Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

112th Session **Judgment No. 3080**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G. P. against the World Health Organization (WHO) on 12 November 2009, WHO's reply of 22 February 2010 and the e-mail of 24 March 2010 by which the complainant informed the Registrar of the Tribunal that he did not wish to enter a rejoinder;

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 is a Norwegian national born in 1947. He joined WHO in March 1988 as a Medical Officer at grade P-5. After serving for a year at the Organization's Headquarters in Geneva (Switzerland), he was assigned first to the Philippines and then to Cambodia. In 1999 he was promoted to grade P-6 and transferred to the Country Office for Indonesia which belongs to the Regional Office for South-East Asia (SEARO). He retired on 30 April 2007.

The complainant entered into a Norwegian registered partnership with his same-sex partner on 15 October 1993. He contacted the Administration on several occasions as from 2003, in particular on 22 July 2003, seeking clarifications on the Organization's position with respect to the recognition of registered partnerships. In early 2006 he received a form entitled "Verification of dependency status for year 2005", which he returned on 30 April, indicating that his partner was his dependent "spouse".

On 1 June 2006 WHO published Information Note 22/2006, setting out a new policy on personal status for purposes of establishing entitlements. It provides inter alia that personal status will be determined by reference to the law of the country of nationality of a staff member and that, once it is determined that a staff member has contracted a valid marriage or a domestic partnership legally recognised under the law of his/her country of nationality, his/her partner will in either case be considered to have the status of a spouse for purposes of entitlements under WHO Staff Rules and related provisions of the WHO Manual.

On 26 July 2006 the complainant submitted a formal request to the SEARO Personnel Department to have his partner recognised as his dependent spouse. He indicated that his personal status had changed on 15 October 1993, the date on which he had entered into a registered partnership. As required by paragraph 20 of the Information Note, he filled in a special form, which he attached to his request. On 27 December 2006 he received a document dated 6 November 2006 by which the Regional Director informed him that his partner was recognised as his dependent spouse for benefits purposes as from 1 June 2006.

The complainant wrote to the Regional Personnel Officer on 2 January 2007 expressing surprise at the decision to recognise his partner as his dependant only as from 1 June 2006 and not as from 15 October 1993. He asked the Organization to pay him a "just and reasonable" compensation for the "lost" benefits (i.e. the difference between the basic salary, post adjustment, hardship and mobility allowance, housing allowance and home leave entitlements paid

to a staff member with dependants and those paid to a staff member without dependants). He also asked to be allowed to claim reimbursement of his partner's medical expenses, subject to the general rule that claims had to be submitted within a year of the treatment in question. On 6 February 2007 the Director of Human Resources Management (HRD) replied that the registered partnership could not be recognised with an effective date prior to the issuance of Information Note 22/2006.

On 9 April 2007 the complainant lodged an appeal with the Regional Board of Appeal contesting the decision to recognise his partner as his dependent spouse from 1 June 2006 and not from the date of his registered partnership. The Board recommended, in its report of 18 July 2007, that the appeal be dismissed on the grounds that the Note allowing recognition of a registered partnership for the purposes of establishing benefit entitlements became effective on 1 June 2006 and could not have retroactive effect. By a letter of 23 January 2008 the Regional Director informed the complainant that he had decided to endorse the Board's recommendation.

On 19 March 2008 the complainant appealed the Regional Director's decision before the Headquarters Board of Appeal (HBA). He argued that the policy set out in Information Note 22/2006 should be interpreted as a confirmation of a practice that had existed for a long time and of the principle of equal rights. In addition, he contended that the policy was discriminatory in that the documents evidencing a same-sex partnership would be subjected to closer scrutiny than those evidencing a heterosexual marriage. The HBA took due note of the introductory paragraph of the Note, which reads in part as follows: "It is a long-established principle that matters of personal status should be determined by reference to the law of the country of nationality of the staff member". Hence, it held that the complainant had been in a marital relationship since 15 October 1993 and that he had been denied the basic rights he enjoyed in his country of origin and the benefits available to heterosexual staff members with a dependent partner. It also noted that in 2004, i.e. prior to the entry into force of the 2006 Note, the same-sex marriage of another staff member had been recognised by WHO under Staff Rule 310.5, which

