

The Administrative Tribunal,

Considering the second complaint filed by Mr D.B. against the International Labour Organization (ILO) on 4 May 2005 and corrected on 13 September, the Organization's reply of 2 November 2005, the complainant's rejoinder of 7 February 2006 and the ILO's surrejoinder of 31 March 2006;

Considering Article II, paragraph 1, 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, a German national born in 1946, joined the International Labour Office – the secretariat of the ILO – in 1981 and currently holds a grade P.5 post as a Senior Technical Specialist in the Department of Sectoral Activities. By a minute dated 28 October 2002 he informed the Office's Human Resources Development Department (HRD) that he had entered into a life partnership (*Lebenspartnerschaft*) under German law with his same-sex partner on 9 July 2002. He attached his life partnership certificate and asked to be granted the dependency benefits provided for in the Staff Regulations. In January 2003 he renewed this request. Having received no reply, he wrote to the Manager of the Human Resources Operations and Development Branch to enquire whether his minute of 28 October 2002 had been received. Following a series of discussions and an exchange of correspondence with the latter, he was informed, by an e-mail of 10 February 2004, that the issue of recognition of domestic partnerships was still being examined by HRD, particularly in the light of a bulletin issued by the Secretary-General of the United Nations (UN) on 20 January 2004, but that further time was required for the Office to address the issue. In that bulletin, which was subsequently abolished and replaced by a less explicit text, the Secretary-General reaffirmed the principle that matters of personal status are determined by reference to the law of nationality of the staff member concerned, and declared that not only a marriage but also a legally recognised domestic partnership contracted by a staff member under the law of the country of his or her nationality would qualify that staff member to receive the entitlements provided for eligible family members.

On 3 September 2004 the complainant lodged a grievance seeking recognition of his partner as his spouse. The Manager of the Human Resources Operations and Development Branch replied, on 21 September, that since a common position on domestic partnerships amongst organisations of the UN common system was still evolving, the Office considered that it was not appropriate to bring the issue before its Governing Body at that time. Meanwhile, it had only been able to recognise same-sex marriages "where the national legislation define[d] same-sex marriage as a spousal relationship". He authorised the complainant to appeal directly to the Tribunal without first having to exhaust internal remedies.

The complainant chose to lodge an appeal with the Joint Panel. In addition to dependency benefits, he claimed compensation in respect of the health insurance, life insurance and social security contributions he had had to make on behalf of his partner who, not being recognised by the ILO as a spouse, could not be covered by the Staff Health Insurance Fund (SHIF) or the UN Joint Staff Pension Fund. He also claimed compensation for financial damage resulting from the fact that his partner had not been able to obtain a Swiss work permit, and he asked the Office to request such a permit from the Swiss authorities. Lastly, he sought compensation for moral injury.

In its report dated 15 December 2004 the Panel found that a German life partnership could satisfy the criteria of a *de facto* situation creating the status of spouse, within the meaning of Judgment 1715. It also noted that in March 2004, following the publication of the Secretary-General's bulletin of 20 January, the Office had decided to recognise two Canadian same-sex marriages, thereby giving a broad interpretation to the term "spouse" as used in the Staff Regulations. According to the Panel, in so doing the Office had *de facto* adopted a new practice with regard to non-traditional unions. It recommended that, in application of that practice, the Office should contact the Permanent Mission of Germany to the United Nations in Geneva to seek confirmation that the complainant's life

partnership was recognised under German law for the purposes of granting benefits and entitlements and, based on the response by the Permanent Mission, interpret the word “spouse” widely so as to recognise the complainant’s partner as his spouse. The Panel further recommended that the Office should grant the complainant dependency benefits with retroactive effect, at least from “the date of the adoption of its practice with regard to same-sex unions”, i.e. March 2004, and that it should “take all measures it would normally take for a spouse with regard to residency and work permits”. It did not, however, consider that the complainant should be awarded moral damages, in view of “the Office’s *bona fide* efforts to address the issue through its Governing Body”.

By a letter of 4 February 2005, the Executive Director of Management and Administration informed the complainant on behalf of the Director-General that the latter did not share the Joint Panel’s conclusions. She explained that the Office’s recognition of two Canadian same-sex marriages was “predicated on the establishment of a spousal relationship, regardless of the sex of the officials’ spouses”, and that “this [did] not give rise to any practice, *de facto* or otherwise, authorizing the Office’s recognition of a domestic partnership”, which would require an amendment to the Staff Regulations duly approved by the Governing Body. Given that bulletins issued by the UN Secretary-General are not directly applicable to the ILO, there was no basis other than the Staff Regulations upon which the Office could rely to grant an application for change in family status. Consequently, the Director-General considered that there was no legal basis for the Joint Panel’s recommendation that the Office recognise domestic partnerships under the Staff Regulations currently in force. That is the impugned decision.

