

**107th Session**

**Judgment No. 2860**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr E. H. against the Food and Agriculture Organization of the United Nations (FAO) on 25 January 2008, the Organization's reply of 6 June, the complainant's rejoinder of 28 July and the FAO's surrejoinder of 6 November 2008;

Considering the *amicus curiae* brief submitted by the Federation of International Civil Servants' Associations (FICSA) on 10 July 2008;

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 French national born in 1967, joined the FAO in 1996 as an Associate Professional Officer/Economist at grade P-2. He is currently employed as a Senior Economist at grade P-5. On 31 March 2005 he informed the Administration of a change in his status and claimed dependency benefits in respect of his same-sex partner, with whom he had entered into a "Civil Solidarity Contract" (*Pacte civil de solidarité*, hereinafter referred to by its French acronym "PACS") on 25 February 2000. In support of his claim he attached his

PACS certificate. On 12 August 2005, following an exchange of e-mails between the complainant and the Administration, he was informed that “the issue of registered partnerships and same-sex marriages [was] still under review by the FAO [g]overning [b]odies” and that it would be further examined by the Committee on Constitutional and Legal Matters (CCLM) – a subsidiary committee of the FAO Council – at its next session in October 2005.

By a memorandum dated 14 October 2005 the complainant appealed to the Director-General, challenging the Organization’s refusal to take a decision on his claim. He also asked the Director-General to take a final decision within the meaning of Staff Regulation 301.11.1. By a letter of 28 November 2005 the Assistant Director-General in charge of the Administration and Finance Department, writing on behalf of the Director-General, informed the complainant that his appeal had been dismissed as without merit and that his request for a final decision had not been approved. He explained that the Organization’s governing bodies had still not reached a decision on the issue of same-sex marriages and domestic partnerships, and that the complainant’s claim for spousal benefits based on a PACS could not be entertained under existing legal provisions and the applicable jurisprudence because he did not satisfy the requirements of FAO Administrative Manual paragraph 318.5.11.

On 30 December 2005 the complainant lodged an appeal with the Appeals Committee. By a memorandum dated 27 October 2006 the Chairman of the Committee asked the FAO to seek the official position of the French government regarding the rights and obligations of partners bound by a PACS as compared to married couples, and whether the partners of French civil servants bound by a PACS were recognised as having the same rights and obligations as married spouses. The Assistant Director-General replied on 2 February 2007 that the Committee did not have the statutory authority to make such a request. He further explained that on the basis of a recommendation from the CCLM the Council had asked that the issue of personal status for purposes of staff entitlements be reviewed again at its 2007 spring session and that, consequently, the Organization was not in a position

to take any initiative that could contradict or pre-empt any future decision made by the Council.

In its report dated 12 June 2007 the Appeals Committee recommended inter alia that the term “spouse” be interpreted to include partners under a PACS and other similar forms of registered partnership and that the Director-General exercise his discretion to direct that the FAO Staff Regulations and Rules be interpreted in this manner without modification and without the need to obtain a decision from the FAO governing bodies. It further recommended that the complainant’s partner be granted dependency status pursuant to Manual Section 318 and that the complainant be paid dependency benefits with retroactive effect from the date upon which he had applied for them. The Committee rejected the complainant’s other claims.

By a letter of 2 November 2007 the Director-General informed the complainant that he had decided not to accept the recommendations of the Appeals Committee. He explained that a decision to grant the appeal would require either an amendment or an “officially modified interpretation of the Staff Regulations and Rules” which is the prerogative of the governing bodies; accordingly, the claim could only be reviewed in light of the existing provisions and relevant Tribunal case law. Furthermore, the Committee had “misinterpreted” Judgments 2549, 2550 and 2590 which were distinguishable because they dealt with German, Danish and Dutch law respectively. The Organization was relying on Judgment 2193, which was identical both in fact and in law to the complainant’s case, as authority for its decision that partners bound by a PACS cannot be considered as having the status of spouses. In light of this precedent, the Organization was not required to submit evidence to show that the legal effects of a PACS and a marriage were different as this had already been decided by the Tribunal. He stated that the Committee’s comparison of the legal effects of a PACS under French law with the spousal benefits provided under the FAO Staff Regulations and Rules was irrelevant and that the appropriate analysis was a comparison between the provisions of French law regarding marriage and those concerning the PACS or other domestic partnerships. In addition, the

