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

**NINETY-FOURTH SESSION**

**Judgment No. 2193**

The Administrative Tribunal,

Considering the complaint filed by Mr R. A.-O. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 24 September 2001 and corrected on 22 October, UNESCO's reply of 6 December 2001, the complainant's rejoinder of 10 January 2002 and the Organization's surrejoinder of 10 April 2002;

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, a Spanish national born in 1947, joined UNESCO in Paris in 1980 as a translator and minute writer at grade P.3. He is currently employed at grade P.5 and seconded to the Office of Monthly Periodicals.

By a memorandum of 21 April 2000 the complainant informed the Staff Administration Division that he had entered into a Civil Solidarity Contract (*Pacte civil de solidarité*, hereinafter referred to by its French acronym "PACS") with his male partner on 30 March 2000. Referring to Staff Rule 103.7(c), which requires staff members to inform the Organization of any change in their status that is likely to affect their eligibility for any grant, benefit or allowance, he declared that his partner was entirely dependent on him. By a memorandum of 6 June, the Office of Human Resources Management informed the complainant that under the rules currently applicable within the United Nations system the PACS was not recognised as a formal marriage that could create an entitlement to any benefits or allowances for a dependent spouse under Staff Rules 103.7 and 103.9. Consequently, the agreement he had entered into with his partner could not affect any entitlement to allowances for dependants.

On 27 June 2000 the complainant submitted a protest to the Director-General. Having received no reply, on 31 July he filed a notice of appeal with the Appeals Board, followed by a detailed appeal dated 14 September. In its report of 4 December 2000 the Appeals Board, by a majority of its members, made the following recommendations. UNESCO should give a broad, liberal interpretation to the relevant provisions of the Staff Regulations and Rules, so as to include within their sphere of application the protection of homosexual partners; the Organization should take into account the practice adopted by the United Nations Secretariat, which relies on the laws of the staff member's country of origin in determining their marital status, including that of homosexuals; likewise, it should recognise the French legislation under which homosexual partnerships are treated as a form of marriage; the Director-General should grant the complainant's request on the basis of Staff Rule 112.2, which entitles him to make exceptions to the application of the Staff Rules in certain cases; and lastly, the Director-General should launch a debate on this matter and the relevant texts should be amended. These recommendations were not endorsed by the Director-General and the complainant was informed of this by a letter of 28 June 2001, which constitutes the impugned decision.

B. The complainant submits four pleas. First, the impugned decision is discriminatory and contrary to the letter and spirit of international and European conventions. It also disregards the changes in moral thinking that have occurred since the end of the eighties.

Secondly, the notion of a dependent spouse contained in the Staff Rules must be interpreted broadly. Under French legislation, an individual bound by a PACS to a person covered by the social security system is also considered to

be a beneficiary of that system for the purposes of entitlement to health insurance, maternity benefits, paid leave, etc. Since Article 5(3) of the Headquarters Agreement between the French government and UNESCO provides that, subject to the provisions of Article 5(2), "the laws and regulations of the French Republic shall apply at Headquarters", the status of dependent spouse under Staff Rule 103.9 must be applicable to homosexual partners bound by a PACS.

Thirdly, the Director-General is entitled under Staff Rule 112.2 to amend or make exceptions to the application of the Staff Rules. Had he been reluctant to accept a broad, liberal interpretation of the Staff Rules, he could and ought to have made an exception in the present case, or an amendment to the disputed text in order to protect the rights of homosexuals, to prevent discrimination on the basis of sexual orientation and to uphold the rules aimed at protecting domestic partners, thereby promoting the culture of tolerance advocated by the Organization.

Lastly, in view of the patently discriminatory and homophobic nature of the impugned decision, the complainant feels that he has been wrongfully denied the rights that the laws of many states now confer on homosexuals. The gravity of the moral injury he has suffered is beyond doubt, in view of the plainly vexatious and discriminatory nature of the said decision and the dismissive attitude displayed towards him by the Director-General.

The complainant seeks the setting aside of both the initial decision of 6 June 2000 and the impugned decision; the application by the Director-General of the recommendations of the Appeals Board; an award of 45,734.71 euros in compensation for the moral and material injury suffered; and 1,524.49 euros in costs.

C. UNESCO replies that it was created by an international treaty and that it is therefore not subject to any European Community or national legislation. Consequently, the Organization is not bound by contracts entered into under national laws. Furthermore, its relations with the host State are defined in the Headquarters Agreement which provides, in Article 5(2), that the Organization shall have "the right to make internal regulations applicable throughout Headquarters in order to enable it to carry out its work".

It points out that since the word "spouse" is not defined by Staff Rule 103.9, it must be understood in the ordinary sense of "husband or wife". Consequently, the status of spouse can only stem from a marriage (civil, religious, traditional etc.) that is properly recognised by the authorities of a state.

