

**115th Session**

**Judgment No. 3203**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr A.J.H. B. (né H.) against the International Telecommunication Union (ITU) on 16 August 2010, the ITU's reply of 6 December 2010 and the complainant's letter of 10 January 2011 informing the Registrar of the Tribunal that he did not wish to file a rejoinder;

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. Facts relevant to this case are given in Judgments 2643 and 2826, delivered on 11 July 2007 and 8 July 2009 respectively, on the complainant's first and second complaints, and in Judgment 3204, also delivered this day. 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 basis that the Secretary-General had failed to provide reasons for rejecting the recommendations made by the Appeal Board in its report of 19 April 2006. The Board had

recommended inter alia that the matter be referred to the ITU Council with a view to amending the Staff Rules to allow for the recognition of domestic partnerships. The Tribunal referred the case back to the Union for a reasoned decision on the action it proposed to take on the Appeal Board's recommendations and ordered it to pay costs, but dismissed the complainant's remaining claims.

Following the delivery of Judgment 2643, the complainant filed a second complaint in which he impugned the decision of the Secretary-General of 27 August 2007 to refer the issue of same-sex marriage to the ITU Council for consideration at its session in 2008. In Judgment 2826 the Tribunal held that, insofar as it was directed against that decision, the complaint was irreceivable for failure to exhaust the internal remedies and barred by the principle of *res judicata*. The Tribunal noted that the complaint might also be viewed as an application for review or execution of Judgment 2643. However, it found that the complainant had not put forward any admissible ground for review of that judgment. Moreover, by taking a new decision to refer the issue to the Council, the Secretary-General had executed Judgment 2643 and there was no basis upon which the Tribunal could require anything further, save on a receivable complaint with respect to that new decision. It therefore dismissed the complaint.

The matter of domestic partnerships was not submitted to the ITU Council for consideration at its 2008 session. On 4 September 2009 the complainant tendered his resignation and requested that it take effect on the last day of October; his request was granted on 8 September.

By a memorandum of 26 October 2009 addressed to the Secretary-General, the complainant expressed his disappointment that the matter of same-sex marriage had not been submitted to the ITU Council in either 2008 or 2009. He stated that the Secretary-General's failure to fulfil the promise he had given on 27 August 2007 had caused him distress and he requested that the matter be submitted to the ITU Council at its session in 2010. He also claimed 12,000 Swiss francs in moral damages.

The complainant separated from service with effect from 31 October 2009. Having received no reply to his memorandum of 26 October, he filed an appeal with the Appeal Board on 14 January 2010, in which he reiterated his earlier request and his claim for damages.

On 19 January the Chief of the Administration and Finance Department sent the complainant a registered letter, appended to which was a decision – dated 18 December 2009 – informing him that his request was denied. The Chief explained that he had signed the decision on behalf of the Secretary-General on 18 December but that it had not been sent earlier due to a regrettable series of circumstances. It was stated in the decision that the complainant had no cause of action and that the matter of the recognition of same-sex marriage had not been submitted to the ITU Council in either 2008 or 2009 for objective reasons. In addition, the complainant was invited to clarify on what basis he had quantified his claim for moral damages.

In its report of 5 March 2010 the Appeal Board recommended that the matter of same-sex marriages be submitted to the ITU Council in 2010, or, failing that, that the complainant be provided with an explanation as to the grounds upon which the Board's earlier recommendations of 19 April 2006 were dismissed. It further recommended that his claim for moral damages be rejected.

By a letter dated 7 May 2010 from the Chief of the Administration and Finance Department the complainant was notified that the Secretary-General had decided to follow the Appeal Board's first recommendation. Consequently, the matter of the recognition of same-sex marriages and domestic partnerships for the determination of family status and related entitlements had been submitted to the ITU Council in April 2010 and the Council had been invited to take a decision as to whether it was necessary for the ITU to align its policies in this regard with those of most other organisations of the United Nations Common System. The Council's position was that a review of the current Staff Regulations and Rules did not need to be undertaken at that time. The Chief added that, as the matter had been submitted to the Council, the ITU considered that the promise given to the

complainant on 27 August 2007 had been fulfilled, and that the related recommendation of the Appeal Board in its report of 5 March 2010 had been fully respected. Nevertheless, the Secretary-General had decided to award the complainant the amount of 12,000 Swiss francs in compensation for the moral damages that the Union's failure to submit the matter to the ITU Council in 2008 might have caused him. That is the impugned decision.

