

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**S.**  
**v.**  
**EPO**

**122nd Session**

**Judgment No. 3702**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. S. against the European Patent Organisation (EPO) on 21 December 2011 and corrected on 14 March 2012, the EPO's reply of 25 June and the complainant's rejoinder of 19 September 2012, the EPO having chosen not to file a surrejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant contests the implied refusal to give retrospective recognition to his registered same-sex partnership.

The complainant is a British national who joined the European Patent Office – the EPO's secretariat – in 1981. In May 1991 he entered into a registered partnership under Danish law with his Danish same-sex partner. At that time the EPO refused to recognise his registered partnership as a legal equivalent to marriage for the purposes of his entitlements under the Service Regulations for permanent employees of the European Patent Office. He challenged that decision in a first

internal appeal, which was rejected by the President of the Office in January 1994. The complainant did not pursue that appeal before the Tribunal.

In December 2004 the EPO issued Communiqué No. 284, recognising same-sex marriages for the purposes of the Service Regulations with retroactive effect either from the date of the marriage or from the employee's date of entry into the EPO, whichever was later. At that time, the Communiqué did not refer explicitly to same-sex partnerships.

In January 2006 the complainant requested that the Communiqué be applied to his registered partnership, failing which his request was to be treated as an internal appeal. His request was rejected and the matter was referred to the Internal Appeals Committee (IAC). In November 2006, while that second appeal was pending, the President decided to re-examine the complainant's request in the light of recent judgments of the Tribunal, and to recognise his partnership with effect from 1 January 2006 (the month in which the second appeal had been filed). The complainant nevertheless maintained his appeal, arguing that his partnership should be recognised with effect from May 1991, as would have been the case for a same-sex marriage, by virtue of the provisions of Communiqué No. 284. The EPO considered that this claim was not justified, as the complainant had not challenged the decision taken by the President in January 2004 within the applicable time limit.

Communiqué No. 284 was amended in July 2007 to include registered partnerships, but this measure had retroactive effect only from 1 January 2006, and not from the date of the partnership.

The IAC rendered its opinion in July 2011, unanimously recommending that the appeal be allowed, although its members were divided on the issues of costs and moral damages. At the time of filing his complaint in December 2011, the complainant had not yet received a final decision from the President, and that remained the case at the time when the EPO filed its reply in June 2012. The complainant thus impugns the implied decision to dismiss his second appeal.

The complainant asks the Tribunal to award him the relevant spousal allowances and benefits linked to his same-sex partnership, with compound interest on arrears at 8 per cent. He also claims moral

damages and costs. The EPO requests the Tribunal to dismiss the complaint as unfounded.

### CONSIDERATIONS

1. The complainant seeks to have his same-sex partnership recognized by the EPO, retroactively, for the period 16 May 1991 to 31 December 2005 for the purpose of receiving the benefits provided for in Communiqué No. 284 (“the Communiqué”). He wishes to receive all of the benefits and rights that would have accrued to him over that period in the same way as such benefits and rights were received by EPO staff members who were in a marriage relationship. His same-sex partnership was registered on 16 May 1991 under the Danish Registered Partnership Act, 1989. He claims that by denying him the benefits which he seeks, the EPO has unlawfully subjected him to discriminatory and unequal treatment, and treatment which is contrary to the provisions of the Communiqué, particularly paragraph 3 thereof.

2. The Communiqué, which is under the rubric “Treatment of same-sex Marriages for the purpose of Service Regulations”, was issued on 20 December 2004. It provides as follows:

- “1. Recently, some contracting states have opened up the institute of marriage to persons of the same-sex. With a view to taking account of all the different concepts of marriage in the contracting states, the Office requested the opinion of the Administrative Council as to the treatment of same-sex marriages under the Service Regulations.
2. In the light of the results of the discussions at the 98<sup>th</sup> meeting of the Administrative Council, the President has decided that a permanent employee shall qualify for entitlements provided for married employees if the marriage is recognised as valid under the law of the contracting state concerned. At present this applies to Belgium and the Netherlands.
3. **The President’s decision will be applied retroactively, i.e. benefits will be made available as of either the date of marriage or the date of entry into the Office, whichever occurred later.**” (Emphasis added.)

3. It is observed that it was on 19 August 1992 that the complainant filed his first internal appeal against a decision by the Office to reject

his initial request for the recognition of his same-sex partnership and for the consequential benefits. The IAC unanimously recommended the rejection of the appeal. The President of the Office accepted that recommendation by letter dated 13 January 1994. The complainant received that decision on 19 January 1994 and did not appeal it by way of complaint in the Tribunal.