It argues that the exception to the application of the Staff Rules requested by the complainant would be contrary to the rules currently applicable within the United Nations common system. There have always been differences between the Staff Regulations and Rules of the United Nations and those of the specialised agencies, such as UNESCO, on issues such as the criteria for assessing the income of a dependent spouse; dependent children; and common law marriages. It is true that in April 1998 the United Nations Consultative Committee on Administrative Questions (CCAQ) published conclusions on this matter, which were adopted in June 1998 by the executive heads of the various organisations of the United Nations system in their capacity as members of the Administrative Committee on Co-ordination (ACC), and which provide that: (1) those organisations which have yet to recognise common law marriages should adopt a policy enabling them to do so, in order to confer the status of spouse on individuals bound by such marriages; and that (2) with regard to domestic partnerships, all organisations should strive to prevent discrimination. However, to date, none of the organisations has adopted any legal amendments concerning the status of domestic partnerships. Consequently, the only relevant text is Staff Rule 112.2, the application of which is at the discretion of the Director-General.

Lastly, the Organization considers that the complainant's claim for compensation in respect of alleged moral and material injury is both irreceivable, the complainant having failed to exhaust all internal appeal mechanisms, and unfounded, since he has produced no evidence of the injury in question.

D. In his rejoinder the complainant submits that the Organization displays bad faith in its reply by citing only Article 5(2) of the Headquarters Agreement without mentioning the existence of Article 5(3). One can only conclude that the "immunity" invoked by the Organization is not as far-reaching as it suggests.

He strongly disagrees with the Organization's argument that in the absence of a definition in the Staff Rules, the word "spouse" must be understood "in the ordinary sense of 'husband or wife'". In his view, this definition in itself reflects the homophobic attitude of the Organization since it refers not to individuals bound by marriage but merely to "men and women".

He submits that in order to give meaning to the commitment made by the organisations of the common system in 1998, the Director-General should allow his claim by making an exception to the strict application of the Staff Rules.

Lastly, he considers his compensation claim to be receivable on the grounds that it is simply accessory to and a consequence of his main claim for the quashing of the impugned decision.

E. In its surrejoinder UNESCO reiterates its arguments.

## CONSIDERATIONS

1. On 30 March 2000 the complainant and his male partner entered into a PACS contract in Paris, at the Registry of the court of first instance for the fifteenth *arrondissement*. He informed UNESCO's Staff Administration Division of this by a memorandum of 21 April 2000, in accordance with Staff Rule 103.7(c) concerning eligibility for allowances, which states in part that:

"Staff members shall notify the Organization of any changes in their situation which may affect their eligibility for any grant, benefit or allowance."

The purpose of this memorandum was to obtain recognition of his entitlement to allowances for a dependent spouse pursuant to Staff Rules 103.7 and 103.9.

2. By a memorandum of 6 June 2000 the Office of Human Resources Management informed the complainant that his change of status could not affect any entitlement to allowances for dependants, because the PACS was not recognised by the United Nations common system as a formal marriage that could create an entitlement to any benefits or allowances for a dependent spouse.

3. On 27 June 2000 the complainant lodged a protest within the meaning of paragraph 7(a) of the Statutes of the Appeals Board. Having received no reply from the Director-General he filed a notice of appeal on 31 July 2000 and submitted a detailed appeal to the Appeals Board on 14 September.

On 4 December 2000 the Appeals Board issued a report in which a majority of its members - one member having expressed a dissenting opinion - recommended that the Director-General should allow the complainant's claim.

The Director-General decided not to endorse that recommendation, and the complainant was informed of this in a letter of 28 June 2001. That is the decision impugned.

4. In support of his complaint he submits that the Director-General's decision amounts to discrimination and contravenes both the letter and the spirit of international conventions; that the notion of a dependent spouse contained in UNESCO's Staff Rules must be interpreted broadly; that the Director-General is entitled to amend or make exceptions to the application of the Staff Rules; and that he has suffered moral and material injury warranting compensation.

He seeks the setting aside of the decisions of 6 June 2000 and 28 June 2001, the application by the Director-General of the Appeals Board's recommendations of 4 December 2000, an award of 45,734.71 euros in compensation for the moral and material injury suffered and 1,524.49 euros in costs.

5. In support of his argument that the impugned decision is discriminatory and contrary to the letter and spirit of international and European conventions, the complainant refers to a publication on civil liberties and human rights. Citing that work, he says it is particularly owing to the rulings of national courts and of the European Court of Human Rights "which condemn acts of discrimination contravening Article 14 of the European Convention on Human Rights" that equality before the law has "led to the recognition of a fundamental right, the existence of which renders possible the exercise of civil liberties: namely, the right not to suffer unjustified discrimination". He adds that Article 7 of the Universal Declaration of Human Rights, like the European conventions, prohibits all forms of discrimination, and, furthermore, that discrimination on the ground of sexual orientation would contravene the European Convention on Human Rights, the Universal Declaration and other international covenants concerning human rights.

He considers that the impugned decision is contrary to the changes in moral attitudes that have occurred since the end of the eighties and that the Organization cannot forever take refuge behind an obsolete interpretation of the wording of the Staff Rules and disregard rights granted to individuals by the legislation of "civilised nations" such as the host country.

6. It should first be noted that in examining the cases submitted to it, the Tribunal verifies, in particular, whether from both a substantive and a formal point of view the employing organisation has failed to observe the terms of the staff member's contract of employment or the provisions of the Staff Rules. It also verifies whether there has been any breach of the general principles of law.

The Tribunal may therefore seek to establish whether there has been an infringement of the complainant's "right not to suffer unjustified discrimination", which is a right that all individuals are deemed to possess, to the extent that such infringement could result in a breach of the principle of equal treatment whereby, according to the Tribunal's case law, staff members in equivalent situations should receive the same treatment.