B. The complainant states that his complaint is directed at the Secretary-General's decision of 7 May 2010, which notified him of the implicit decision, taken by the ITU Council at its session in 2010, to refuse to recognise same-sex marriages. He submits that the Tribunal is competent to hear the complaint because the ITU's policies violate fundamental human rights and are discriminatory. As he can no longer engage the Union's internal appeal procedure, his only recourse is to bring a complaint directly before the Tribunal. He argues that, although he is no longer a staff member, he does have a cause of action because the Council's implicit decision affects him in that it prevents him from obtaining benefits which may be due to him retroactively. In his view, if the Tribunal determines that the ITU must recognise same-sex marriages, then he is entitled to benefit from such recognition as from 2008 at the latest, based on the Secretary-General's failure to fulfil his promise to submit the matter to the ITU Council at its 2008 session. Indeed, his entitlements ought to be calculated with effect from 2006, because the Secretary-General should have submitted the matter to the Council that year.

On the merits, the complainant argues that the implicit refusal by the ITU Council to recognise same-sex marriages is a breach of fundamental human rights and is discriminatory. In particular, it violates Articles 2 and 7 of the Universal Declaration of Human Rights, which prohibit discrimination in particular on the basis of sex. In effect, the Council failed to take measures to end the sex discrimination to which he was subjected during his employment with the Union.

Furthermore, he contends that the Council violated its obligation to ensure that ITU policy is consistent with the policy of the United Nations. He asserts that the question of same-sex marriage and domestic partnership is governed by the bulletin issued by the Secretary-General of the United Nations on 24 September 2004, according to which an organisation must refer to the law of the nationality of staff members when determining their personal status for the purpose of entitlements under the Staff Regulations and Staff Rules. As of April 2010, various programmes, funds and specialised agencies of the United Nations were applying either the bulletin itself or their own policies which are in line with the bulletin in this respect. The ITU Convention provides that the Council must take into account current practice of the United Nations system when revising the Staff Regulations, and that the Secretary-General must supervise the staff members of the Union with a view to assuring the application of the common system conditions of employment for staff. Instead, the Council has implicitly approved the discriminatory treatment of ITU staff members as compared to similarly situated staff members of other United Nations agencies.

Lastly, the complainant points out that, according to the Rules of Procedure of the Council of the ITU and the General Rules for Conferences, Assemblies and Meetings of the Union, decisions of the Council are taken by majority vote. However, in this case the Chairman of the Council noted that certain Member States were opposed to considering the matter and allowed a minority to take the decision, instead of calling a vote, in violation of the Rules of Procedure.

The complainant asks the Tribunal to order the ITU to align its Staff Regulations and Staff Rules with those of the United Nations by using the gender-neutral word “spouse” instead of the current discriminatory terminology, and to acknowledge that his same-sex marriage should have been recognised while he was still in service. He seeks retroactive payment of the dependency benefits that would have been due to him had the ITU Council recognised same-sex marriages

in 2006, or alternatively, in 2008. In addition he claims 10,000 Swiss francs in moral damages.

C. In its reply the Union contends that the complaint is irreceivable on several grounds. First, the Tribunal is not competent to rule on the decision adopted by the ITU Council or on the decision-making procedure followed by that body. The Council is the Union's executive body and, as such, it is the only body that can decide whether to review the ITU's Staff Regulations and Staff Rules. The Union explains that, pursuant to the Council's Rules of Procedure and in line with consistent practice, virtually all Council decisions are taken on the basis of a consensus. In the absence of a consensus, the decision concerned is only put to a vote if a Member State explicitly requests such a vote. As there was no consensus on the issue of recognising same-sex marriages or on amending the ITU's Staff Regulations and Staff Rules to that end, the Chairman of the Council properly decided that there was no need to consider the matter at that time.