defines "dependants" for the purposes of determining entitlements under the Staff Rules. The HBA concluded that the Organization had a moral obligation toward its staff to put into practice that which it itself recognised as a "long-established principle" that matters of personal status should be determined by reference to the law of the country of nationality of the staff member concerned. It also held that the complainant had suffered discriminatory treatment because of his sexual orientation. Consequently, it recommended that he be paid – with retroactive effect from 15 October 1993 – the entitlements, emoluments and allowances, travel and social security expenses set out in the Note, as well as interest on these amounts for the period 1 June 2006 to the date of the final decision on the compensation to be awarded. It also recommended that he be compensated for the expenses he had incurred with respect to his partner travelling with him when he took home leave during his employ in Cambodia and Indonesia, and that he be paid costs.

By a letter of 13 July 2009 the Director-General informed the complainant that his appeal was rejected because, contrary to the finding of the HBA, he was not in a marital relationship but in a registered partnership, as confirmed by the Permanent Mission of Norway, and there was no provision for the recognition of domestic partners for dependency purposes in the Staff Rules prior to the entry into force of the above-mentioned Note on 1 June 2006. That is the impugned decision.

B. The complainant contends that, under Norwegian law, a registered partnership is equal to a marriage. Indeed, the Norwegian law on registered partnership provides that registered partners have the same rights and obligations as spouses married under Norwegian marriage law, except with respect to the right to adopt children. He submits that, since he was in a relationship equal to a marital relationship since 15 October 1993, his personal status and that of his partner should be recognised with retroactive effect from that date. He finds it unfair not to have been treated in the same way as any other married staff member.

He indicates that, as early as 1993, he asked the Administration orally on several occasions whether WHO recognised same-sex partnerships for the purpose of granting dependency benefits, but the replies were generally negative. Consequently, he made no formal request to have his partnership recognised until 2003. At that stage, he was advised to be patient and to wait until the Organization issued guidelines on the matter, which were under discussion. He was given the impression, including by the Director of HRD, that once the guidelines were issued he would be eligible for the benefits granted to a staff member with a dependent spouse, and that these benefits would be paid retroactively.

The complainant objects to the "unjustified" and "deliberate" delay in processing his claim, which made him feel that his case was not important and that he was being discriminated against. The Regional Board of Appeal informed him on 18 July 2007 that it had sent its report to the Regional Director, but the latter forwarded it to him only on 16 February 2008, that is to say almost seven months later, despite his follow-up calls and letters. He adds that he received the HBA's report only on 26 August 2009 with the Director-General's final decision of 13 July 2009.

He asks the Tribunal to order WHO to pay him, for the period 15 October 1993 to 1 June 2006, the difference between the basic salary and benefits (in particular: post adjustment, housing allowance and the mobility and hardship allowance) paid to staff with dependants and those paid to staff without dependants, together with interest. He claims the lump-sum payments to which he would have been entitled for his partner's home leave travel between 1994 and 2005, with interest, 30,000 United States dollars in moral damages and 5,000 dollars in costs.

C. In its reply WHO submits that it correctly determined that the complainant was entitled to dependency benefits from 1 June 2006. It asserts that the 2006 Note was the first explicit recognition by it of registered partnerships and that there was no provision therein for retroactive recognition of dependency status and the corresponding entitlement to benefits. It stresses that, according to the Tribunal's case

law and that of the United Nations Administrative Tribunal, a provision shall not be construed as having retroactive effect unless that is clearly intended, and that it would be contrary to the principle of the stability of legal relationships to apply the Note retroactively to 1993, as requested by the complainant. Prior to the issuing of the Note, the Organization recognised "spouses" for purposes of granting dependency benefits only in the context of a marriage, and not of a registered partnership. It rejects the complainant's argument that the law of his country of origin should take precedence over WHO's internal rules.