However, an allegation of discrimination can only be taken into consideration by the Tribunal and, if need be, give rise to redress on condition that it is based on precise and proven facts which establish that discrimination has occurred.

7. In the present case, the complainant considers that the impugned decision is discriminatory because he was allegedly denied the allowances for a dependent spouse because of his sexual orientation. In his view, the PACS that he entered into with his same-sex partner should automatically create an entitlement to such allowances.

The complainant argues that the notion of a dependent spouse contained in the Staff Rules must be interpreted broadly. In his view, the restrictive interpretation of the word "spouse", whereby a couple is deemed to exist only where it is formed by the bonds of a "formal marriage", is not only regressive but is also contrary to the spirit and letter of the legislation of the host State, France, which brought in the law concerning the PACS enabling, inter alia, two individuals of the same sex to sign a contract organising their life as a couple. He points out that to take account of Article 7 of that law a provision has been added to the Social Security Code whereby an individual bound by such a contract to a person who is covered by the French social security scheme is treated as a beneficiary of the latter. In support of his argument, he adds that the Headquarters Agreement between the French government and UNESCO provides in Article 5(3) that, subject to the provisions of Article 5(2), "the laws and regulations of the French Republic shall apply at Headquarters", and that under those circumstances the status of dependent spouse under Staff Rule 103.9 must be applicable to homosexual partners bound by a PACS.

8. For its part, the Organization observes that having been created by an international treaty it is not bound by any European or national legislation. It emphasises that the Headquarters Agreement indicates in Article 5(2) that the Organization shall have "the right to make internal regulations applicable throughout Headquarters in order to enable it to carry out its work". Thus, it has adopted internal regulations, particularly the Staff Regulations and Staff Rules in line with the United Nations common system. Consequently, it is not bound by contracts entered into under national laws.

In the present case, the Tribunal shares that view, notwithstanding the complainant's reference to Article 5(3) of the Headquarters Agreement, which is cited above. Indeed, that provision, which applies subject to the provisions of Article 5(2), cannot be interpreted as obliging the Organization to apply all statutory and regulatory provisions of the host country.

9. In any case, and in accordance with Staff Rule 103.9, the Tribunal notes that the dependants who can, subject to certain conditions, create an entitlement to allowances are the spouse, children, father, mother, brothers and sisters. Thus, in order to be entitled to the allowances he claims, the complainant must prove that the partner to whom he is bound by a PACS has the status of a spouse within the meaning of Rule 103.9.

10. Since the Staff Rules contain no definition of the word "spouse", it is necessary to resort to case law and to the relevant submissions in order to determine whether the complainant's partner is entitled to be considered as a spouse.

In Judgment 1715, under 10, the Tribunal held that:

"As a general rule, and in the absence of a definition of the term [spouse], the status of spouse will flow from a marriage publicly performed and certified by an official of the State where the ceremony has taken place, such marriage being then proved by the production of an official certificate. The Tribunal accepts, however, that there may be *de facto* situations, of which 'traditional' marriages are examples, and which some States recognise as creating the status of 'spouse'".

Thus, the Tribunal establishes a link between the word "spouse" and the institution of marriage, whatever form it may take.

It cannot be said on the basis of the French texts submitted in the present case that the PACS is a form of marriage. On the contrary, these texts draw a clear distinction between spouses bound by marriage and partners bound by a PACS, since it is only by virtue of special provisions that the latter are entitled to certain benefits available to spouses. For example, Article 8 of French law No. 99-944 of 15 November 1999 concerning the PACS specifies that the "provisions of Articles L. 223-7, L. 226-1(4) and L. 784-1 of the Labour Code are applicable to partners bound by a PACS".

11. Consequently, neither the letter nor the spirit of the relevant texts cited by the parties, nor indeed the case law, enable partners bound by a PACS to be considered as having the status of spouses within the meaning of Staff Rule 103.9. Since the UNESCO Administration has simply applied the Staff Rules strictly, it cannot be accused of taking a discriminatory decision against the complainant.

12. The complainant submits that since the Director-General is entitled to modify or create exceptions to the application of the Staff Rules, he could and ought to have made an exception in the present case or amended the disputed text in order to protect the rights of homosexuals.

Staff Rule 112.2(a) provides that:

"These Rules may be amended by the Director-General in a manner consistent with the Staff Regulations".

Rule 112.2(b) reads, in part, as follows:

"The Director-General may make exceptions to the Rules, in specific cases, provided that such exceptions are not inconsistent with the Staff Regulations".

However, irrespective of the validity of the arguments put forward in urging the Director-General to take individual choices into account in the context of a culture of tolerance compatible with changing moral beliefs, the Director-General cannot be compelled to resort to what is merely an option open to him under certain clearly defined circumstances, since exercising that option is entirely a matter of discretion.

13. The pleas by which the complainant seeks the setting aside of the impugned decision, and likewise those by which he seeks the application by the Director-General of the recommendations of the Appeals Boards must therefore be rejected. Consequently, his claim for compensation in respect of moral and material injury must likewise be rejected.

## DECISION

For the above reasons,

The complaint is dismissed.