Director-General considered that agreeing with the Committee's recommendations would run counter to decisions made by the FAO governing bodies. The decision to refer the issue to the governing bodies was justified since no common position had been developed in the United Nations (UN) system; the approach of the World Food Programme (WFP) – a joint programme of the UN and the FAO – or any other organisations within the UN system was not binding on the FAO. In the Report of the Council of FAO of its 132nd Session held in June 2007, the Council “noted that a claim made by a staff member against a decision by FAO to refuse to grant dependency benefits to his partner with whom he had concluded a [PACS] was *sub judice*” and that “FAO would apply the conclusion of any judgement of the Administrative Tribunal on his claim to any other staff member in the same conditions of fact and law as the complainant”. The Director-General concluded by rejecting the complainant's appeal as unfounded. That is the impugned decision.

B. The complainant points out that the FAO Staff Regulations and Rules do not include a definition of the word “spouse” and that staff members who are married to a person of the same sex are entitled to benefits in respect of their dependent spouses. Referring to the case law of this Tribunal, particularly Judgments 2549 and 2550, and also to Judgement No. 1183 of the United Nations Administrative Tribunal, he submits that partners bound by a PACS can be considered spouses and that an increasing number of UN agencies already recognise domestic partnerships for the purpose of granting dependency benefits. Indeed, the WFP recognises domestic partners as spouses, even though it is bound by the FAO Staff Regulations and Rules. In addition, it is a legal and social reality that domestic partners are considered to be spouses in an increasing number of UN and FAO Member States, and the FAO should determine the personal status of staff members by reference to the law of their nationality.

The complainant argues that under French law a PACS is similar enough to marriage for partners bound by a PACS to be considered spouses. He acknowledges that in Judgment 2193 the Tribunal made a contrary finding, but he points to the dissenting opinions in that

judgment. He also states that since 2003, when Judgment 2193 was delivered, there has been an evolution in French legislation, the case law and perceptions within society regarding domestic partnerships.

According to the complainant, no decision of the FAO governing bodies is required in order for the Staff Regulations and Rules to be interpreted so as to treat domestic partners, including those bound by a PACS as spouses, as this was clearly the Director-General's prerogative. In his view, the Organization's insistence that such a decision of the governing bodies is necessary is a "dereliction of duty" and duplicitous. Noting that since October 2003 the issue of domestic partnerships and same-sex marriages has been examined more than five times by the governing bodies; he observes that the FAO Council is clearly not interested in taking a decision on the issue and asserts that the FAO is *de facto* deferring its authority to interpret its Staff Regulations and Rules to the Tribunal.

He considers that the Organization has employed dilatory tactics by delaying the internal appeal procedures and by making its decisions subject to processes which are not time-bound and which are typically "uncontrollable". In addition, he alleges that the FAO tried to manipulate the debates of the CCLM and the Appeals Committee by failing to share key information with those bodies.

The complainant submits that the FAO consistently adopts the narrowest interpretation of its Staff Regulations and Rules in order to exclude staff members engaged in domestic partnerships and same-sex marriages from dependency benefits, contrary to the general principle of law according to which ambiguous provisions should be construed against the party responsible for drafting them.

Lastly, he contends that the FAO's attitude in this matter has been guided by discrimination against same-sex and domestic partners.

