

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

105th Session

Judgment No. 2760

The Administrative Tribunal,

Considering the complaint filed by Ms J.L. H. against the International Atomic Energy Agency (IAEA) on 6 April 2007, the IAEA's reply of 13 July, the complainant's rejoinder of 29 August and the Agency's surrejoinder of 5 December 2007;

Considering Article II, paragraph 5, 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 Canadian national born in 1954, joined the IAEA on 29 July 2003 as a Senior Auditor at grade P.4 in the Office of Internal Oversight Services (OIOS). Her initial three-year fixed-term contract was extended and is due to expire on 28 July 2008.

On 28 April 2006 the complainant married her same-sex partner in Ottawa (Canada) under the Federal Civil Marriage Act. She notified the Agency of this on 3 May and subsequently provided an official marriage certificate. On 1 June she claimed the dependency benefits for which provision is made in Staff Regulation 5.03 by submitting an electronic application form to the Division of Personnel. After some exchanges of e-mails the complainant was informed by the Division on 5 July that the policy governing the change in her marital status was still under consideration. On 15 December the complainant sent a memorandum concerning her outstanding claim. Further correspondence followed. In her reply of 22 December 2006 the Acting Director of the Division of Personnel rejected the complainant's claim and informed her that, under the Agency's Staff Regulations and Staff Rules, the term "spouse" did not extend to unions involving persons of the same sex, regardless of whether the union was regarded as a marriage by the staff member's national law. On 19 January 2007 the complainant asked the Director General to review and reverse that decision and sought permission to appeal directly to the Tribunal, should her request be denied. On 20 February 2007 the Director General informed the complainant that he upheld the decision not to extend the definition of "spouse" to same-sex partners and, consequently, to reject her claim for benefits. That is the impugned decision.

B. The complainant challenges the decision of 20 February 2007 on the grounds that it is tainted with an error of law, and an abuse of authority, that it constitutes discrimination based on sexual orientation and that it breaches her right to be treated with dignity and the requisite good faith.

The complainant contends that her partner must be recognised as her spouse under the Staff Regulations and Staff Rules, since they provide no definition of the term "spouse", and in such cases the Tribunal's case law establishes that the status of spouse will flow from a marriage publicly performed and certified by a State official. No reason was put forward to justify the way in which the Director General interpreted the term "spouse" in his decision, which is consequently unlawful.

The Agency's narrow interpretation of the term "spouse" is discriminatory and it is contrary not only to the principles established by the Tribunal's case law, but also to the law of the Agency and of the United Nations and to international human rights instruments. In her opinion the term must also be interpreted in the light of the principle of non-discrimination applying at the Agency. Moreover, the complainant relies on the practice of the United Nations which consists in determining a staff member's marital status by reference to the law of that person's home country, and she observes that some provisions of international human rights instruments are relevant to the issue of discrimination in international organisations. She describes the discrimination which she has

suffered in the present case owing to her sexual orientation and draws attention to the fact that the Tribunal has consistently held that fundamental principles of law and of non-discrimination in particular prevail over discriminatory staff rules and regulations.

The complainant argues that, by interpreting the term “spouse” as he did, the Director General in fact amended the Staff Regulations and Staff Rules, whereas only the Board of Governors has the power to do so, and that he therefore acted *ultra vires*.

She alleges that the time taken to reply to her benefits application was unjustifiably long, especially as no reasons were given for the decision. In her view the Agency intentionally delayed taking a decision and thereby seriously injured her dignity.

The complainant asks the Tribunal to set aside the impugned decision, to order the Agency to pay her retroactively and with interest all the benefits to which she is entitled as a consequence of her marriage, to order the payment of moral and punitive damages and to retain jurisdiction to award consequential damages in the event of her incurring medical or other expenses between her marriage and the delivery of the judgment, which would otherwise have been covered or avoided but for the decision. She also seeks an award of costs.

C. In its reply the IAEA states that an explicit definition of the term “spouse” does exist for the purposes of its Staff Regulations and Staff Rules and that the Director General exercised his discretion properly in deciding that this definition did not apply and should not be amended to apply to the complainant’s case.

The Agency argues that since it is an independent organisation it is not legally bound by the internal practice or “law” of the United Nations. It acknowledges, however, that it refers to national law in order to determine the family status of its staff members in the context of the Staff Regulations and Staff Rules, but says that hitherto it has never had to deal with the issue of a same-sex marriage.