## DISSENTING OPINION BY MR JUSTICE HUGESSEN

*Original in English*

(1) The complainant and his male partner have lived together in a relationship marked by commitment and interdependence similar to that which one expects to find in a marriage. On 30 March 2000 the complainant and his partner signed a "Civil Solidarity Contract" (PACS) which is governed by French law No. 99-944 of 15 November 1999. By entering into this contract, they agreed to lead a common life together and undertook to furnish financial assistance to each other, to be jointly responsible for ordinary day-to-day expenses and housing costs, and to be subject to joint taxation. Specifically, Article 7 of law No. 99-944 entitles the complainant's partner to benefit from the complainant's social security benefits where he is not covered by his own.

(2) On 21 April 2000 the complainant informed the Staff Administration Division of his changed civil status, pursuant to Staff Rule 103.7(c). On 6 June he received a reply informing him that UNESCO would not recognise the change in his civil status for the purpose of obtaining benefits for a dependant because the PACS was not recognised by the United Nations common system as a formal marriage that could create an entitlement to allowances for a dependent spouse.

(3) On 27 June the complainant contested that decision. Having received no reply, he filed an appeal with the Appeals Board, which issued its report on 4 December 2000. By a majority the Board recommended that UNESCO:

"[...] recognize the national law of the staff members to determine his/her marital status including those of homosexuals. Equally, the Organization should recognize the French law which recognizes homosexual partnership as [...] marriage-like."

(4) Alternatively, in the event that the Director-General had difficulty accepting the above-mentioned position, the Board recommended that he make an exception to the Staff Rules, pursuant to Rule 112.2 in order to:

"[...] protect the human rights of homosexuals, prevent discrimination on the ground of sexual orientation and fulfill the object of the rules to protect a domestic partner by granting the necessary family allowances and manifest the culture of tolerance of the Organization."

(5) Finally, the Board recommended that the Director-General:

"[...] specifically amend the rules to leave no room for doubt and to define the word 'spouse' or domestic partner appropriately and remove any kind of discrimination against homosexual partners assuming that every kind of mutual loving and caring assistance, transforms the two domestic partners into spouses".

(6) On 28 June 2001 the Director-General decided not to endorse the Board's recommendations and upheld his decision not to recognise the complainant's partner as a dependant within the meaning of the Staff Rules.

(7) The Appeals Board formulated the issue as "the non-recognition by the Administration of a Civil Solidarity [...] Contract, familiarly known as PACS or '*Pacte civil de solidarité*' in French, signed by the [complainant] on 30 March 2000". Neither the PACS nor the French law governing it are binding upon the Organization unless the latter's Constitution or Staff Rules and Regulations so provide. The more fundamental question, however, which must be assessed in the larger social, political, ethical and legal context, is whether the Administration's decision not to grant the complainant and his male partner a dependant's allowance including social security and spousal allowance - a decision which is itself based on provisions of the UNESCO Staff Rules - violates the principle of non-discrimination on grounds of sexual orientation.

(8) The complainant argues that the Director-General's decision discriminates against him based on his sexual orientation and thus must be quashed.

(9) Under Staff Rules 103.7 and 103.9, which entitle the spouse of a staff member to certain benefits and allowances, there is no definition of the word "spouse" and, indeed, the term does not specify the sex or the sexual orientation of the person. As such, the defendant Organization argues that the word "spouse" must be construed as being restricted to the relationship of marriage between husband and wife, which is a legal bond between persons of opposite sex. Thus, since the complainant is not married to his partner, he does not have a "spouse" who would be entitled to the allowances provided under Rule 103.7.

(10) In support of its position, UNESCO relies on Judgment 1715, under 10, where the Tribunal stated the following:

"As a general rule, and in the absence of a definition of the term [spouse], the status of spouse will flow from a marriage publicly performed and certified by an official of the State where the ceremony has taken place, such marriage being then proved by the production of an official certificate. The Tribunal accepts, however, that there may be *de facto* situations, of which 'traditional' marriages are examples, and which some States recognise as creating the status of 'spouse'. In each such case where there is no definition of 'spouse' it will be up to the staff member to prove not only the existence of the relevant fact but also the precise provisions of local law which give it consequences and the exact nature of those consequences, and he must show that such law is applicable in the context of the organisation's staff regulations and rules."

(11) That case did not deal with the issue of homosexuality or even discrimination. However, it does stand for the proposition that the word "spouse", when left undefined by an organisation's staff rules and regulations, is to be understood to include only persons married in fact or in law. The French law governing the PACS does not equate a same-sex relationship to marriage, nor does it recognise a PACS as entailing the same legal consequences as a formal marriage. In fact, a formal marriage is clearly distinguished from the PACS whereby same-sex partners benefit from certain limited, enumerated and well-defined benefits, normally recognised only to married persons, through the application of specific provisions. (See J.-J. Lemouland, "Pacte civil de solidarité (PACS) - Formation et dissolution du pacte civil de solidarité", *Semaine juridique, Édition notariale et immobilière*, 2000, No. 9, p. 406; and J. Hauser, "Pacte civil de solidarité (PACS) - Statut civil des partenaires", *Semaine juridique, Édition notariale et immobilière*, 2000, No. 9, pp. 411-412, 415.)