The complainant seeks the acknowledgment of his spousal status, and the retroactive granting of all entitlements and relevant dependency benefits from 31 March 2005, the date he applied for those benefits, plus compound interest at the rate of 12 per cent per annum. He also claims 5,500 euros in compensation for the cost of his spouse's health insurance and contributions to the Italian social

security system, 10,000 euros in costs for both the present proceedings and the internal appeal proceedings, 50,000 euros in moral damages “for pain and suffering inflicted by the Organization’s failure to recognise [his] spousal status, the behaviour and tactics it used to handle the case and deny [his] rights [and] the humiliating immigration procedures that [his] spouse – a non-EU citizen – and [he] had to go through” and “punitive” damages in the symbolic amount of one euro. He also asks the Tribunal to order disclosure of the reports prepared by the Organization for the 80th and 81st sessions of the CCLM.

C. In its reply the Organization argues that under existing legal provisions it cannot allow the complainant’s claim because he has not satisfied the requirements of Manual paragraph 318.5.11, which relevantly provides that staff members are required to supply a marriage certificate in support of a claim for spousal benefits. Furthermore, it submits that it has acted in strict conformity with the principles established by the case law, in particular Judgments 1715, 2193 and 2590. It points out that in accordance with Judgment 2590, “the personal status of staff members must be determined in accordance with their national legislation”. A PACS is not a form of marriage under French law. It contends that the complainant has misinterpreted changes in the French legislation and that substantive differences remain between the legal regimes established for married individuals and those who have concluded a PACS. It asserts in particular that individuals bound by a PACS “are still considered single with regard to the family general status under [French law]” and it points out that same-sex marriages are illegal.

The Organization denies that it has been derelict in its duty in this matter and submits that the Director-General has acted in accordance with its Constitution and the General Rules by requesting the views of the governing bodies on this complex issue. The Director-General does not consider that he is authorised to take any initiative pending a decision by the governing bodies as there is no issue regarding the interpretation of the Staff Regulations and Rules and the governing bodies have confirmed that his cautious approach has been appropriate.

They consider that the FAO should apply the case law with respect to registered partnerships. In particular, it relies on Judgment 2590 where the Tribunal rejected the allegation of discrimination and considered that, “in a case involving such controversial issues in some member States”, the organisation was simply concerned not to take any positive decision without the Council’s prior approval.

D. In his rejoinder the complainant develops his pleas. He contends that it is no longer legitimate for the Director-General to await a decision from the governing bodies. He asserts that the fact that same-sex marriages are illegal in France is not relevant to this case because that does not mean that partners under a PACS cannot be considered spouses. There are substantial similarities and in many cases equivalence between the legal implications of a PACS and marriage under French law. In support of this he attaches a letter from the Permanent Representative of France to the FAO. He claims an additional 5,000 euros in moral damages because of the FAO’s delay in submitting its reply.

E. In its surrejoinder the Organization maintains its position and emphasises that in French law a spouse has a different legal status than a domestic partner under a PACS.

F. In its *amicus curiae* brief FICSA expresses its wholehearted support for the complainant. It submits that in the light of recent developments and particularly of the case law cited above, most UN organisations are now recognising domestic partnerships.

## CONSIDERATIONS

1. The complainant impugns before the Tribunal a decision taken by the Director-General not to recognise his same-sex partner with whom he had entered into a PACS as his spouse for the purpose that the latter be granted dependency status.

2. He puts forward, in summary, the following arguments. He submits that the word “spouse” is not defined in the FAO Staff Regulations and Rules. In the UN system, domestic partners, including those engaged in a PACS, have been recognised as spouses for the purpose of granting dependency benefits. In view of the provisions applying to PACS and marriage under French law, a PACS is “close enough” to marriage for partners bound by a PACS to be considered as spouses.

While acknowledging that the Tribunal reached a different conclusion in Judgment 2193, he maintains that, since the date of that judgment, domestic partnerships have gained social recognition and the perception of equivalence of the spousal relationship between domestic partners and married persons has evolved. In addition, the United Nations Administrative Tribunal held in Judgement No. 1183 that partners bound by a PACS should be considered as spouses. He also points out the evolution in the French law reflecting a convergence of the legal provisions applicable to PACS and to those applicable to marriage as evidenced in a letter from the Permanent Representative of France to the FAO. Lastly, he notes that the Tribunal’s own case law has evolved regarding Danish and German domestic partnerships, as shown in Judgments 2549 and 2550.