The Organization adds that the complainant's request for recognition of his registered partnership should be considered in the light of the progressive evolution of the laws of its Member States and of the case law of both this Tribunal and the United Nations Administrative Tribunal. It stresses that the recognition of same-sex marriages and domestic partnerships in connection with the determination of staff members' entitlements only dates back to October 2004 for those working in the United Nations and notes that the complainant did not request the Administration to recognise his partner as a dependant at the time when he entered into a registered partnership with him. Indeed, in 1993 none of the organisations of the United Nations system recognised domestic partners for the purpose of granting dependency benefits. It adds that, when the complainant accepted the offer of appointment and the subsequent extensions, he accepted WHO rules and regulations, which did not provide for the recognition of domestic partners.

Subsidiarily, the Organization submits that, if the Tribunal were to accept the complainant's claim for retroactive recognition of his registered partnership, it could only be from the date on which the complainant formally claimed recognition of his change of status, i.e. 30 April 2006. It contends that his claim for moral damages is irreceivable for failure to exhaust internal remedies. In any event, it denies any "deliberate procrastination" or failure to treat the complainant with respect.

CONSIDERATIONS

1. The complainant entered into a registered partnership with his same-sex partner on 15 October 1993, shortly after this became possible in his country, Norway, as a result of the adoption of Act No. 40 of 30 April 1993.

2. He then made oral enquiries with WHO as to whether his partner could be regarded as a dependant for the purposes of certain entitlements, but at first he received only evasive or rather negative answers. It is true that, at the time, the recognition of same-sex marriages or partnerships, which had only recently begun to appear in the legislation of a few States, remained a virtually unknown concept in international organisations.

3. On 22 July 2003, in other words at a juncture when discussions as to how to accommodate this new legal reality had already advanced considerably within the United Nations system, the complainant submitted his first formal request in an e-mail to HRD in which he stated that he "would appreciate [its] further investigating the possibility of getting [his] partnership accepted by WHO" and listed the material benefits that would flow from a decision to that effect.

4. On 30 April 2006 the complainant, who was required to fill out a form entitled "Verification of dependency status for year 2005" as part of an annual check on the accuracy of staff members' personal details, entered the name of his partner as his "spouse". In the remarks section of the form, he referred to his frequent contacts and correspondence with HRD concerning recognition of the registered partnership into which he had entered in 1993.

5. Information Note 22/2006 on "Personal Status for purposes of establishing WHO entitlements" was circulated on 1 June 2006. This Note referred to the principle that matters of personal status should be determined by reference to the law of the country of nationality of the staff member and, for the first time, it explicitly

took into consideration same-sex marriages or domestic partnerships contracted in States where these forms of union were legally recognised, in that it specified that a staff member's partner in such a marriage or partnership would be considered to have the status of his/her "spouse" for the purposes of entitlements under WHO rules.

6. Having requested that these new provisions be applied to him, the complainant received a "Personnel Action" dated 6 November 2006 indicating that his partner was recognised as his dependent spouse. However, this measure took effect only on 1 June 2006, the effective date of Information Note 22/2006, and not, as he had hoped, on 15 October 1993, when he had entered into the registered partnership. His protest to the Organization in this connection proved fruitless because, by a decision of 6 February 2007, the Director of HRD confirmed the date on which this measure took effect, on the grounds that the above-mentioned Information Note was not retroactive.

7. The complainant then referred the matter to the Regional Board of Appeal through the internal appeal procedures laid down in Section 12 of the Staff Rules, but his appeal was dismissed, in accordance with the Board's recommendations, by a decision of the Director of SEARO dated 23 January 2008.

8. The complainant challenged this decision before the HBA, which recommended that all his claims should be granted. However, by a decision of 13 July 2009 the Director-General departed from the HBA's recommendations and dismissed the complainant's appeal. She took the view that since the complainant was not married but a party to a registered partnership, his partner could be recognised as his spouse only under the policy set out in the Information Note of 1 June 2006, which had entered into force on that date, since "there [wa]s no provision for the recognition of domestic partners for dependency purposes in WHO's Staff Rules prior to 1 June 2006".