(12) In my view, since it is clear on the authority of the Tribunal's case law cited above that formal marriage or something closely analogous thereto under the applicable municipal law is required for the purpose of entitlement to allowances, the Tribunal must adhere to the interpretation of the term "spouse" formulated in Judgment 1715. In addition, since the requirements set out in that decision regarding *de facto* marriages are not met in the case of the complainant, the only question left to be addressed is whether the provisions of the Staff Rules at issue in the case at bar are discriminatory on grounds of sexual orientation.

*General principle of non-discrimination*

(13) The Tribunal has consistently held that fundamental principles of law, and of non-discrimination in particular, prevail over, and in fact render void, discriminatory staff rules and regulations. In Judgment 978, under 13, it stated as follows:

"The Organization does not deny that 103.14(b)(iii) discriminates against women on its staff. Indeed it amended the offending text with effect from 29 April 1988, the word 'husband' having seemingly been allowed to survive in the text only by oversight. In other provisions of the Staff Rules 'husband' was amended to 'spouse' in 1974. That does not, however, relieve the Organization of liability. The old text of 103.14(b)(iii) was not enforceable because it was discriminatory: it offended against UNESCO's constitutional objectives, the Charter of the United Nations, the general principles of law and the law of the international civil service, all of which condemn discrimination on the grounds of sex.

That being so, the Director-General should have confirmed the complainant's entitlement to the recurrent benefits. Since he failed to acknowledge the discriminatory and therefore unenforceable character of the provision his decision was based on a mistake of law and must be quashed."

See also Judgment 917 cited below.

(14) The first paragraph of Article 2 of the Universal Declaration of Human Rights states as follows:

"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

(15) This language is reminiscent of the wording of Article 14 of the European Convention on Human Rights and Article 26 of the International Covenant on Civil and Political Rights (1966). Article 26 provides as follows:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

(16) In Judgment 2120, the Tribunal held that the enumerated list in the above provision by its very terms is not exhaustive. It also held that, although not strictly binding on the organisation, these provisions are relevant to a consideration of whether a particular rule offends fundamental principles of law. It is clear from these and other international instruments that the principle of non-discrimination is indeed a fundamental principle of law and, as a result, must prevail over discriminatory staff rules and regulations.

*Analytic framework*

(17) Several Tribunal judgments have dealt with the issue of discrimination. These judgments, taken together, suggest a useful analytic framework for determining whether an organisation's rules or regulations are discriminatory, contrary to general principles of law.

(18) In my opinion, the time has come, however, to refine and limit one particular approach, which has been used in the past by this Tribunal as well as other courts around the world on a related question but one, which it can now be seen, is not entirely identical. When dealing with allegations of unequal treatment, it has been the practice to refer to and apply the "similarly situated" test as the best way to determine whether a rule or decision breached the principle of equality. Application of this test involves comparing the alleged victim of unequal treatment with an individual not subject to the impugned rule in order to determine whether they were similarly situated. It is based on the principle that like people should be treated alike (see for example Judgment 818). This approach was recently used by the European Court of Justice (ECJ) in *Grant v South-West Trains Ltd*, (Case C-249/96), a case involving allegations of discrimination on the basis of sexual orientation. With due respect for the ECJ - which is constrained, as the Tribunal is not, by the provisions of national and European Community laws - the case reveals the inadequacy of the approach where the issue is one of discrimination as opposed to simple inequality.

(19) While the decision is not of course binding on the Tribunal, it is nevertheless instructive to look closely at *Grant* since it is analogous to the case at bar. In *Grant*, the ECJ determined that persons who have a stable relationship with a partner of the same sex are not "in the same situation" as those who are married or have a stable relationship outside marriage with a partner of the opposite sex. It based its decision on its view of the state of European Community law at the time. As a result, benefits given to opposite-sex partners of staff members were not extended to same-sex partners of staff members.

(20) To reach this conclusion under the strict "similarly situated" test is to assert that same-sex couples are "so different" from married couples that it would be unreasonable to make the same benefits available to both. At best, this is an assumption. However, the presumption that same-sex relationships are somehow less interdependent than opposite-sex relationships is, itself, a fruit of stereotype rather than one of demonstrable, empirical reality. The Court's approach to the issue of equality of treatment demonstrates the frailties of the "similarly situated" test when it comes to assessing discrimination. In fact, surely the only difference in the situation of two couples each legally committed in principle to a lifetime of mutual support and succour where one of the couples is gay and the other is not is that fact alone. They are not similarly situated because, and only because, they have different sexual orientations. I believe that this cannot be a sound or even a rational basis for treating them differently.

(21) Looking closely at several Tribunal judgments, a more useful approach emerges.

(22) In Judgment 917, under 6, the Tribunal noted that the principles that govern the international civil service forbid discrimination and require that all members of the staff be treated considerately and with respect for their dignity. This statement highlights a crucial point: at the heart of the rule against discrimination in the international civil service are the protection of, and respect for, basic human dignity.

(23) Other decisions have attempted to draw the line between permissible distinctions and improper discriminatory practices. In Judgment 212, the Tribunal stated as follows:

"A policy of discrimination is blameworthy and objectionable only if it aims at the exclusion of certain persons as a matter of principle on account of their nationality, race or opinions. It is normal and even desirable if it is based

on the professional qualifications and merits of the persons concerned."

