

The Administrative Tribunal,

Considering the complaint filed by Mr A. J. H. against the International Telecommunication Union (ITU) on 11 August 2006 and corrected on 15 August, the ITU's reply of 18 September, the complainant's rejoinder of 21 November 2006 and the Union's surrejoinder of 5 February 2007;

Considering Articles II, paragraph 5, 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, a British national born in 1967, joined the ITU in 2001 as a Radiocommunications Engineer in the Informatics, Administration and Publications Department in the Radiocommunications Bureau at grade P.2. On 23 October 2003 he entered into a "Civil Solidarity Contract" (*Pacte civil de solidarité* or PACS) under French law with his same-sex partner. By a memorandum of 24 October 2005 he requested that his partner be recognised as his dependent spouse for the determination of dependency benefits, including entitlements to travel on home leave, dependency allowance and health insurance coverage. He pointed out that, following the entry into force on 5 December 2005 of the United Kingdom Civil Partnership Act 2004, he and his partner who had entered into a PACS under French law would be viewed as "Civil Partners" under UK law and as such would enjoy the same legal status as parties to a civil marriage. The Acting Chief of the Personnel and Social Protection Department replied on 9 November 2005 that the complainant's request required an in-depth study of the question of recognition of domestic partnership vis-à-vis the current legal and statutory framework of the Union, but that he would endeavour to give him a reply before the end of the year.

In the meantime, the complainant had submitted a request for home leave, covering the period from 25 December 2005 to 7 January 2006, in which he had indicated the name of his partner under the heading "Accompanying dependants". In late November 2005 he was informed that his request to have his partner recognised as his accompanying dependant on home leave had been rejected. He wrote to the Secretary-General on 21 December 2005 requesting a review of that decision. Having not received a reply within the prescribed time limit, he filed an appeal with the Appeal Board on 10 March 2006.

In its report of 19 April 2006 the Appeal Board considered that the recognition of domestic partnerships would require a prior amendment of the Staff Rules. It noted that the issue of domestic partnership had been under discussion since 1991 within the United Nations system and had been resolved by the United Nations (UN) as well as many other international organisations. The Board therefore recommended that the Secretary-General refer the matter to the ITU Council with a view to rapidly amending the Staff Rules so as to protect staff members against discrimination on the grounds of family status and sexual orientation.

By a memorandum of 15 May 2006 the Chief of the Personnel and Social Protection Department informed the complainant that the Secretary-General, having considered the Appeal Board's conclusions, had decided to maintain the decision not to recognise his partner as his dependant spouse for the purpose of dependency allowances. That is the impugned decision.

B. The complainant submits that, according to the bulletin issued by the Secretary-General of the UN on 24 September 2004, the ITU has no choice but to refer to the law of the nationality of staff members when determining their personal status for the purpose of entitlements under the Staff Regulations and Staff Rules. He also submits that, according to the Tribunal's case law, where national legislation enables a staff member and his partner to be considered as spouses they will be deemed to be spouses under the applicable Staff Rules. In this respect, he points out that pursuant to the entry into force of the Civil Partnership Act 2004, he and his partner are treated as civil partners under UK law, which is the law of his nationality. According to that act, civil partners and

married couples are placed on an equal footing. He therefore contends that the Secretary-General has wrongly refused to recognise his partner as his dependent spouse for the purpose of the Staff Rules. In his view the impugned decision was taken in breach of the principles of equal treatment and non-discrimination.

The complainant seeks recognition of his partner as his dependent spouse for the purposes of dependency benefits, and retroactive payment of dependency benefits, including expenses incurred by him in relation to his travel on home leave, dependency allowance and health insurance coverage. In addition he claims 10,000 Swiss francs in compensation for injury to his dignity, as well as costs.

C. In its reply the ITU explains that the recognition of domestic partners has been discussed within the UN system and that it has reserved its position on the conclusions drawn by the High Level Committee on Management in 2004 concerning the common policy on this issue. The Union emphasises that, according to the aforementioned policy, each organisation will endeavour to implement the principles laid down therein, "having regard to its own circumstances and requirements". In its view the common policy can impose a legal obligation on an organisation only insofar as the organisation's own circumstances and requirements so permit. In this respect, it points out that there is no ambiguity as to the meaning of the term "spouse" in the Staff Regulations and Staff Rules, which clearly refer to "husband" or "wife". It adds that to date the Union has given no indication of any intention to amend its legal framework so as to widen that definition.

