

107th Session

Judgment No. 2826

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr A. J. H. against the International Telecommunication Union (ITU) on 1 October 2007 and corrected on 10 October, the ITU's reply of 14 November 2007, the complainant's rejoinder of 12 January 2008 and the Union's surrejoinder of 22 February 2008;

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. Facts relevant to this case are to be found in Judgment 2643, which was delivered on 11 July 2007. Suffice it to recall that in his first complaint the complainant impugned the decision of the Secretary-General of the ITU not to recognise his same-sex partner as his dependent spouse for the purpose of dependency benefits. In Judgment 2643 the Tribunal set aside that decision on the grounds that the Secretary-General had failed to state reasons for rejecting the recommendation of the Appeal Board that the matter be referred to the

ITU Council with a view to amending Staff Rules to provide for the recognition of domestic partnership. It ordered that the case be referred back to the Union for a reasoned decision on the action it proposed to take on the Appeal Board's recommendation. It also ordered the Union to pay the complainant 3,000 Swiss francs in costs.

Pursuant to that judgment, the Secretary-General informed the complainant by a memorandum of 27 August 2007 that the amount of 3,000 Swiss francs had been paid directly to his bank account on 2 August and that he had decided to refer the matter of domestic partnership to the ITU Council, for decision, at its session in 2008. He explained that it was too late to refer the matter to the session of the Council in 2007, given that a detailed report had to be prepared and submitted to the Council for discussion before any decision could be taken on the issue. He added that, if need be, the Staff Regulations and Staff Rules would be amended. That is the impugned decision.

B. The complainant contends that the Secretary-General should have taken a decision on the recognition of domestic partnership instead of referring the matter to the Council. In his view, the Secretary-General was entitled to give a broad definition of the term "spouse" and consequently recognise his partner as a dependent spouse. In that respect, he points out that in the French version of the Staff Regulations there is only one occurrence of the terms "husband" and "wife"; the term commonly used in the relevant provisions is "spouse". While acknowledging that there are discrepancies between the French and English versions of the applicable rules, he states that according to Article 29 of the ITU Constitution, where discrepancies arise the French text must prevail. He stresses that in Judgment 2590 the Tribunal ruled that, in the absence of a definition of the term "spouse" in the organisation's rules, a passing reference to husband and wife cannot justify interpreting all the relevant texts as denying legally married same-sex spouses any right to benefits.

The complainant also criticises the Secretary-General's decision not to refer the matter to the Council at its next session in 2007 but to wait until 2008. The consequence of such decision is a further delay in

granting him dependency benefits which, in his view, could have been granted by the Secretary-General as early as 2005. Referring to Judgment 2590, he submits that he should be granted moral damages in respect of that delay.

Lastly, the complainant indicates that on 3 September 2007 he married his partner in British Columbia under Canadian law. Since this event took place after the Secretary-General had taken the impugned decision, he wishes to inform the ITU that he is willing to withdraw suit if it recognises his marriage for the purposes of dependency benefits. Failing that, he seeks the retroactive recognition of his partner as his dependent spouse for the purpose of dependency benefits. He also claims moral damages in the amount of 3,000 Swiss francs and costs.

C. In its reply the ITU submits that the complaint is irreceivable on several grounds. The decision of 27 August 2007 is not a final decision within the meaning of Article VII, paragraph 1, of the Statute of the Tribunal. Moreover the complaint shows no cause of action: the impugned decision does not adversely affect the complainant since the Secretary-General stated therein that the question of recognition of domestic partnership would be brought before the Council with a view to amending the relevant Staff Regulations; he thereby endorsed the recommendation of the Appeal Board, which was in line with the complainant's initial request.

The defendant also contends that the claim for the recognition of the complainant's partner as his dependent spouse is barred under the *res judicata* rule. It argues that the complainant puts forward in his second complaint a claim almost identical, with the same foundation in law, to that on which the Tribunal ruled in Judgment 2643. The ITU adds that the new arguments introduced by the complainant could have been put forward in his first complaint; in introducing new elements, he appears to seek the review of Judgment 2643. Referring to the case law, it observes that the complainant has not produced conclusive new evidence or put forward any unusual circumstances warranting review.