(24) This emphasises the importance of scrutinising the grounds for drawing distinctions between staff members, distinguishing between irrelevant personal characteristics such as nationality, race and opinions on the one hand, and relevant attributes such as professional qualifications and personal merit on the other.

(25) This approach was recently confirmed in Judgment 2120 (a case dealing with discrimination on the basis of marital status) where the Tribunal held that all forms of unjustified or improper discrimination are prohibited, the latter being defined, at least in the employment context, as "the drawing of distinctions between staff members or candidates for appointment on the basis of irrelevant personal characteristics".

(26) Furthermore, in Judgment 818, the Tribunal held that it will also consider "whether the purpose or even the mere effect of the rule is to put some members of the staff at a severe disadvantage". Two lines of analysis emerge from this statement. First, it should be determined whether either the purpose or the effect of a rule is discriminatory. Secondly, it should be determined whether the discriminatory rule puts a staff member at a severe disadvantage. It is clear that the discriminatory effects should be evaluated from the point of view of the victim, rather than from that of the organisation.

(27) The above-mentioned cases suggest the following approach when determining whether a staff member has been the victim of improper discrimination as a result of a distinction created by a challenged administrative decision or staff rule. First, it should be determined whether the challenged decision or rule has drawn a distinction between a staff member and others based on irrelevant personal characteristics, such as race, colour, sex, language, religion, political or other opinion, national or social origin, marital or other status. To be clear, this list is not exhaustive. Secondly, the inquiry must focus on whether the distinction (or differential treatment) has the effect of imposing a burden, obligation or disadvantage not imposed upon other staff members or of withholding or limiting access to benefits or advantages which are available to others. Thirdly, the inquiry will determine whether, despite all the above, there are sound administrative reasons for the difference in treatment or if the differential treatment is a fair, reasonable and logical outcome of circumstantial differences. In order for discrimination to be addressed and identified in all of its varied contexts and forms, it is preferable to focus on impact (i.e. the discriminatory effects and their severity on the complainant) rather than on constituent elements (i.e. the grounds of the distinction).

*Application to the present complaint*

(28) Applying the analytic framework suggested above, the first question to be resolved in the case at bar is whether the distinction implied in Staff Rules 103.7 and 103.9 is one based on "irrelevant personal characteristics". The answer must be yes. It is undoubted that this distinction is indeed based on a personal characteristic, specifically, sexual orientation. Furthermore, it is frankly impossible to see on what basis the Organization would be entitled to regard that characteristic as being relevant to any matter in which it may have a legitimate interest.

(29) In my view, the wording of different non-discrimination provisions quoted above is useful when determining the types of discrimination that will be improper. In this respect, the Tribunal should have no difficulty in including sexual orientation as an improper and irrelevant basis for distinction.

(30) Same-sex couples are a highly vulnerable social group. The historic disadvantage, stereotyping, marginalisation and stigmatisation suffered by homosexuals has been widely recognised and documented. The European Parliament, in its legislation prohibiting discrimination on the basis of sexual orientation, specifically sought to address the discrimination faced by homosexuals not only as individuals but as couples. (See *Resolution on equal rights for homosexuals and lesbians in the EC* (A3-0028/94) adopted on 8 February 1994; see also *Resolution on equal rights for gays and lesbians in the EC* (B4-0824 and 0852/98) adopted on 17 September 1998, reaffirming the European Community's commitment to equal rights for gays and lesbians.) These resolutions confirm that homosexuals, whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantages. They also demonstrate the increasing recognition that homosexuals are equally deserving of human rights protection.

(31) The second question to be resolved is whether the distinction or differential treatment has the effect on the staff member of imposing a burden, obligation or disadvantage not imposed upon other staff members or of withholding or limiting access to benefits or advantages which are available to others. The answer to this question, too, is undeniably yes.

(32) The distinction between same-sex and opposite-sex couples has the effect on the complainant of imposing a disadvantage not imposed on heterosexual staff members with a dependent partner. Specifically, the disadvantage is that UNESCO is withholding access to benefits available to heterosexual staff members with dependants.

(33) The purpose of family or dependant's allowance, which is a feature of all staff pay and benefits schemes within international organisations, is to protect the staff member's domestic partner (and indirectly the staff member too) and thus to provide a benefit to people who are precisely in the sort of loving and caring relationship shared between the complainant and his partner. Hence, domestic partnerships that take the character of voluntariness, permanency, legal enforceability, and mutual dependency and assistance as between partners, are entitled to family allowance benefits if the other conditions as to incomes and dependency of a domestic partner are satisfied.

(34) Since 1953, the Consultative Committee on Administrative Questions (CCAQ)[(1)] has been trying to put into place a definition of "dependency" as well as to define the criteria which will be used to assess the allowances owed to dependants. At its 88th Session held in April 1998 in Rome, the CCAQ formulated conclusions on the issue which were later endorsed by the ACC (see UN document ACC/1998/5). The report of that meeting states:

"**Definition of dependency**

[...]

24. At the outset, organizations which had not already done so agreed to undertake the necessary steps to put in place a policy to recognize common law marriage for dependency purposes if proof was provided that the common law marriage was recognized by the staff member's home country.