9. It is that decision that the complainant impugns before the Tribunal, though his claims must also be deemed to be directed against the above-mentioned decisions of 6 February 2007 and 23 January 2008. The complainant asks the Organization to accept that his registered partnership is equal to a marriage according to Norwegian law and that he is therefore entitled to the benefits enjoyed by married staff members as from the date on which his partnership was registered, i.e. from 15 October 1993. In addition to the payment of various benefits retroactively from that date, he seeks compensation for moral injury and an award of costs.

10. The Tribunal first notes that there is no doubt that, before the entry into force of Information Note 22/2006, WHO was already generally applying the principle that, for the purposes of applying the Staff Rules concerning them, staff members' personal status should be determined by reference to the law of their country of nationality. Indeed, paragraph 1 of the Note drew attention to the fact that this was "a long-established principle", that "[t]his basic principle is already recognized in the staff rules and administrative issuances of several organizations in the common system [of the United Nations]" and that "[i]t is also a guiding principle already recognized in WHO's Staff Rules". Thus, although paragraph 2 of the Note stated that "[t]he purpose of th[at] document [wa]s to provide that personal status for purposes of establishing WHO entitlements w[ould] be determined by reference to the law of the country of nationality of the staff member", there are no grounds for inferring from these terms that the principle in question had not been recognised by the Organization until then. In fact, as the defendant explains in its written submissions, in the minds of senior management, the sole purpose of issuing the Information Note of 1 June 2006 was to define the terms and conditions for applying this principle in the new legal and sociological context emerging from the legal recognition, in certain States, of same-sex marriages or domestic partnerships. Moreover, the Organization itself emphasises that "[t]he principle that matters of personal status should be determined by reference to the law of the nationality of the staff

member informs WHO's Staff Rules and policies". There is therefore no real dispute between the parties on this issue.

11. However, the Organization goes on to argue that this principle "does not override" the applicable texts, and it submits that prior to 1 June 2006 the Staff Rules did not make it possible to recognise the partner of a staff member who had entered into a domestic partnership.

12. The Tribunal will not accept this argument. The provisions of WHO's Staff Rules governing staff members' entitlements generally refer to a "spouse" without specifically defining this notion. The case law of the Tribunal establishes that when the term "spouse" is used in an organisation's staff rules or regulations without being otherwise defined therein, it is not limited to individuals within a marriage but may also cover persons in other forms of union (see in particular Judgments 2760, under 4, and 2860, under 9). Thus, in several recent judgments concerning cases where the applicable provisions were couched in similar language, the Tribunal held that the organisations concerned had to recognise same-sex marriages (see Judgment 2590 or Judgment 2760 quoted above) or unions in the form of registered partnerships when the relevant national law made it possible to consider persons in such unions as "spouses" (see Judgments 2549 and 2550, and Judgment 2860 quoted above).

13. The Organization rightly points out that some provisions of the Staff Rules expressly referred to "husband and wife", rather than "spouses", until the entry into force of amendments which were confirmed by the Executive Board of WHO on 16 January 2006. If it could be inferred from these provisions, particularly in light of their scope or their number, that the Staff Rules thereby intended to define the notion of "spouse" as denoting exclusively married persons of opposite sex, the Organization would be correct in submitting that same-sex partners – *a fortiori* those joined not by marriage but by a registered partnership – could not be recognised for the purposes of

the rules governing staff members' entitlements (see, in this connection, Judgment 2643, under 6).

14. But, as the Tribunal has already ruled, a passing reference to "husband" or "wife" in the Staff Rules is not sufficient to warrant interpreting all the relevant provisions thereof as denying same-sex spouses the entitlements concerned (see Judgment 2590 quoted above, under 6). Moreover, all the former provisions in question concerned only the special case where a staff member and his/her spouse were both officials of international organisations within the United Nations system. It cannot be inferred from the isolated references to "husband" and "wife" in these very specific provisions that they served to define the notion of "spouse" for the purposes of all the Staff Rules and thus prevented the granting of benefits to same-sex partners. The Tribunal also notes that there is evidence in the file that in 2004 WHO had agreed to recognise the partner of a staff member in a same-sex marriage as that person's spouse, which shows that the Organization was already adopting this interpretation at that time.