B. The complainant contends that the ILO discriminates against him because of his sexual orientation, thereby violating a fundamental human right protected under numerous international conventions. He submits that homosexual orientation or the fact that a person lives in a same-sex union cannot be accepted as reasons for an employer to differentiate between workers in the terms and conditions of their employment.

He also contends that he is discriminated against on the basis of his nationality, in relation to officials of other nationalities whose same-sex union has been recognised only because their national law provides for same-sex marriages. He points out that national legislation does not generally determine the terms and conditions of employment at the ILO, and that the exception to that rule which is made in determining matters of personal status is merely a practice, albeit one which is shared by other international organisations. No provision of the Staff Regulations, nor any other published rule, informs staff of that practice. Referring to Judgment 28, the complainant submits that the Tribunal is bound only by the internal law of the Organization, and that it should therefore consider the recognition of same-sex spouses exclusively by reference to the Staff Regulations, which specify no formal requirement for a person to qualify as a spouse.

Rejecting the Organization’s argument that the Staff Regulations must be amended so as to provide expressly for domestic partners in addition to spouses, he asserts that if the Staff Regulations were to be read as excluding “spouses other than those formally married”, such interpretation would not be in congruence with the values that the ILO stands for and which the Governing Body is obliged to respect. He suggests that the Tribunal may wish to consider that the Director-General has the power to interpret the Staff Regulations in favour of domestic partners without amendment, as did the UN Secretary-General.

In the complainant’s view, it is inappropriate for the Organization to refer to just one aspect of national law, because the life of a German official living outside Germany, especially as an international civil servant, is not otherwise governed by German law. Moreover, the German life partnership law was enacted, not with the intention of distinguishing same-sex unions from marriage but, on the contrary, in order to eliminate the differences between them. Yet the ILO is using the German legislation in order to distinguish life partnerships from marriage. In this regard, he adds that the few differences that remain between life partnership and marriage in Germany are irrelevant to his employment relationship with the ILO.

The complainant draws attention to a ruling of 17 July 2002 in which the German Federal Constitutional Court held that the special protection afforded to marriage by Article 6 of the Basic Law (*Grundgesetz*) does not prevent the legislator from establishing, for same-sex life partnerships, rights and obligations which are equal or similar to those stemming from marriage. Following that ruling, the Life Partnership Act of 2001 was amended on 15 December 2004 to reduce the differences between marriage and life partnership to “a few marginal aspects”.

He also argues that he is discriminated against as an ILO official in the context of the international civil service. He holds the ILO responsible for the disadvantage he suffers in comparison with other international civil servants whose domestic partnerships are recognised by their respective organisations.

The complainant seeks recognition of his partner as his spouse for the purposes of the Staff Regulations, and retroactive payment of dependency benefits as from 9 July 2002, the date on which his life partnership was registered. In addition, he claims 30,000 United States dollars in moral damages, compensation for loss of salary due to the fact that his partner did not have a work permit, and compensation for the costs incurred for his partner's health insurance and social security contributions, including life insurance premiums.

C. The Organization refers to Judgments 1715 and 2193 and submits that the complainant has failed to prove the existence of a marriage to support his claim, or the precise provisions of local law which demonstrate that his life partnership is a marriage under German law, or indeed that the German Life Partnership Act is applicable in the context of the spousal entitlements he is claiming under the Staff Regulations. It points out that, on the contrary, the statements made by the German Consul-General and by the complainant himself before the Joint Panel confirm that partners in a German life partnership do not enjoy all the rights enjoyed by spouses under German marriage law, and that the German Federal Constitutional Court ruled on 17 July 2002 that life partnership and marriage are not the same institution.

According to the defendant, there is no basis to find that the impugned decision was illegal, or that it was in any way manifestly mistaken in law or fact, procedurally flawed or an abuse of authority. On the contrary, it considers that, had it followed the Joint Panel's recommendation, its decision would have been unlawful, since the Office would have unilaterally taken action that only the Governing Body is authorised to take. It contends that, although in November 2001 the Governing Body decided to authorise the Director-General, subject to the reservations and opposition of certain member States, to take various steps with respect to domestic partners, the basis of its decision was that the term "spouse" in the Staff Regulations could not be interpreted automatically by the Director-General to include domestic partnerships without prior Governing Body approval.

The defendant asserts that in taking the impugned decision, the Director-General correctly relied on the Organization's consistent practice, which has become part of its internal law. In the absence of a definition of the term "spouse" in the Staff Regulations, it refers to the law of the country of the official's nationality in order to ascertain "whether the institution of marriage is in effect between that official and the individual claimed as a 'spouse'". In the complainant's case, it considers that reference to national law compels the conclusion that he is not recognised as being married under German law, but is recognised as having a life partnership, which is "a separate and distinct institution giving rise to a status different than marriage under German law".