The defendant points out that Regulation 12.1 provides that Staff Regulations may be amended by the Council but not by the Secretary-General. Moreover, Rule 12.1.2 provides that exceptions to the Staff Rules may be made by the Secretary-General provided inter alia that no exception is inconsistent with any Staff Regulation. Since the Staff Regulations cannot be interpreted as allowing the complainant's partner to be considered as his dependant spouse, the Secretary-General is not entitled to make any exception to the relevant Staff Rules.

Subsidiarily, the ITU contends that the bulletin issued by the Secretary-General of the UN does not apply to specialised agencies of the UN system. It further rejects the allegations of unequal treatment and discrimination since the requirements to be fulfilled in order to be granted the dependency status are laid down in the Union's Staff Regulations and Staff Rules, which the Secretary-General is bound to observe.

D. In his rejoinder the complainant develops his arguments. He submits that the Union has violated his fundamental human right to equal treatment as he was treated differently from other ITU staff members and other international civil servants working for the UN Secretariat or specialised agencies which recognise domestic partnership. He adds that since the impugned decision had a discriminatory effect, it was taken *ultra vires*. Referring to the Tribunal's case law, he contends that the interpretation of the term "spouse" should not be confined to a nominalistic approach. Moreover, the Union has not explained why it did not refer the matter of same-sex partnership to the Council for discussions following publication of the UN Secretary-General's bulletin in 2004. Lastly, he indicates that he claims 30,000 francs in damages instead of the original 10,000 francs.

E. In its surrejoinder the ITU maintains its position. It reiterates that the complainant's request for recognition of his partner as his spouse was rejected in accordance with the Staff Regulations and Staff Rules, which provide that the term "spouse" relates to "the conventional meaning of marriage in its traditional form, i.e. between two persons of opposite sex". It stresses that the Union is bound by the wording of these Regulations and Rules. It further contends that the complainant's claim for 30,000 francs in damages is irreceivable insofar as it widens his original claims.

## CONSIDERATIONS

1. The complainant, an ITU official of British nationality holding grade P.2, entered into a PACS under French law with his same-sex partner and had his partnership registered under the 2004 Civil Partnership Act applicable to British citizens. On 24 October 2005 he asked the ITU to recognise his partner as his dependent spouse for determination of the benefits pertaining to that status. After informing the complainant on 9 November 2005 that his request required an in-depth study of the question of recognition of domestic partnership under the Union's current legal and statutory framework, the Administration refused on 25 November 2005 to treat his partner as a dependant for the purpose of applying the rules governing home leave. On 21 December 2005 the complainant asked the Secretary-General to review that decision and, having received no response from the Administration, lodged an appeal with the Appeal Board on 10 March 2006. He requested that his partner be

recognised as his dependent spouse for the determination of dependency benefits, including entitlements to travel on home leave, dependency allowance and affiliation to the Staff Health Insurance Fund. The ITU did not contest the receivability of the appeal but argued that it could not be allowed on the grounds that the rejection of the complainant's request was founded on the current provisions of the Staff Regulations and Staff Rules, "wherein the term 'spouse' relates solely to the conventional meaning of marriage in its traditional form, i.e. between two persons of opposite sex", and that the Secretary-General was legally barred "from departing from this legal framework without securing a change to the Staff Regulations and Staff Rules by means of the procedures laid down in the ITU Convention and Staff Regulations".

2. The Appeal Board met on 11 April and issued its report on 19 April 2006. Having noted that the appeal raised "the preliminary issue of recognition by the ITU of domestic partnership in the Staff Rules" and that the application of those Rules, which were by definition general and impersonal, was a non-discretionary duty of the Secretary-General, it asserted that "changes in societal attitudes, the development of a culture of tolerance in general and that of domestic partnership in particular should be reflected in a prior amendment of the Rules by the legislative body itself, in this case the ITU Council", and added that "[a]s these Rules currently stand, it is difficult to contemplate any interpretation of their provisions without raising the fundamental question of recognition of domestic partnership". Furthermore, after recalling that the question of domestic partnership had been under discussion since 1991 in the United Nations Consultative Committee on Administrative Questions and that answers had finally been worked out within the UN and in many international organisations, the Committee pointed out that, although the ITU was looking into the matter, "[f]ifteen years of discussion and the acknowledged developments to date might have warranted a more assiduous approach to the [said] question". The Appeal Board concluded by recommending that:

"- The Secretary-General should refer the issue of domestic partnership and its implications to the Council;

- The Secretary-General should transmit to the Council the study concerning the issue of domestic partnership undertaken by his staff;

- The conclusions of the study should be formulated as specific recommendations, including the definition of criteria for the recognition of a domestic partnership;

- The Secretary-General should request the Council's authorisation to take the necessary measures to provide for the consequences of such recognition, in co-ordination with all interested parties (staff, Insurance Fund and other common system institutions); [and]

- All these measures should lead rapidly to an amendment of the Staff Rules so as to afford the requisite protection against any form of discrimination based on family status and sexual orientation."