15. At this stage it is still necessary to determine whether the complainant and his partner were in a form of union such that they could be considered "spouses" under Norwegian law. Indeed, if under the applicable national law the differences between the rules governing registered partnerships and those governing marriages were such that these forms of union could not be regarded as being equivalent, the complainant would have no grounds to claim the relevant entitlements on the basis of the Staff Rules (see Judgment 2193, which concerned a French "Civil Solidarity Pact" – the French domestic partnership – before the rules governing it were substantially amended to bring them closer to those governing marriages). The Organization would be right in saying that the complainant's entitlement to dependency benefits in respect of his partner arose only upon the entry into force of the Information Note of 1 June 2006 quoted above, which recognises all legally recognised domestic partnerships.

16. However, in the present case there is no doubt that the rules on registered partnerships embodied in the above-mentioned Norwegian Act of 30 April 1993 are similar to those governing marriages. According to Sections 3 and 4 of the Act read together, "[r]egistration of a partnership has the same legal consequences as contraction of a marriage", the only exception being that "[t]he provisions of the Adoption Act concerning spouses shall not apply to registered partnerships", or at least, not all of those provisions. Furthermore, evidence in the file, in the form of an attestation from the Royal Ministry of Children and Equality stating that "registered partners have the same rights and duties as married couples in relation to one another and to society", confirms the extremely close similarity of the legal rules governing the two forms of union in question. In these circumstances it is clear that the complainant's partner had to be regarded as a "spouse" for the purposes of the Staff Rules of WHO. In particular, it should be noted that the limitation placed by Norwegian law on registered partners' rights in respect of adoption is not enough to prevent a registered partnership from being treated as a marriage. Indeed, the Tribunal has recently ruled, with regard to the French "Civil Solidarity Pact" in its present form, that the partners under such a pact must be regarded as spouses, even though the rules governing such contracts likewise confer no right of adoption (see Judgment 2860 quoted above, under 17, 19 and 21). The same finding was reached in respect of registered partnerships under Danish law, on which the Norwegian Act is largely modelled and which likewise places a restriction on adoption (see Judgment 2549, under 12).

17. It may be concluded from considerations 10 to 16 above that the complainant was entitled to draw benefits for a dependent spouse under the Staff Rules before the Information Note of 1 June 2006 was issued. In these circumstances, although it is true that the Note itself did not apply retroactively, this fact is immaterial to the outcome of the dispute. Furthermore, since the complainant was already entitled to draw the benefits in question, it is to no avail that the Organization argues that their payment for a period prior to 1 June 2006 would

breach the principle of the stability of legal relationships or its contractual relations with the complainant.

18. The date as from which the complainant is entitled retroactively to draw the benefits in question must be determined on these bases.

19. According to the Tribunal's case law, when an organisation is ordered to grant a financial benefit to a staff member who fulfilled the legal requirements for claiming it, but who failed to do so as soon as his/her entitlement arose, the benefit in question is due only as from the date of the initial claim by the person concerned, and not the date on which he/she became entitled to the benefit (for examples concerning the retroactive granting of benefits to staff members with same-sex partners, see Judgment 2550, under 6, or Judgment 2860, under 22). There would be no justification for ordering an organisation unexpectedly to pay potentially large, backdated, aggregated sums for benefits which had not been claimed by the staff member concerned when he or she should have done so. Contrary to the opinion of the HBA, the complainant, who admits that he did not formally apply for the disputed benefits as soon as he entered into a registered partnership on 15 October 1993, therefore has no grounds for seeking their retroactive payment as from that date.

20. It is true that the position would be different if the Organization itself were responsible for the fact that the complainant did not submit a claim back in 1993 and, indeed, the complainant puts forward a number of arguments in this connection. He contends that at that point in time he was unable to obtain any clear-cut information from the Administration as to the possibility of drawing the benefits in question in his particular situation and that the few answers he was given on the matter were rather discouraging. He adds that the formal submission of an application to have his partner recognised as his spouse would have had the disadvantage of raising the issue of his sexual orientation, with no real guarantee of confidentiality, in the

countries where he was then working, where both the law and public opinion were often hostile to homosexuality. But, as the complainant himself points out in his submissions, it is understandable that the people whom he contacted within the Organization at that time were uncertain how to advise him, insofar as legislation and case law had only just started to recognise same-sex unions. Given that the complainant does not allege that he was pressurised into not applying for spousal dependency benefits, WHO cannot be accused of having acted improperly. Furthermore, however regrettable it may be that the local context was not favourable to the exercise of his rights, again the Organization was not responsible for this situation, particularly inasmuch as the complainant does not allege that he objected to being posted to those areas.