The ILO submits that its practice is not discriminatory, but rather is based on sound administrative reasons, and represents a fair and reasonable outcome in view of circumstantial differences. The practice cannot be said to have as its *purpose* to discriminate on the grounds of sexual orientation, since same-sex marriages are treated in the same manner as opposite-sex marriages. Whilst it might be considered to have a discriminatory *effect* in certain cases involving countries where same-sex marriage is legally impossible, this would result from the laws of the country concerned, and the practice might nevertheless be justified by broader considerations which warrant its continuing application "until such time as there is a change in underlying circumstantial differences, particularly in the direction of national laws which currently reflect the diversity of opinion on the subject among Member States of [the] Organization and the United Nations".

The Organization considers that there are no grounds for awarding the complainant moral damages, compensation for loss of income due to the fact that his partner did not have a work permit, or indeed compensation for expenses associated with his partner's health insurance and social security, since it has done what is in its power to improve the situation of same-sex partnerships. It also argues that if the Tribunal were to decide that the complainant is entitled to dependency benefits, such benefits would only be due from the date of entry into force of the amended Staff Regulations, and not retroactively.

D. In his rejoinder the complainant develops his arguments. In particular, he submits that in referring to national law the Organization should consider that law in its context. The distinction between marriage and life partnership in German legislation is, in his view, based on discriminatory feelings. He considers that, vis-à-vis such legislation, the ILO should find its own non-discriminatory solution based on its own philosophy and commitments.

He cites two decisions of the German Federal Administrative Tribunal to support the view that he is not single and that it is therefore illegal to pay his salary and benefits at the single person's rate. Furthermore, he accuses the Office of negligence and observes that it has failed to show that it has been active in promoting the recognition of domestic partnerships in accordance with the Governing Body's instructions.

E. In its surrejoinder the Organization maintains its position. It submits that reference to the law of nationality appears to be the only approach that is practicable and consistent with the Organization's appreciation of the world's many cultures. It adds that the discussions that took place in the Governing Body in November 2001 and in the UN General Assembly in March 2004 show that any amendment whereby an international organisation would create its own definitions of "spouse" or "partner" for the purpose of benefits under its staff regulations is still strongly opposed by a substantial number of States.

CONSIDERATIONS

1. The complainant is a grade P.5 official of German nationality who, by a minute of 28 October 2002 addressed to the ILO Administration, requested that his male partner, to whom he is bound by a "life partnership" registered on 9 July 2002 under the German Life Partnership Act (*Lebenspartnerschaftsgesetz*) of 16 February 2001, be recognised as his spouse. On 16 January 2003 he filled in an ILO family status report and application for dependency benefits, requesting that his spouse be considered as a dependent. After having reiterated his request several times, referring in particular to the new rules adopted by the United Nations, he received a provisional reply dated 10 February 2004, followed by a letter from the Manager of the Human Resources Operations and Development Branch dated 21 September 2004, giving him the reasons why the Office could not recognise same-sex unions unless they were marriages defined by the applicable national legislation as creating a spousal relationship. The author of the letter added:

"The Office sincerely hopes to be in a position to have rules enacted regarding legally recognised partnerships as soon as it can satisfy itself that its proposals will reach a sufficient degree of support within our legislative bodies."

This reply was not considered satisfactory by the complainant. He filed a grievance with the Joint Panel, which found in his favour after having heard many witnesses, including the German Consul General in Geneva. Indeed, on 15 December 2004 the Joint Panel recommended that the Office should contact the Permanent Mission of Germany to the United Nations and Other International Organizations in Geneva in order to seek confirmation that the complainant's partnership was "legally recognised under the law of that country for the purposes of granting benefits and entitlements", and to give full legal effect to that recognition, at least as from March 2004, when two same-sex marriages contracted under Canadian law had been recognised as being valid.

2. By a decision notified on 4 February 2005, the Director-General refused to follow the Joint Panel's recommendation and rejected the complainant's grievance. It is that decision of 4 February 2005 which is impugned before the Tribunal. The complainant seeks recognition of his partner as his spouse for the purposes of the Staff Regulations, the payment of dependency benefits as from 9 July 2002, the refund of costs incurred for his partner's health insurance and social security contributions and the payment of compensation for the latter's loss of salary due to the fact that he was unable to obtain a work permit. The complainant also claims compensation of 30,000 United States dollars for moral injury.

3. As in Judgment 2549 also delivered this day, the question is whether the Office could and should have regarded the complainant's partner as his "spouse" in the meaning of the Staff Regulations and allowed him the benefits normally granted to the dependent spouse of a member of staff: on this core issue, the arguments exchanged between the parties and the Joint Panel's recommendation are very similar – *mutatis mutandis* – to those analysed by the Tribunal in Judgment 2549. Thus, for the reasons indicated in that judgment, the Tribunal considers that there may be situations in which the status of spouse can be recognised in the absence of a marriage, provided that the staff member concerned can show the precise provisions of local law on which he or she relies.