25. In addition, recognizing that this issue was intrinsically related to the work and life issues outlined in ACC's policy statement for a Work/Family Agenda, the Committee:

- endorsed the principle that organizations should move - to the extent possible, in unison - in the direction of non-discrimination with regard to the recognition of domestic partnerships;

- agreed as a first step to initiate consultations within organizations on the basis of the draft criteria provided in annex V;

- requested its secretariat to monitor progress on organizations' consultations and report thereon to the Committee's eighty-ninth session."

(35) UNESCO says that, to date, none of the organisations has adopted legal changes to its staff rules and regulations recognising the status of partnerships as giving entitlement to benefits. However, it states that the internal consultations continue in order to explore the possibility, in the future, of such changes. Thus, UNESCO argues that until such consultations are concluded and an amendment to the Staff Rules is made, the only relevant provisions in the case at bar are Rules 103.7(c) and 103.9(c). These provisions do not provide any legal grounds that would justify that the legal consequences of a formal marriage be applied to a staff member who is not married.

(36) The argument displays a fundamental misconception of the governing role of the anti-discriminatory dispositions of the law applicable to the international civil service. As the cited cases demonstrate, the failure of UNESCO - or any other organisation - to legislate to remove discriminatory provisions from its Staff Rules is no obstacle to the Tribunal finding that such discrimination exists and refusing to apply the impugned provisions. Indeed, looked at in this light, the CCAQ's report of 1998, far from supporting any argument in favour of the Organization, is simply yet another indication that the provisions are indeed discriminatory and that the Organization, being fully aware of this fact, has failed to do anything about it. In effect, the Organization pleads its own inaction and negligence, a plea which the Tribunal should reject absolutely.

(37) The third question is whether, despite positive answers to the first two, there are "sound administrative reasons" for the difference in treatment or whether the differential treatment is a fair, reasonable and logical outcome of circumstantial differences.

(38) In my view, the Tribunal has not been presented with, nor is it possible to imagine, any justifiable reasons

UNESCO might have for discriminating against the complainant based on his same-sex relationship. The Organization implies that the complainant has failed to prove the facts supporting his allegations of discrimination. That puts the matter the wrong way around: the distinction drawn by the Staff Rules is based on an irrelevant personal characteristic, sexual orientation, and amounts to a clear denial of equal economic benefit of the law. If the Organization thinks it can or should be justified, it should produce the necessary evidence.

(39) In the case at bar, the impugned provisions of the Staff Rules deny homosexual couples equal benefit of the law not on the basis of merit or need, but solely on the basis of their sexual orientation. The implied definition of "spouse" in the Staff Rules as someone of the opposite sex reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples. The complainant's relationship demonstrates the error of that approach. The discriminatory impact of the distinction cannot be deemed to be trivial or justifiable when the legislation reinforces prejudicial attitudes based on such faulty stereotypes. None of the couples excluded from benefits under the Staff Rules are incapable of meeting the fundamental social objectives sought by the Organization when it adopted these provisions. When determining whether a decision or rule discriminates against a staff member on grounds of sexual orientation, focus should not be on the economic aims and origins of the prohibition against such discrimination in the workplace, but rather on the dignity of the individual and the value of equality as a fundamental human right recognised as such by national legal systems.

*Conclusions*

(40) For all the above reasons, the Tribunal should conclude that Rules 103.7 and 103.9 are unenforceable vis-à-vis the complainant because they are contrary to fundamental principles of law. The provisions improperly discriminate between staff members for the purpose of entitlement to family allowances and benefits on the ground of sexual orientation. Discrimination on such a ground is contrary to the Charter of the United Nations, general principles of equality of treatment and respect for the human dignity of employees, principles which govern the international civil service, as well as international instruments on human rights. Since the provisions had no effect vis-à-vis the complainant, there was no authority to withhold the benefits. Consequently, the impugned decision, being based on these provisions, cannot stand.

(41) On the issue of compensation for moral and material injury, the complainant feels deeply aggrieved by the refusal of the Director-General to give effect to the recommendations of the Appeals Board and by the Organization's homophobic and scandalous attitude towards him. He claims in his prayer for relief that:

"UNESCO, for its part, is blind to [homosexuals'] existence. I am one of the victims of the Organization's discriminative and disgraceful practices. Although a member of staff, I am first and foremost a human being and a citizen, and I have no intention of renouncing the legal rights accorded me by all European countries."

(42) The Organization objects to the receivability of the claim for damages insofar as it goes beyond those set out in the internal appeal. It relies on the decision in Judgment 1380, where the Tribunal held, under 12, with respect to a claim for moral and material injury that "[the complainant] sought no award of damages for injury from the Joint Appeals Board. The claim is irreceivable under Article VII(1) of the Tribunal's Statute because she has not exhausted the internal means of appeal."

(43) In this respect UNESCO is right and the Tribunal, despite the force of the claim, could make no award of damages. The complainant would, however, be entitled to an award of costs.

## DISSENTING OPINION BY JUDGE RONDÓN DE SANSÓ

I regret to have to express my disagreement with the majority opinion dismissing the present complaint. The complainant seeks the setting aside of the decision of 6 June 2000 by which the Office of Human Resources Management refused to extend the benefits and allowances for dependent spouses provided for in UNESCO Staff Rules 103.7 and 103.9 to the person with whom he had entered into a PACS pursuant to French law No. 99-944

promulgated on 15 November 1999. The complainant also requests that the Director-General of UNESCO should follow the recommendations made by the Appeals Board on 4 December 2000.