Furthermore, he contends that the Organization’s attitude towards him has been guided by discrimination against same-sex and domestic partners. He considers that by adopting the narrowest interpretation of its Staff Regulations and Rules the FAO has disregarded a general principle of law.

3. The complainant’s claims are set out under B, above.

4. The Federation of International Civil Servants’ Associations (FICSA) submits an *amicus curiae* brief supporting the complainant’s claim.

5. The FAO makes two preliminary observations. It observes first that the authority to take a decision on the issue of domestic partnerships and same-sex marriages rests with the governing bodies;

and second, that the complainant's claim cannot be entertained as it does not meet the requirements of Manual paragraph 318.5.11 which provides, among other things, that when applying for spousal benefits, a staff member must provide a marriage certificate.

6. Throughout its submissions, the FAO's position is premised on its assertion that in the absence of a definition of the word "spouse" in the Staff Regulations and Rules, the status of "spouse" can only arise in the context of a marriage. It follows, in its view, that to accept the complainant's position would require either an amendment or an officially modified interpretation of the Staff Regulations and Rules. In these circumstances, as the Director-General observed, the complainant's appeal could only be considered on the basis of the existing regulatory provisions and the Tribunal's case law. In support of the assertion that the status of "spouse" can only arise in the context of a marriage, the FAO relies on Judgment 1715, under 10. It argues that it follows from this assertion that the complainant's plea should fail because the Tribunal held in Judgment 2193, under 10, that a PACS is not a form of marriage under French law.

7. The FAO submits that its position is fully supported by Judgment 2590, under 6. While the FAO acknowledges that in accordance with that judgment, the personal status of a staff member is to be determined in accordance with the law of the nationality of the staff member, this principle can only be applied to the extent that it is compatible with the Staff Regulations and Rules. It points out that in this judgment the Tribunal again recognised that, in the absence of a definition of the word "spouse", the status of spouse only flows from the institution of marriage.

8. As to the complainant's assertions regarding the new developments in the French law in relation to a PACS, the FAO argues that the changes do not eliminate the substantive differences between the legal status of individuals bound by a PACS and the legal status of those in a marriage. In response to the complainant's allegations of discrimination, the FAO points out that the actions it

has taken in the present case are the same as those it took in the case giving rise to Judgment 2590 where the Tribunal rejected the allegations of discrimination. As well, the Organization disputes the assertion that its conduct amounts to a disrespect for general principles of law. The FAO maintains that as the matter had been referred to the governing bodies, the Director-General had no authority to pre-empt their review.

9. The Tribunal rejects the FAO's assertion that under the Staff Regulations and Rules, the status of "spouse" can only arise in the context of a marriage. It is now well established in the case law that, unless the term "spouse" is otherwise defined in the staff regulations, it is not limited to individuals within a marriage. It may also arise from other types of unions. As the Tribunal observed in Judgment 2760, under 4, in the absence of a definition of "spouse" in the relevant regulatory provisions, "same-sex marriages [...] or unions in the form of 'registered partnerships' [have] to be recognised by these organisations where the applicable national legislation enable[s] persons who ha[ve] contracted such unions to be regarded as 'spouses' (see Judgments 2549 and 2550)". (See also Judgment 2643, under 6.)

10. Based on the flawed premise that the status of spouse can only be derived from a marriage, the Director-General reasoned that since the complainant's claim would require either an amendment or an officially modified interpretation of the Staff Regulations and Rules, his consideration of the appeal was limited to the "existing provisions and relevant case law". In this regard, as noted earlier, the Director-General concluded that as the complainant's claim was identical both in fact and in law to the claim considered by the Tribunal in Judgment 2193, the findings in that judgment determined the outcome of the complainant's appeal.