On the merits the Union submits that the impugned decision is lawful. It argues that since Judgment 2590 was delivered prior to Judgment 2643, the Tribunal would have followed its own case law if it had considered that the complainant was in the same situation in fact and in law as the complainant in Judgment 2590. The Tribunal did not do so because it had observed a difference between the two cases, namely the fact that the ITU Staff Regulations and Staff Rules explicitly define the concept of “spouse” as denoting husband and wife in a large number of provisions. It adds that, contrary to the complainant’s contention, the term “husband and wife” is mentioned eight times in the French version of the Staff Regulations and Staff Rules.

With regard to the allegation that a decision on domestic partnership has been repeatedly postponed, the defendant stresses that, unlike in other organisations, this is a new issue for the Member States of the ITU Council.

Lastly, the ITU points out that since the complainant’s marriage under Canadian law occurred after the impugned decision was taken, that fact could not have been taken into consideration. It recalls that the question of recognition of domestic partnership will be submitted to the Council for decision at its 2008 session and invites the complainant to await its decision. It assures the complainant that his request for dependency benefits will be processed promptly in the event that the Council agrees to recognise domestic partnership and to amend the Staff Regulations and Staff Rules accordingly.

D. In his rejoinder the complainant states that he has made no attempt to “challenge” Judgment 2643. With regard to the interpretation of the term “spouse”, he indicates that the defendant should have drawn a distinction between the Staff Regulations and the Staff Rules because the Council’s approval is required only for modifications to the Staff Regulations but not for modifications to the Staff Rules. According to Staff Rule 12.1.2, the Secretary-General may make exceptions to the Staff Rules provided that they are not inconsistent with any Staff Regulations or decision of the Council. He therefore considers that the Union’s indication that the term “husband

and wife” is used several times in the French version of the Staff Rules is “a red herring” since the Council, to which the Secretary-General has decided to submit the issue of domestic partnership, is not responsible for modifying the Staff Rules.

In addition, he contends that he has been discriminated against and should be awarded moral damages. In support of his contention, he indicates that the Administration had directed the Appeal Board to refer to the less favourable and non-binding English version of the Staff Regulations and Staff Rules. He also alleges that in two other cases, the Union has adopted a broader approach than that taken in the impugned decision. Thus, in one instance it recognised as a dependent spouse the partner of an unmarried male staff member in order to allow her to reside in Switzerland. The second case concerned a staff member who had several spouses.

E. In its surrejoinder the ITU maintains its position. In its view, although the Council’s approval is required only for modifications to the Staff Regulations, this does not alter the fact that the Union’s legal texts as a whole define the concept of “spouse” as referring to a man and a woman, as shown by the extensive references to “husband and wife” in the Staff Regulations and Staff Rules. It denies that it intended to harm the complainant by relying on the English version of the Staff Regulations and Staff Rules; it chose to rely on the English text as it was the language chosen by the complainant in his submissions.

Concerning the allegation that it has interpreted the notion of spouse more broadly in other cases, the defendant indicates that in one exceptional case, on humanitarian grounds, the Administration requested and obtained from the Swiss authorities a residence permit for the common-law wife of a staff member; at that time, such unions were not recognised under Swiss law and the staff member’s partner, who was pregnant, was not allowed to reside in Switzerland without a residence permit. However, the defendant did not recognise the common-law wife as a spouse or a dependent spouse. It adds that, with

regard to polygamy, the practice of the Union is to recognise only one dependent spouse.

CONSIDERATIONS

1. In Judgment 2643 the Tribunal ruled on a complaint involving the parties to the present case with respect to a decision refusing recognition of the complainant's same-sex partner for the purpose of the payment of benefits that pertain to the status of "spouse". In that complaint, an order was sought for the recognition of the complainant's partner as his dependent spouse and for retroactive payment of dependency benefits. The decision impugned by that complaint was set aside on the basis that the Secretary-General had failed to state reasons for rejecting the recommendation of the Appeal Board that the matter be referred to the ITU Council for authorisation to take the necessary measures to provide for the consequences of recognition of domestic partnerships.

2. By its decision in Judgment 2643 the Tribunal remitted the matter to the ITU and ordered it to pay costs but specified in point 4 of the decision that "[a]ll other claims [were] dismissed". In reaching its decision, the Tribunal held that the ITU:

"was not wrong in asserting that, in the light of the case law and the applicable [Staff] Regulations and Rules as they currently stand, the Secretary-General was barred from giving the term 'spouse' the broad interpretation requested."