21. Since the benefits in question were thus due only as from the submission of the complainant's first claim for them, the date on which this claim was submitted must be determined. WHO submits in this connection that the first claim was that made on 30 April 2006 in the above-mentioned form entitled "Verification of dependency status for year 2005". However, as already stated, the complainant took care to point out in this form that he had already informed the Organization's services of his claim. According to the evidence on file, the first formal expression of this claim is to be found in the above-quoted terms of the e-mail which the complainant sent on 22 July 2003. The Tribunal therefore considers that the disputed benefits must be paid as from that date.

22. The Tribunal observes that, regardless of any other circumstances, the choice of this date leads it to reject the Organization's argument that case law which had not yet been established when its dispute with the complainant arose cannot be applied retroactively to this case. Indeed, it is sufficient to point out in this regard that, by then, Judgment 2193 quoted above had already established the essential principles on which that case law rests, even though it concerned a case which led to a different decision to that adopted in the present judgment.

23. It may be concluded from the foregoing that the complainant is entitled to all the financial benefits which he would have received for the period 22 July 2003 to 31 May 2006, if the Organization had recognised his partner as his spouse for the purposes of the rules then in force.

24. The decision of the Director-General of 13 July 2009, the decision of the Director of HRD of 6 February 2007 and the decision of the Regional Director of 23 January 2008 refusing to grant these benefits to the complainant will therefore be set aside. Since the Organization does not contest the nature of the benefits in question, it must pay the complainant the additional amount to which he was entitled in respect of a dependant for the period in question in terms of basic salary, post adjustment, housing allowance and hardship and mobility allowances. It will also reimburse the complainant the lump-sum option for his partner's home leave travel expenses for each of the years in this period when this benefit was due. All these sums shall bear interest at 5 per cent per annum from their due dates until their date of payment.

25. As far as the award of moral damages is concerned, it must first be pointed out that, contrary to the Organization's submissions, the fact that this claim was not raised before the internal appeal bodies does not make it irreceivable. Consistent precedent has it that the rule laid down in Article VII, paragraph 1, of the Statute of the Tribunal that internal means of redress must first be exhausted does not apply to a claim for compensation for moral injury, which constitutes a claim for consequential relief which the Tribunal has the power to grant in all circumstances (see Judgment 2609, under 10, or Judgment 2779, under 7).

26. The unlawful refusal to recognise the complainant's rights as from 22 July 2003 has caused him undeniable moral injury, which has been aggravated by the excessively slow examination of his initial claim and internal appeal procedure. On the other hand, there is no evidence in the file to suggest that, when dealing with this case, the

Organization deliberately discriminated against the complainant or that it failed in its duty to respect his dignity. In view of all these factors, the Tribunal considers that the moral injury suffered by the complainant will be fairly redressed by ordering the Organization to pay him compensation in the amount of 15,000 United States dollars.

27. Since the complainant succeeds in part, he is entitled to costs in respect of proceedings before the Tribunal and the internal appeal procedure, which the Tribunal sets at a total amount of 3,000 dollars.

DECISION

For the above reasons,

1. The decision of the Director-General of WHO of 13 July 2009, the decision of the Director of the Human Resources Management Department of 6 February 2007 and the decision of the Director of the Regional Office for South-East Asia of 23 January 2008 are set aside.
2. The case is remitted to WHO for an examination of the complainant's rights in accordance with considerations 23 and 24 of this judgment.
3. The Organization shall pay the complainant moral damages in the amount of 15,000 United States dollars.
4. It shall also pay him 3,000 dollars in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 11 November 2011, 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 8 February 2012.

Seydou Ba
Mary G. Gaudron
Patrick Frydman
Catherine Comtet