4. It is therefore necessary to determine whether the provisions of the German Life Partnership Act of 16 February 2001 enable the complainant and his partner to be considered as spouses in the meaning of the applicable regulations. According to the analysis given in the defendant's reply, the Act applies only to same-sex partners; it provides that the partnership should be concluded before the State authorities and gives rise to a number of mutual rights and obligations, such as an obligation of maintenance, which may continue to exist after the end of the partnership. But the defendant points out that the Act did not intend to institute a marriage and that the German Federal Constitutional Court, when asked to rule on whether the law was compatible with Article 6, paragraph 1, of the Basic Law, stated in a decision of 17 July 2002 that a registered life partnership "[was] not a marriage" in the meaning of that provision. This is correct, but it should be added that the Court also held in that same decision that

“[t]he special protection afforded to marriage by Article 6, paragraph 1, of the Basic Law does not prevent the legislator from establishing, for same-sex life partnerships, rights and obligations which are equal or similar to those stemming from marriage. The institution of marriage is not threatened by an institution intended for persons who cannot marry.” The German Government took account of this decision when in 2004 it put forward a proposal to amend the Act of 16 February 2001 in the following terms:

“The Constitutional Court in its ruling of 17 July 2002 declared that granting life partnerships a status equal to that of marriage is compatible with the Basic Law. Artificial distinctions between marriage and life partnership must be eliminated.”

As a further example of the assimilation, by the German Government and courts, of the essential features of marriage and life partnership, it is worth mentioning a decision by the Federal Labour Court, which ordered the payment of family allowances to German civil servants living in partnership and governed by a collective agreement according to which such allowances were payable to married officials. The defendant interprets this decision correctly when it points out that the Federal Labour Court considered that the Life Partnership Act had created “a new *sui generis* marital status”, while adding that the solution adopted by the Court might have been justified in view of the terms of the collective agreement that it had to interpret in that case, but that it is not relevant for the purpose of applying the Staff Regulations of the ILO.

5. The differences between marriage and life partnership, with respect to the way in which they are entered into and their effects in terms of the mutual rights and obligations of the persons concerned, are in fact extremely tenuous, as may be inferred from the submissions, and in particular from the testimony of the German Consul General in Geneva before the Joint Panel and the opinions of German Courts.

6. In the circumstances, as decided in the case leading to Judgment 2549, the Tribunal finds that the Director-General was wrong, in the impugned decision of 4 February 2005, to refuse to recognise that the complainant’s partner has the status of spouse, and that this status must be recognised with retroactive effect from 28 October 2002, the date of the complainant’s first request for recognition. The defendant Organization must give full effect to this ruling by granting the complainant the benefits he has been denied since that date, and by sending the Staff Health Insurance Fund a written statement recognising his partner as a dependent spouse so that the Fund can determine the consequences of that recognition with regard to his membership. Subject to presentation of receipts, the Organization shall refund the complainant the cost incurred in taking out private health insurance for his partner, though not the cost of the life insurance to which the complainant himself has subscribed. As far as pension and invalidity rights are concerned, the Organization must provide the United Nations Joint Staff Pension Fund with whatever information it needs to assess the entitlements of the complainant’s partner. On the other hand, the claim for compensation for loss of salary due to the fact that the Swiss authorities did not issue a work permit cannot be allowed in the circumstances, since that is a matter for which the Swiss authorities are responsible and since the partner, who held a *carte de légitimation*, was considered as the complainant’s “personal employee”.

7. The complainant also claims compensation for moral injury, due partly to the Organization’s discriminatory attitude towards him and partly to the negligence it showed in not pressing for recognition of domestic partnerships. There is no evidence in the file of any ill will or discriminatory attitude on the part of the defendant. Nevertheless, having considered all the circumstances of the case, the Tribunal finds that the complainant is entitled to compensation for moral injury, which it shall set at 5,000 Swiss francs.

8. Since he succeeds, the complainant is entitled to costs, which are set at 3,000 francs.

DECISION

For the above reasons,

1. The impugned decision of 4 February 2005 is set aside.
2. The case is referred back to the ILO for consideration of the complainant’s rights in accordance with 6 above.
3. The Organization shall pay the complainant compensation in the amount of 5,000 Swiss francs.

4. It shall also pay him 3,000 francs in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 12 May 2006, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, Mr Seydou Ba, Judge, Ms Mary G. Gaudron, 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

James K. Hugessen

Seydou Ba

Mary G. Gaudron

Claude Rouiller

Catherine Comtet