners was still under consideration. Given that, and given that the letter of 27 November purports to deal with the issue of financial assistance and not the issue of recognition of same-sex partnerships, it must be read as indicating that no final decision had yet been taken on the application for recognition of Ms T. as the complainant's spouse.

Even if the letter of 27 November is read, as it is by the majority, as indicating that a final decision had been taken, it is clearly capable of another interpretation. At best, it is ambiguous. In this regard, it is convenient to note Judgment 2258 in which it was said:

"Communications from an organisation to a staff member must be interpreted according to the meaning that their addressee can reasonably ascribe to them. Since it owes a duty of care to its employees, an administration which intends to take a compulsory decision binding the person concerned must express its decision clearly so as to remove from its action any potentially harmful ambiguity."

As indicated above, the complainant could reasonably – and clearly did – interpret the letter of 27 November as indicating that no final decision had then been made with respect to the recognition of Ms T. as her spouse. Thus, that letter cannot be treated as the notification of a final decision. No final decision was communicated until 18 March 2004. Accordingly, in our view, the complaint is receivable.

As the question of substance presented by the complaint may fall for decision in respect of events occurring after November 2003, for example, by refusal to provide for health insurance coverage thereafter, we have refrained from expressing any opinion on the substantive question raised by the complaint.

In witness of this judgment, adopted on 5 May 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, Mr Seydou Ba, Judge, Mrs Flerida Ruth P. Romero, Judge, Ms Mary G. Gaudron, Judge, Mr Agustín Gordillo, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

James K. Hugessen

Seydou Ba

Flerida Ruth P. Romero

Mary G. Gaudron

Agustín Gordillo

Claude Rouiller

Catherine Comtet

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