It is further observed that it was on 25 January 2006, after the Communiqué was issued in 2004, that the complainant wrote to the President requesting that its terms be applied to his same-sex partnership as well. He stated that under Danish law his partnership has the same effect as a marriage and that it provides that the term “spouse” shall apply to partners. He was informed by a letter dated 16 February 2006 that the President had rejected his request and had submitted it to the IAC. However, by a letter dated 2 November 2006, the complainant was informed that the President had re-assessed his request in light of the Tribunal’s latest case law and had decided to grant it. However, the decision was that his same-sex partnership was to be recognized as of 1 January 2006, from which date it was to be considered as having the same consequences as a marriage. It is from this decision that the complainant filed the internal appeal which has eventually come to the Tribunal.

4. The EPO raised receivability as an issue in the internal appeals proceedings, but states that it does not raise it in these proceedings in the Tribunal. In its opinion issued on 26 July 2011, the IAC determined that the internal appeal was receivable in that there were grounds for reopening the President’s decision in order to consider the recognition of the period 16 May 1991 to 31 December 2005. It is noted that at the date when the complaint was filed (21 December 2011) the President had not given a final decision on the IAC’s recommendations. The EPO has admitted that the President had not given a final decision by 25 June 2012, the date of its reply in these proceedings in the Tribunal. There is no indication that it has been given to date. The Tribunal sees the present complaint as being directed against the implied rejection of the complainant’s internal appeal.

5. On the merits, the EPO presents some of the arguments that it made on receivability in the internal appeal, but relies on them to support its submission that the complaint should be dismissed as it is, in effect, re-litigating the matter which the complainant had initiated by his first internal appeal of 1994. The EPO contends that, by extension, as the complainant did not appeal to the Tribunal against the President's rejection of that initial appeal, he could not have brought the present case because he was seeking to reopen the same case for the recognition of his same-sex partnership for the period 16 May 1991 to 31 December 2005. The EPO bases this argument on the principle of legal certainty.

6. The Tribunal considers the EPO's arguments to be untenable as the decision of 13 January 1994 was overtaken by the Communiqué when it was subsequently issued on 20 December 2004 as well as by the President's decision to re-assess the complainant's case in light of the Communiqué and the case law that arose thereon. In that re-assessment, the President extended the benefits under the Communiqué to him, but only with effect from 1 January 2006. It was this re-assessment decision that the complainant challenged by his request of 25 January 2006 for the recognition of his same-sex partnership and his entitlement to benefits under the Communiqué, retroactively, from 16 May 1991 when it was registered to 31 December 2005. This was a new decision, which had no bearing on the prior decision of 13 January 1994 or the complainant's failure to file a complaint in relation to it. The principle of legal certainty does not apply.

7. It is clear that the IAC's recommendation that the provisions of the Communiqué should be applied to the complainant, retroactively, for the period 16 May 1991 to 31 December 2005, is correct. Paragraph 3 of the Communiqué expressly states that the President's decision to recognize a same-sex partnership "will be applied retroactively, i.e. benefits will be made available as of either the date of marriage or the date of entry into the Office, whichever occurred later". The Communiqué gives no discretion to the President to apply the recognition retroactively in some cases and not in other cases. The President's failure to so recognize it amounts to a breach of the provisions of the Communiqué which

expressly provides that a permanent employee, whose same-sex marriage is recognized as valid under the law of a contracting state, would thenceforth be entitled to the same benefits as those provided for other married employees. Notwithstanding that the Communiqué also stated that at the time when it came into effect, its terms applied to Belgium and the Netherlands, its purport was that it applied to them as they were the contracting States whose laws recognized same-sex marriages at that time. Moreover, by his decision extending the Communiqué to the complainant, but only from 1 January 2006, the President recognized that the complainant's same-sex partnership which was registered under Danish law was within the scope of the Communiqué.

8. The decision not to extend the application of the Communiqué to the complainant fully retroactively to the date of his partnership also constitutes discriminatory and unequal treatment. Once the President recognized the complainant's same-sex partnership that recognition had to be given effect from the date of its registration on 16 May 1991 as this occurred later than the date of the complainant's entry into the Office.

9. In the foregoing premises, the complaint is well founded and the complainant is entitled to have his same-sex partnership recognized, retroactively, for the period 16 May 1991 to 31 December 2005. The EPO will therefore be ordered to pay him the related benefits that arise therefrom, with interest at the rate of 5 per cent per annum from 20 December 2004, the date of the Communiqué, until the date of final payment. The EPO will be ordered to pay the complainant 5,000 euros moral damages on account of the unequal treatment. The EPO shall also pay the complainant 1,000 euros in costs.

#### DECISION

For the above reasons,

1. The EPO shall pay the complainant retroactively, for the period 16 May 1991 to 31 December 2005, the benefits that would have

accrued to him over that period under paragraph 3 of Communiqué No. 284.

2. The EPO shall pay the complainant interest on the sums due in respect of the period 20 December 2004 to 31 December 2005 at the rate of 5 per cent per annum from due dates until the date of final payment.
3. The EPO shall pay the complainant 5,000 euros in moral damages.
4. The EPO shall also pay the complainant costs in the amount of 1,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 18 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Andrew Butler, Deputy Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

ANDREW BUTLER