3. By a memorandum dated 15 May 2006 the Chief of the Personnel and Social Protection Department informed the complainant that after consideration of the Appeal Board's conclusions the application for recognition of his partner as a dependant spouse had been rejected.

4. The complainant impugns that decision before the Tribunal, contending that it is discriminatory and inconsistent with applicable national law as well as the principles laid down in the Tribunal's case law and accepted by many international organisations, including the UN.

5. The defendant, for its part, points out that it has reserved its position with regard to the conclusions reached by the High Level Committee on Management in 2004 concerning the policy to be adopted in the UN system regarding recognition of marriages and domestic partnerships: it does not endorse the view that the validity of acts affecting officials' civil status should be assessed on the basis of the legislation applicable in the country of which they are nationals and it emphasises that, exercising its independent judgement, it did not consider that the circumstances were such as to enable it to amend the provisions of the Staff Regulations and Staff Rules, which clearly establish that the status of "spouse", conferring entitlement to certain allowances, is applicable only to persons of opposite sex united by bonds of marriage. It submits that it cannot be bound by the positions adopted by the UN Secretary-General or by other international organisations, as recognised by the case law of this Tribunal, and that there is no need, under those circumstances, to seek to determine what rights the complainant and his partner enjoy under United Kingdom legislation. The Secretary-General of the ITU can only apply the said Regulations and Rules as they stand, and the decision he took cannot be held to be discriminatory.

6. The Tribunal has accepted in several recent judgments that same-sex marriages (see Judgment 2590) and unions taking the form of “registered partnerships” must be recognised where the national legislation applicable to the staff member concerned allows persons who have contracted such unions to be treated as “spouses” (see Judgments 2549 and 2550). The important difference between the present case and those previously decided lies in the fact that the ITU Staff Regulations and Staff Rules explicitly define the concept of spouses as denoting husband and wife in a large number of provisions, and that, contrary to the situations examined in Judgments 2549 and 2550, the ITU refuses to accept that same-sex unions lawfully contracted under the national legislation of the official concerned may be taken into consideration for the purpose of applying the Staff Regulations and Staff Rules. It follows that the defendant was not wrong in asserting that, in the light of the case law and the applicable Regulations and Rules as they currently stand, the Secretary-General was barred from giving the term “spouse” the broad interpretation requested.

7. However, whilst the Appeal Board abstained from recommending that the complainant’s appeal be dismissed, it noted that the appeal raised “the preliminary issue of recognition by the ITU of domestic partnership in the Staff Rules”. It recommended to the Secretary-General that he refer the matter to the Council and request the latter’s authorisation to take the necessary measures to provide for the consequences of recognition – on the basis of criteria to be established – of domestic partnership, adding that all these measures should lead rapidly to an amendment of the Staff Rules “so as to afford the requisite protection against any form of discrimination based on family status and sexual orientation”. Yet far from indicating whether he accepted these recommendations, the Secretary-General merely stated that he had dismissed the complainant’s appeal “after consideration of the Appeal Board’s conclusions”.

8. The Tribunal recalls its well-established case law, according to which, where the competent authority does not accept the Appeal Board’s recommendation, it must state the reasons why it is disregarding that recommendation (see, for example, in a case concerning the ITU, Judgment 2391, under 8). The decision notified to the complainant on 15 May 2006 does not indicate whether the Secretary-General felt it was unnecessary to refer the question of recognition of domestic partnership and the possible amendment of the Staff Rules to the Council, and if so, on what grounds. Being unaware of those grounds, the Tribunal has no option but to set aside the impugned decision and to send the case back to the defendant organisation for a reasoned decision on the action it proposes to take on the Appeal Board’s recommendations.

9. The complainant cannot obtain the benefits he requests for his partner. His claim for compensation for moral injury cannot be allowed, because in the light of the current statutory framework, he has not established that he has suffered an injury warranting an award of compensation. As he succeeds in part, he is entitled to an award of costs in the amount of 3,000 Swiss francs.

## DECISION

For the above reasons,

1. The decision of the Secretary-General of the ITU, conveyed to the complainant on 15 May 2006, is set aside.
2. The case is referred back to the ITU.
3. The Union shall pay the complainant 3,000 Swiss francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 27 April 2007, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2007.