The rejection of the complainant's arguments by the majority is based on the following points:

(1) France and UNESCO are bound by a Headquarters Agreement which, in Article 5(2), authorises UNESCO to "make internal regulations applicable throughout Headquarters in order to enable it to carry out its work".

The Tribunal states that although the complainant bases his argument on the third paragraph of Article 5, that paragraph is subject to the provisions of Article 5(2) and cannot be interpreted as obliging the Organization to apply all statutory and regulatory provisions of the host country.

(2) The Tribunal notes that there is no provision defining the term "spouse" in either the Staff Regulations or the Staff Rules. One must therefore refer to case law and to the relevant written submissions in order to determine whether the complainant's partner can be considered to be a spouse. Thus, the Tribunal cites Judgment 1715, in which it held that the term "spouse" presupposes that marriage has taken place.

Taking into account the above-mentioned sources, the Tribunal concludes that a PACS is neither similar nor comparable to a marriage.

(3) Regarding the complainant's argument that the Director-General ought to have exercised his authority to modify the Staff Rules so as to protect the rights of homosexuals, or to make an exception to the application of the Staff Rules, the Tribunal considers that the exercise of that authority is discretionary.

I believe that the complaint ought to be allowed for the following reasons:

*Headquarters Agreement*

Defined in simple terms, the Headquarters Agreement is a bilateral agreement between a sovereign state and an international organisation operating on the territory of that state, determining the legal status of the organisation and the conditions under which it operates. This type of agreement enables international organisations to enjoy certain prerogatives and freedoms which facilitate the exercise of their mandate.

Article 5 of the Headquarters Agreement, signed in 1954 between the French government and UNESCO, provides that:

"1. The Headquarters shall be under the control and authority of the Organization.

2. The Organization shall have the right to make internal regulations applicable throughout Headquarters in order to enable it to carry out its work.

3. Subject to the provisions of the preceding paragraph, the laws and regulations of the French Republic shall apply at Headquarters."

The last two paragraphs must be analysed in a coherent manner. Under paragraph 2, UNESCO can adopt internal regulations aimed at establishing the way in which the Organization shall carry out its work within its Headquarters. The nature of the rules that the Organization is entitled to adopt is clear from the following two points: firstly, they are internal rules, and secondly, their aim is to regulate the functioning of the Organization. They are therefore organisational rules. As such, they cannot innovate in the sphere of subjective relations, but must be confined to defining structures and regulating the operation thereof. These elements determine the extent of the Organization's authority to establish internal regulations and also the content of such regulations. Paragraph 3 is intended as a reminder that national laws and regulations, and particularly those concerning matters of public policy, must be observed and applied within the Organization.

It follows that internal regulations cannot become a substitute for national legislation governing a country's institutions.

Indeed, all matters concerning the civil status of individuals are matters of public policy, both within a country (in that they cannot be revoked by a contract between individuals) and internationally (in that they cannot be

disregarded by international law). Thus, in the present case concerning recognition of the PACS, this is not simply a private contract between two persons who want their contract to be recognised and to produce effects within an international organisation, but a contract entered into with nationally recognised authorities and governed by the provisions of the Civil Code itself, which, in its section concerning persons, defines the regime which establishes their status, their family relations and all the conditions of their identity before the law.

That is why I cannot accept that a headquarters agreement entered into in order to regulate the organisation and functioning of an international organisation can provide the basis for refusing to recognise the registration of a contract which stems from national legislation and is thereby a matter of public policy.

*The meaning of "spouse"*

I consider that the Tribunal cannot give a word its most narrow interpretation when the word has already acquired a much broader meaning. Semantic interpretation cannot be restrictive. On the contrary, it must be as broad as possible. This is a rule of contemporary international law which, adhering closely to the principles of human rights, considers the progressive nature of any interpretation to which it refers. Using that approach, organisations such as the World Bank have agreed to recognise the male partner of a male staff member as a "spouse". I consider that this concept should be taken to mean a stable partner bound to the staff member by a permanent relationship which is not prohibited by law but which, on the contrary, is expressly authorised and provided for by specific legislation. To deny that status to an individual who is in a relationship recognised by the state and evidenced by an official document would be to disregard the validity not only of that document, but also of the law establishing it.

*Reasons concerning non-discrimination*
*and the violation of human rights*

These reasons are stated and discussed in the dissenting opinion of Judge Hugessen, which I fully endorse.

In witness of this judgment, adopted on 5 November 2002, Mr Jean-François Egli, Presiding Judge for this case, Mr Seydou Ba, Judge, Mr James K. Hugessen, Judge, Mrs Flerida Ruth P. Romero, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

*(Signed)*

Jean-François Egli

Seydou Ba

James K. Hugessen

Flerida Ruth P. Romero Hildegard Rondón de sansó

Catherine Comtet

1. The CCAQ was, at that time, a subsidiary body of the Administrative Committee on Co-ordination (ACC), the latter being made up of the executive heads of UN organisations.

Updated by PFR. Approved by CC. Last update: 13 February 2003.