The IAEA states that the definition of the term “spouse” is to be found in the Guide to Dependency Benefits and in a Notice to the Staff of 11 July 2005, which indicate that for the purposes of the Staff Regulations and Staff Rules this term refers only to persons of opposite sex. The complainant was aware of this definition, as is shown by the e-mail she sent to the Division of Personnel on 2 June 2006. The Director General applied the definition to the present case in a way that was consistent with the Agency’s continuous practice. The Agency’s intention has always been that it should apply to a couple of the opposite sex. Since the Agency has already developed a definition of “spouse” and has consistently applied it in its own administrative policy, it is not bound by what is recognised under national law. The defendant says that the facts in the present case are different to those of the cases at issue in the Tribunal judgments on which the complainant relies.

The IAEA considers that the Director General’s decision does not constitute an abuse of authority and it emphasises that, while it is true that the Board of Governors has sole power to adopt and amend the Staff Regulations, this decision does not amount to an amendment. Staff Regulation 5.03 provides that staff members shall be entitled to receive benefits in respect of their dependants under conditions established by the Director General. He did not therefore “amend” the Staff Regulations, but exercised his discretion so as to maintain a definition of “spouse” consistent with the Agency’s past practice and the national law of the great majority of its member States.

Contrary to the complainant’s assertions, the fact that the decision not to amend the definition of “spouse” places her at a disadvantage in comparison with heterosexual staff members does not imply that it is discriminatory, because administrative law necessarily divides people into different groups in setting criteria for the granting of salaries and other benefits. Awarding benefits to the complainant would create discrimination between her and other same-sex spouses who have been lawfully married in a country of which they are not a national.

Although the Agency admits that it was slow in taking the decision of 20 February 2007, it disputes the complainant’s contention that the issue of the recognition of same- sex unions has long been settled by the Tribunal, since cases addressing this issue are few and different to the instant case. The present case raises a new issue; the Director General had consequently to give thought to the application of the term “spouse” in the context of the Agency to spouses of the same sex.

D. In her rejoinder the complainant maintains her position. She states that it is wrong to treat a guide as if it

were on the same level as the Staff Regulations and Staff Rules. The Guide to Dependency Benefits was not incorporated into her contract, it is not even subsidiary legislation and it does not provide an unambiguous definition of “spouse”. Moreover the complainant draws attention to the fact that the Agency has not demonstrated the existence of an administrative policy on its definition of the term. Had such a policy existed, it would have rejected her application at the outset. She comments that in the instant case a new policy has been formulated which creates an exception to the policy of determining family status by reference to the law of the nationality of the staff member concerned. In her opinion the Agency has shown bad faith by disregarding its own policy of prohibiting discrimination based on sexual orientation. In addition, it has not adequately explained the delay in reaching its decision. On the contrary, the Agency’s actions justify her claim for moral and punitive damages.

E. In its surrejoinder the Agency stresses that the Guide to Dependency Benefits merely clarifies the Staff Regulations and Staff Rules, but does not have the same status as they do. The Guide does not determine staff members’ rights, which are established by the Staff Regulations and Staff Rules.

The defendant states that a marriage is not accepted at face value as giving rise to a right to dependency benefits, but must be evaluated in the light of the Staff Regulations and Staff Rules. While it does not deny the existence of the complainant’s marriage, it does not accept that she has a “spouse” within the meaning of the Staff Regulations and Staff Rules.

CONSIDERATIONS

1. The complainant married on 28 April 2006 a person of the same sex, as she is permitted to do under the law in force in Canada pursuant to an Act passed on 20 July 2005. She immediately informed the Agency of her new marital status and on 1 June 2006 she applied for the dependency benefits to which staff members with a spouse are eligible under Staff Regulation 5.03 and Staff Rules 5.03.1 and 5.03.2.

On 22 December 2006 the complainant, who in the intervening period had repeatedly tried to obtain a reply to her application, was informed that it had been rejected. According to a memorandum from the Acting Director of the Division of Personnel notifying her of this decision, the reference to “spouse” for the purposes of applying the Staff Regulations and Staff Rules could not mean the union of persons of the same sex, even if such a union was regarded as a marriage by the national law applicable to the staff member.