Secondly, referring to the Tribunal's case law, the ITU points out that a decision by an international organisation is challengeable only if it causes a staff member injury. It considers that the complainant has no cause of action because the Union followed the Appeal Board's recommendation that the matter be submitted to the ITU Council at its session in 2010 with a view to amending the Staff Regulations and Staff Rules. Consequently, the Secretary-General's promise of 27 August 2007 was fulfilled. The complainant further lacks a cause of action because he is no longer a staff member; the impugned decision of 7 May 2010 was taken after his separation from service and it does not have retroactive effect. His claims based on the retroactive application of decisions the Council might have taken in 2009 fail on the same grounds.

Furthermore, his argument that any recognition by the Council of same-sex marriages or domestic partnerships should have retroactive effect to the date of the ITU Council in 2006 is barred by the principle of *res judicata* and is therefore irreceivable. Indeed, in

Judgments 2643 and 2826 the Tribunal held that it was “legally impossible” for the Union to recognise the complainant’s domestic partnership or subsequent marriage in the absence of an amendment to the Staff Regulations by the ITU Council.

On the merits, the Union rejects the complainant’s assertions that its Staff Regulations and Staff Rules violate fundamental human rights and are discriminatory. It likewise rejects his contention that the Council has violated its obligation to align its policy regarding the recognition of same-sex marriages and domestic partnerships with that of the United Nations and its programmes, funds and specialised agencies. Regarding his argument that the position of the ITU Council was based on the views of a minority of Member States, it reiterates that it is a general rule that the Council, in plenary meeting, shall endeavour to reach a coordinated decision which takes into account the views expressed by all the councillors so that it is unnecessary to take a vote. Lastly, the ITU considers that it is in the same situation in law as it was in the case that led to the complainant’s first complaint, and it invites the Tribunal to reach the same conclusions that it reached in Judgment 2643.

#### CONSIDERATIONS

1. The complainant is in a same-sex relationship. He and his partner entered a “Civil Solidarity Contract” under French law on 23 October 2003. He commenced employment with the ITU in 2001. His employment was terminated, on his initiative, on 31 October 2009. Since at least October 2005, the complainant has pressed the Union to recognise his partner as his spouse for the purposes of various employment benefits and, more generally, has pursued the explicit recognition and acceptance of same-sex relationships by the ITU in the employment context. The complainant’s pursuit of these objectives has led to two earlier proceedings in the Tribunal resulting in Judgments 2643 and 2826. Both judgments detail much of the background relevant to this third complaint and it is unnecessary to repeat it.

2. The immediate factual context of the complaint presently before the Tribunal centres on a memorandum of 26 October 2009 from the complainant to the Secretary-General and what flowed from the memorandum. At this time, the complainant's employment with the ITU was to conclude within a week. The complainant had written to the Secretary-General on 4 September 2009 indicating an intention to resign effective 31 October 2009. The ITU had written to him on 8 September indicating its agreement to his resignation at the end of October 2009.

In the memorandum of 26 October the complainant requested two things. The first was that the Secretary-General submit "the matter" to the ITU Council at its session in 2010. In context, the matter was the recognition of marriages between people of the same sex. The second was a request that the Secretary-General award the complainant 12,000 Swiss francs "in moral damages for having failed to abide by the commitment [he] made on 27 August 2007". This was a reference to a decision of the Secretary-General of 27 August 2007 which included a statement that "the question of the recognition of marriages between people of the same gender [would] be submitted to Council 2008 for consideration and, as the case may be, modification of the Staff Rules and Regulations".

3. By 14 January 2010 the complainant had not received a reply to his memorandum of 26 October 2009. He lodged an appeal to the Appeal Board, noting the Secretary-General's failure to reply within six weeks and the provisions of Staff Rule 11.1.1.2 (b). As it turns out, a reply had been prepared on 18 December 2009 but not sent. It was sent on 19 January 2010 with an apology and the explanation that it "was not sent due to an extraordinary regrettable series of circumstances". The Secretary-General lodged his reply to the complainant's appeal to the Appeal Board on 12 February 2010. The Secretary-General in his conclusions in the reply, invited the Board to dismiss the complainant's requests though, as to the claim for 12,000 Swiss francs in moral damages, the Secretary-General maintained "the invitation for the [complainant] to provide further clarifications as to the way he arrived at [this] amount".