3. In accordance with Judgment 2643 the Secretary-General took a fresh decision, which he communicated to the complainant by a memorandum dated 27 August 2007. That decision was to refer the issue to the 2008 session of the ITU Council with a view to the amendment of the Staff Regulations and Staff Rules. That is the decision said to be impugned by the complaint before the Tribunal. The complainant is seeking again an order for the retroactive recognition of his partner for the purpose of dependency benefits, as well as moral damages and costs.

4. The ITU argues that the complaint is irreceivable in that internal remedies were not exhausted with respect to the new decision of 27 August 2007. It also argues that it is barred by operation of the principle of *res judicata*. Notwithstanding the relevant Staff Regulations and Staff Rules, the complainant took no steps to initiate an internal appeal with respect to the decision of 27 August. Accordingly, internal remedies were not exhausted and, pursuant to Article VII of the Tribunal's Statute, a complaint with respect to that decision is irreceivable. Moreover, there can be no doubt that the precise issue raised in the present case was ruled upon in Judgment 2643 and was the subject of point 4 of the decision by which all other claims were dismissed. It is therefore barred by the principle of *res judicata* (see Judgments 1216, 1263 and 2316).

5. Insofar as the complaint is directed to the decision of 27 August 2007, it is clearly irreceivable. However, the complainant advances arguments suggesting that the real purport of his second complaint is to seek either review or execution of Judgment 2643. To the extent that the complaint might be treated as an application for review, the complainant contends that in determining whether recognition of his partner is barred by the Staff Regulations and Staff Rules, regard should be had to the French text and that, when regard is had to that text, particularly the text of the Staff Regulations, there is no basis for giving the word "spouse" a more limited meaning than was given to the same word in the relevant Staff Regulations and Staff Rules considered in Judgment 2590. The complainant contends that he was precluded from raising that issue in his earlier complaint because of the failure of the Secretary-General to give reasons for the decision then impugned.

6. There was nothing to preclude the complainant from raising the argument based on the French text of the Staff Regulations in his first complaint. He was then armed with the recommendation and reasons of the Appeal Board, both of which were based on the English text of the relevant Staff Regulations and Staff Rules. Further, as he was then seeking recognition of his same-sex partner as a dependent

spouse, it was for him to advance argument as to why that course should be taken rather than the more limited course recommended by the Appeal Board. Moreover, the grounds on which the Tribunal may review its judgments are limited to “failure to take account of some essential fact, a material error involving no value judgment, failure to rule on a claim, or the later discovery of some essential fact that the parties were unable to rely on in the original proceedings” (see Judgment 1252 and also Judgments 442, 555 and 649). The argument based on the French text is, in essence, an argument that the Tribunal erred in law in interpreting the ITU Staff Regulations and Staff Rules as barring recognition of the complainant’s partner as his dependent spouse. That is not an admissible ground for the review of a judgment (see Judgment 2029). Nor is it a ground for review that, on 3 September 2007 and after Judgment 2643 was delivered, the complainant married his partner in British Columbia in accordance with the law of Canada. It would entirely defeat the principles of finality and *res judicata* if subsequent facts could be taken into account on an application for review of a judgment.

7. To the extent that his complaint might be viewed as an application for execution of Judgment 2643, the complainant relies on the matters considered above on the basis that he is applying for review of that judgment. He also relies on the Secretary-General’s power to amend the Staff Rules (but not the Staff Regulations) and the delay necessarily inherent in the course adopted. On this basis, the complainant also contends that the Secretary-General should have had regard to the French text of the Staff Regulations and to Judgment 2590 and, in consequence, should have recognised his partner as his dependent spouse. Additionally, he claims that in two other cases, the ITU has adopted a broader approach than that taken in the decision of 27 August 2007. In essence, these arguments are premised on the assumption that, once the matter was remitted to the Secretary-General, there was only one decision that could properly be taken, namely, the recognition of the complainant’s partner as his dependent spouse. That premise is not only inconsistent with the Tribunal’s ruling in Judgment 2643 but overlooks the effect of the

order remitting the matter to the Secretary-General for a new decision. As pointed out in Judgment 1582:

“The Tribunal’s judgments – including, of course, remand for a new decision – are binding on both parties and indeed on the Tribunal itself.”

In the present case, the Secretary-General took a new decision to refer the question of the recognition of domestic partnership to the ITU Council and thereby executed Judgment 2643. There is no basis on which the Tribunal can require anything further, save on a receivable complaint with respect to that new decision.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 14 May 2009, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Seydou Ba
Mary G. Gaudron
Giuseppe Barbagallo
Catherine Comtet