2. By a decision of 20 February 2007 the Director General, whom the complainant had requested to review this position, upheld the rejection of her application on the grounds that “the term ‘spouse’ under the Staff Regulations and Rules [did] not apply to unions between persons of the same gender” and that there was no basis “to extend [its] definition” to such unions. That is the decision impugned before the Tribunal since, by the same decision, the Director General authorised the complainant to file this complaint without first lodging an appeal with the Joint Appeals Board, as provided for by Staff Rule 12.02.1.

The complainant asks the Tribunal *inter alia* to set aside the decision refusing to grant her application, to order the retroactive payment of the dependent spouse benefits to which she believes she is entitled and to order the Agency to pay damages for the moral injury suffered. She also seeks punitive damages on the grounds that the decision concerning her constitutes unlawful discrimination based on her sexual orientation and a breach of the good faith which all international organisations must show in dealings with their staff.

3. The Tribunal observes, firstly, that in order to determine the personal status of its staff members with a view to applying the above-mentioned Staff Regulations and Staff Rules, the IAEA normally refers to the national law applicable to the persons concerned, as it states itself in its submissions. Although the Agency was not legally bound to do so, it has adopted the same rule on this matter as that which the United Nations has chosen to apply, which has the advantage of ensuring respect for the social, religious and cultural diversity of member States and their nationals.

In the instant case it is not disputed that the complainant, who was lawfully married in Canada, as attested by an official certificate issued on 23 October 2006, has the status of a married person under the law of that country. Unlike the legislation recently adopted in certain other States, which have established “registered partnerships” for unions between persons of the same sex, the Federal Civil Marriage Act confers the full status of a marriage on such unions.

4. According to the Tribunal's case law, as recalled in Judgment 2590 concerning a similar case, "[a]s a general rule and in the absence of a definition of the term [in the Staff Regulations and Staff Rules], the status of spouse will flow from a marriage publicly performed and certified by an official of the State where the ceremony has taken place, such marriage being then proved by the production of an official certificate" (see also Judgment 1715, under 10); thus "a link [is established] between the word 'spouse' and the institution of marriage, whatever form it may take" (see Judgment 2193, under 10).

In several recent judgments concerning cases where the staff regulations and rules of the organisations concerned did not define the term "spouse", the Tribunal held that same-sex marriages (see the above-mentioned Judgment 2590) or unions in the form of "registered partnerships" had to be recognised by these organisations where the applicable national legislation enabled persons who had contracted such unions to be regarded as "spouses" (see Judgments 2549 and 2550).

5. In support of its contention that this case law cannot be transposed to the present case, the Agency points out that, for the purpose of applying its Staff Regulations and Staff Rules, it has a definition of the term "spouse" which refers only to the partners of a union between persons of opposite sex.

If the Staff Regulations and Staff Rules were to contain a restrictive definition of that kind, the Tribunal would indeed be led to consider that the Agency was entitled to debar a staff member married to a person of the same sex from claiming a dependent spouse benefit. This was the solution recently adopted in Judgment 2643 concerning an organisation whose staff regulations and rules explicitly defined the concept of a spouse as denoting a "husband" or a "wife" in a large number of provisions. The use of these terms in the provisions in question made it impossible to consider that this concept could be applied to persons of the same sex, even if they were lawfully married (or, as in the case in question, joined in a "registered partnership") under their national law.

6. In the instant case, however, it must be found that the Agency's Staff Regulations and Staff Rules, both of which mention the existence of benefits for a dependent "spouse", do not themselves contain any definition of this term.

It is true that, as the Agency asserts, the Guide to Dependency Benefits, which was drawn up for the staff, indicates in paragraph 2(a) that the term "'[s]pouse' for all purposes of the Staff Regulations and Staff Rules is defined to mean the husband or wife". But this mere information document, which was prepared by the Administration and has no normative value, clearly cannot prescribe the adoption of a restrictive definition which does not appear in the applicable texts themselves.

Furthermore, while the Tribunal notes that the same definition was also given in a Notice to the Staff of 11 July 2005, that document likewise could not narrow the scope of the concept of "spouse" to which the Staff Regulations and Staff Rules refer. Although the secretariat of an organisation may always circulate a Notice to the Staff to clarify certain provisions of its staff regulations and rules, such a notice cannot impose on staff any restrictive conditions other than those stipulated in the provisions themselves. The Tribunal has previously given a ruling to the same effect in Judgment 2120 with regard to a note of the same nature circulated in the same organisation.