4. The Appeal Board issued its report on 5 March 2010. It reaffirmed the recommendations it had made on 19 April 2006. Those recommendations are set out in Judgment 2643, consideration 2. The substance of those recommendations was that the Secretary-General should submit the issue of domestic partnerships to the Council with supporting material and seek authorisation to take consequential steps. The Appeal Board made two recommendations in its report of 5 March 2010. They were:

- “– to submit the matter of same-gender marriages to Council 2010, or in case of non-fulfilment explain to the [complainant] on what grounds the recommendations established by the Appeal Board on 19 April 2006 were dismissed;
- not to award to the [complainant] a compensation for moral damages.”

5. The Secretary-General submitted a report to the ITU Council on 13 April 2010. The matter was considered by the Standing Committee on Administration and Management of the Council and then referred to the plenary session. There was no consensus and the Chairman of the Council decided not to consider the matter further.

The Chief of the Administration and Finance Department wrote to the complainant on 7 May 2010 on behalf of the Secretary-General informing him that the latter had decided to follow the first recommendation of the Appeal Board and explained how this had been done. The letter also informed the complainant that the Secretary-General had decided to award him 12,000 Swiss francs in moral damages.

6. The complainant identifies, in his complaint, the decision impugned in these proceedings in the Tribunal as a decision embodied in the letter of 7 May 2010. The relief he seeks from the Tribunal is an order requiring the ITU to align its Staff Regulations and Staff Rules with those of the United Nations and use the gender-neutral word “spouse”, recognition that his same-sex marriage should have been recognised when employed by the ITU, an order requiring the Union to pay him amounts which would have been paid if his marriage had

been recognised in 2006 and an award of 10,000 francs in moral damages.

7. The ITU argues, in its reply, that the complaint is not receivable and the complainant has no cause of action. The complainant did not answer these arguments in the sense that he filed no rejoinder. However, he did anticipate and deal with the arguments in his brief and referred to what he viewed as some relevant case law. The answer to the ITU's argument is clear. The complaint, certainly as framed by the relief sought, is not one the Tribunal is competent to hear. In the events leading up to the letter of 7 May 2010, no relevant decision had been made by the Secretary-General by which the complainant was aggrieved. The internal appeal proceedings culminating in the Appeal Board recommendations of 5 March 2010 and the subsequent decision of the Secretary-General disclosed in the letter of 7 May 2010, had the result that the complainant had achieved what had been requested by him in his memorandum of 26 October 2009.

However, on the assumption that somehow the letter of 7 May 2010 raises for review by the Tribunal the failure of the ITU Council to decide affirmatively to recognise same-sex marriage by amendments to the Staff Regulations and Staff Rules, that matter is not justiciable before the Tribunal.

8. It should be recalled that in its Judgment 2643, at consideration 6, the Tribunal concluded that the complainant was not entitled to the benefits he claimed (based on the existence of a spousal relationship with his same-sex partner) under the Staff Regulations and Staff Rules. This ruling was made in the context of the complainant asserting, in the proceedings before the Tribunal, that he was entitled to be paid dependency benefits because his partner was a spouse. Such enforceable rights as the complainant had while employed by the ITU derived from the Staff Regulations and the Staff Rules or derived from general principles that form part of the law of the international civil service (see, for example, Judgment 1118, under 9).

The issue of his entitlements to dependency benefits under the Staff Regulations and Staff Rules had been decided adverse to him in 2007. It is true that the case law of the Tribunal on the question of benefits for same-sex partners has developed in the last decade. This is illustrated by Judgment 2860.

Indeed, there are opinions of individual judges concluding that staff rules denying access to dependency benefits to same-sex partners are unenforceable because they violate fundamental principles of law (see, for example, the dissenting opinion of Justice Hugessen in Judgment 2193). But the complainant's attempt to assert such rights failed in 2007. The complainant seeks now to challenge the decision of the Council, the executive body of the ITU, not to amend the Staff Regulations and Staff Rules. The Tribunal acknowledges that the ITU Council is free to make those decisions and that it has no authority to compel it to do otherwise (see Judgment 1118, under 10).

9. Therefore, the complaint should be dismissed.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 2 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo  
Dolores M. Hansen  
Michael F. Moore  
Catherine Comtet