11. It is useful at this juncture to recall that in Judgment 2193, relying on its Judgment 1715, the Tribunal dismissed the complaint because "[i]t cannot be said on the basis of the French texts submitted [...] that the PACS is a form of marriage". However, referring to

Judgment 1715, the Tribunal observed in its later Judgment 2549, under 11, 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.”

12. To the extent that the FAO relies on Judgment 2590 as support for its assertion that the word “spouse” is still limited to an individual within a marriage, the Tribunal’s findings in that judgment were made within the context of a claim for a dependent spouse from a same-sex marriage and not for the purpose of distinguishing a marriage from a domestic partnership.

13. Accordingly, as the Tribunal also observed in Judgment 2549, under 11, it is necessary to determine whether in the light of the provisions of French law, the complainant and his partner should be considered as “spouses” within the meaning of the FAO Staff Regulations and Rules.

14. In support of his pleas the complainant submitted a letter dated 23 July 2008 in which the Permanent Representative of France to the FAO noted that since the coming into force of the law governing PACS in November 1999 there have been profound amendments to that law, notably, Law No. 2004-1484, Law No. 2006-728 and Law No. 2007-1223 of December 2004, June 2006 and August 2007 respectively. In terms of the effects of these amendments, the Permanent Representative stated:

“Because of this similarity between PACS and marriage under French law, the partner under a PACS of a UN official of French nationality enjoys exactly the same treatment as a spouse.”\*

15. The FAO submits that despite these changes, the fact remains that under French law the status of a “spouse” is different from that of a “partner” under a PACS. It asserts that it reviewed the information about PACS under French law in accordance with the principle that

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\* Registry’s translation of the French original.

personal status is to be determined with reference to the law of the nationality of the staff member.

16. The Tribunal observes that this assertion is not borne out by the Director-General's decision in which it is made clear that the decision was based on Judgment 2193 which pre-dates the changes in the French law. Further, the Director-General justified the Administration's refusal to seek out information from the French government on the basis that the legal effects of a PACS and a marriage had already been decided by the Tribunal.

17. In his submissions to the Appeals Committee and before the Tribunal, the complainant detailed the similarities between the rights and obligations derived from a PACS and those derived from a marriage under French law. He also appended the relevant French statutory provisions to his submissions. These materials demonstrate that just as in a marriage relationship, PACS partners are required to provide each other with financial support and are jointly liable for debts incurred for daily living. In matters such as immigration, social security, health insurance, home leave and relocation of civil servants, special leave for persons bound by a PACS, inheritance fees and income taxes, PACS partners are treated the same as spouses in a marriage. In a significant recent development, reference is made to the existence of the PACS and the name of the partners in the official register of personal status of individuals who have entered into a PACS, just as marital status is recorded for married persons. However, as the complainant points out, one of the last remaining differences is in the area of adoption.

18. Although the Director-General did not engage in this analysis in reaching his decision, in its submissions to the Tribunal, the FAO characterises the differences between a marriage and a PACS in the following terms:

“A marriage is celebrated by an *‘Officier d'état civil’* [...] under specific and detailed provisions of the French Civil Code. It is the basis for a legal institution, the *‘couple’*, consisting of two persons of different sex. A legal status is defined which modifies fundamentally and in general terms the

individual status of each of the spouses. A ‘PACS’ is a mere contract which takes the form of a legal agreement signed by two partners and registered by a notary. The two partners accept some reciprocal obligations in specific areas. Two persons of different sex may conclude a PACS which is a contract under which two persons decide to organize their life in common. On the other hand, a marriage is an ‘*acte d’état civil*’ for a full range of purposes.”

19. The Tribunal rejects the FAO’s characterisation of the legal effect of a PACS. Not only does a PACS change the legal status of the partners in relation to each other, but it also changes the legal status of the partners in relation to the State in a variety of ways enumerated earlier and in ways that mirror the status of married couples in relation to the State. Just as in a marriage, a PACS establishes a legal relationship of mutual dependence. Further, and at the very least, in the absence of a contrary provision in the Staff Regulations and Rules, the principle of non-discrimination requires that for the purposes of dependency benefits the term “spouse” be interpreted as applicable to a relationship of mutual dependence under the relevant national law.