The Agency also argues that Staff Regulation 5.03, which states the principle that staff members are entitled to receive benefits in respect of dependent persons such as their "spouse", nevertheless provides that these benefits are granted "under conditions established by the Director General". However, firstly it is extremely doubtful that the power thus conferred on the Director General would have permitted him to deny same-sex spouses the benefits in question, given that the Staff Regulations themselves contain no such restriction. Secondly, and above all, this power, which is normally exercised by establishing Staff Rules, can in any case be exercised only through decisions taken by the Director General himself, which must comply with the relevant formal requirements. In this case, neither the Guide to Dependency Benefits nor the Notice to the Staff mentioned above satisfies these conditions.

Lastly, the Tribunal will not entertain the argument that in the past the Agency had always adopted a definition of the term "spouse" which excluded its application to same-sex partners. Quite apart from the fact that the existence of a long-standing interpretation of that kind would certainly not signify that it was lawful, this assertion is in any case incorrect. Of course, prior to this case dependent spouse benefits had always been claimed for a spouse of the opposite sex, since the possibility of their being paid in the case of a marriage between same-sex partners could not by definition materialise until the recent legislative developments had authorised such marriages in some countries.

But the issue had in fact never arisen at the Agency, as the latter itself emphasises in order to justify the delay in taking a decision on the complainant's application. There are therefore no valid grounds for asserting that a position of principle had already been adopted in the past on the matter.

7. Hence there is nothing to support the Agency's argument that in its Staff Regulations and Staff Rules the term "spouse" should be defined as applying solely to the partners of a union between persons of opposite sex.

Moreover, the Tribunal notes that in the above-mentioned Judgment 2590 it rejected the contention that the Staff Regulations and Rules of the organisation concerned provided for such a restrictive definition of the concept of spouse, even though they contained a passing reference to the terms "husband" and "wife". It considered that the existence of this reference could not, in itself, justify interpreting all the relevant texts applicable to the staff of that organisation as denying same-sex spouses any right to benefits. This solution applies *a fortiori* in the present case, where the Staff Regulations and Staff Rules themselves contain no such reference.

8. It may be concluded from the foregoing that the complainant is entitled to claim the dependent spouse benefits for which provision is made in Staff Regulation 5.03 and Staff Rules 5.03.1 and 5.03.2, as well as any other benefits linked to her status as a married person.

The Director General's decision of 20 February 2007 must therefore be set aside. The Agency must pay the complainant retroactively the sums due since 28 April 2006 in respect of the dependency benefits to which she is entitled as a consequence of her marriage. These sums shall bear interest at the rate of 8 per cent as from the dates on which each payment fell due.

9. The unlawful refusal to recognise the complainant's rights caused her obvious moral injury. In the instant case this injury was aggravated by the long delay – even if the reasons for it are understandable – in examining her application for the payment of the benefits in question. The Agency shall therefore be ordered to pay the complainant damages in the amount of 10,000 euros.

However, there is no evidence in the file to suggest that the Agency in dealing with this case deliberately engaged in discrimination based on sexual orientation when applying the Staff Regulations and Staff Rules, or that it failed in its duty to show good faith in its relations with the complainant. Since the complainant's request raised a delicate new legal issue at the organisation concerned, the mistaken refusal she received cannot be deemed in itself to reveal discriminatory or malicious intent. Moreover, the fact that this decision was taken after such a long period of reflection suggests precisely that the Agency did not necessarily intend to deny this request as a matter of principle. There are therefore no grounds for ordering the Agency to pay the punitive damages claimed by the complainant.

Lastly, in the absence of a present cause of action, the Tribunal will not entertain the complainant's claim for compensation for possible medical or other expenses which she may have been led to bear unjustifiably during the period in which the contested decision applied.

10. Since most of her submissions are well founded, the complainant is entitled to costs, which the Tribunal sets at 5,000 euros.

DECISION

For the above reasons,

1. The decision of the Director General of 20 February 2007 is set aside.
2. The case is sent back to the IAEA in order that the complainant's rights may be determined in accordance with consideration 8 of this judgment.
3. The Agency shall pay the complainant compensation in the amount of 10,000 euros for the moral injury suffered.
4. It shall also pay her 5,000 euros in costs.

5. All other claims are dismissed.

In witness of this judgment, adopted on 8 May 2008, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Seydou Ba

Mary G. Gaudron

Patrick Frydman

Catherine Comtet

Updated by SD. Approved by CC. Last update: 14 July 2008.