20. As to the FAO’s argument that the claim cannot succeed since the complainant could not submit a marriage certificate as required under Manual paragraph 318.5.11, the Tribunal observes that this provision does not confer any rights, rather, it only provides a means of proving the existence of a relationship. As such, it cannot operate to deny a lawful entitlement to a benefit under another provision.

21. In conclusion, having regard to the materials filed in this proceeding, the Tribunal is satisfied that the provisions of French law give rise to a relationship of mutual dependence, and accordingly, the complainant and his partner must be regarded as “spouses” under the Staff Regulations and Rules. In these circumstances, the Director-General erred in refusing to recognise the status of the complainant and his partner for the purpose of dependency benefits and, therefore, his decision will be set aside.

22. Accordingly, the status of the complainant and his partner must be recognised with retroactive effect to 31 March 2005. The Organization must give full effect to this ruling by granting the complainant the dependency benefits he has been denied since that date together with interest thereon at the rate of 8 per cent per annum. Subject to the presentation of receipts, the Organization shall refund to the complainant the costs he has incurred for his partner's health insurance registration and contributions to the Italian social security system.

23. The complainant also claims moral damages for the pain and suffering stemming from the FAO's failure to recognise his spousal status, the manner in which it handled his request, and the humiliating immigration procedures that his partner – a non-EU citizen – and he had to endure in order to obtain that his partner may live with him at his duty station. He also seeks a symbolic award of punitive damages of one euro. The Tribunal observes that there is no information in the record from which it can make a determination that the immigration difficulties flowed from the lack of recognition of the complainant's partner by the Organization. Additionally, as there is no evidence that the impugned decision was motivated by malice, ill will, or discrimination, the claim for punitive damages is rejected. However, having regard to the circumstances of this case, in particular the inordinate delay, the complainant is entitled to compensation for moral injury in the amount of 10,000 euros.

24. As the complainant's request for the disclosure of the reports prepared by the Organization for the 80th and 81st sessions of the CCML has been overtaken by this judgment, disclosure will not be ordered.

25. Having succeeded, the complainant is entitled to costs which the Tribunal sets at 3,000 euros.

## DECISION

For the above reasons,

1. The decision of 2 November 2007 is set aside.
2. The case is referred back to the FAO for a consideration of the complainant's entitlements in accordance with consideration 22.
3. The FAO shall pay the complainant moral damages in the amount of 10,000 euros.
4. It shall also pay him 3,000 euros in costs.
5. All other claims are dismissed.

## DISSENTING OPINION BY JUDGE AGUSTÍN GORDILLO

I respectfully dissent with the majority opinion on the ground that such a decision belongs, in my view, to the competence of the governing bodies of the Organization, as I explained in “The Administrative Law of International Organizations: Checks and Balances in Law Making – The Case of Discrimination” *in*: European Public Law Series / Bibliothèque de droit public européen, vol. LXXXIII, *Internationalisation of Public Law / L'internationalisation du droit public*, London, Esperia, 2006, pp. 289-312. Also *in*: *Revue européenne de droit public / European Review of Public Law*, vol. 18, No. 1, London, Esperia, 2006, pp. 289-312. Also *in*: *International Administrative Tribunals and the Rule of Law*, World Bank Administrative Tribunal / American Society of International Law, *Joint Colloquium*, 27 March 2007, Washington, D.C.

In witness of this judgment, adopted on 7 May 2009, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, Mr Agustín Gordillo, Judge, Mr Claude Rouiller, Judge, Mr Giuseppe Barbagallo, Judge, Ms Dolores M. Hansen, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar

Delivered in public in Geneva on 8 July 2009.

Seydou Ba  
Mary G. Gaudron  
Agustín Gordillo  
Claude Rouiller  
Giuseppe Barbagallo  
Dolores M. Hansen  
Patrick Frydman  
Catherine Comtet