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

101st Session **Judgment No. 2549**

The Administrative Tribunal,

Considering the complaint filed by Mrs A.H.R.C.-J. against the International Labour Organization (ILO) on 13 May 2005 and corrected on 20 July, the Organization's reply of 19 October, the complainant's rejoinder of 7 December 2005 and the ILO's surrejoinder of 28 February 2006;

Considering Articles II, paragraph 1, 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 Danish national born in 1971, was employed by the International Labour Office, the secretariat of the ILO, from 3 January 2002 until 2 January 2005 as an associate expert based in Pretoria (South Africa). Shortly before joining the Organization, she had entered into a registered partnership under Danish law with her same-sex partner. The latter had difficulty obtaining a visa from the South African authorities, and it was not until the end of June 2002 that she was able to join the complainant in Pretoria.

On taking up her functions, the complainant submitted a family status report and application for dependency benefits, designating her partner as her "spouse" and attaching a Certificate of Registered Partnership dated 17 October 2001. The Office, however, recorded her family status as single. An exchange of correspondence ensued between the complainant and the Human Resources Development Department (HRD), culminating in a letter of 11 September 2002 by which she was informed that, since the ILO Staff Regulations did not yet permit recognition of a domestic partner as a spouse, her request for dependency benefits could not be granted.

On 30 September 2003, in a fax addressed to the Manager of the Human Resources Operations and Development Branch (HR/OPS), the complainant renewed her request for recognition of her partner as her spouse. She emphasised that the Danish Foreign Ministry was willing to cover all costs resulting from such recognition, and drew attention to the fact that the United Nations (UN) had recently decided to grant spousal benefits to a staff member married under Dutch law to a partner of the same sex. Having received no reply, she sent a series of reminders on 28 October 2003, 6 January 2004 and 19 January 2004.

On 20 January 2004 the Secretary-General of the United Nations issued a bulletin entitled "Family status for purposes of United Nations entitlements", in which, after reaffirming the principle that matters of personal status are determined by reference to the law of nationality of the staff member concerned, he stated that not only a marriage but also a legally recognised domestic partnership contracted by a staff member under the law of the country of his or her nationality would qualify that staff member to receive the entitlements provided for eligible family members. The complainant sent a copy of this bulletin to the Manager of HR/OPS on 30 January 2004, referring to her previous unanswered communications and reiterating her request for recognition of her partner as her spouse. The Manager replied on 10 February that HRD was continuing to examine the issue of recognition of domestic partnerships in the light of the Secretary-General's bulletin, and that he would inform her of any developments in that regard. The bulletin of 20 January was subsequently abolished and replaced by a less explicit text.

In the meantime, the complainant's case, which had attracted the attention of the Danish media, had become a matter of public controversy in Denmark. Letters were sent to the Director-General of the ILO by the Chairman of the International Branch of the Danish National Organisation for Gays and Lesbians, on 12 November 2003 and 10 February 2004, then by the Danish Ambassador and Permanent Representative to the United Nations Office and Other International Organizations in Geneva, on 8 March 2004. The Ambassador officially confirmed that the complainant's registered partnership was valid under Danish law, and he provided a statement issued by the Danish Ministry of Justice concerning the rights and obligations of parties to a registered partnership under Danish law,

from which he concluded that “Danish registered partnership in all relevant issues is to be considered on a par with a marriage”. Replying to these letters, the Director of the Office of the Director-General emphasised that whilst the Office was now in a position to recognise same-sex marriages where the legislation of the country of the staff member’s nationality recognised such marriages, it could not recognise domestic partnerships without an amendment to the Staff Regulations, for which the necessary approval of the Governing Body had yet to be obtained.

On 23 September 2004 the complainant lodged a grievance, challenging the Office’s refusal to recognise her partner as her spouse. By a letter of 24 September the Manager of HR/OPS informed her that the Office took the view that a Danish registered partnership did not confer on the registered partners the same rights and obligations as those conferred on spouses under Danish marriage law. Consequently, her registered partnership could not be recognised as a “spousal relationship” for the purposes of the Staff Regulations. He authorised her to file a complaint directly with the Tribunal, without first having to exhaust the internal remedies.

The complainant chose to lodge an appeal with the Joint Panel. In its report dated 15 December 2004 the Panel recommended that the Office recognise the complainant’s partner as her spouse and grant her spousal benefits with retroactive effect, particularly because of the new practice it had “*de facto* adopted” in March 2004, by deciding to recognise two Canadian same-sex marriages, thereby giving a broad interpretation to the term “spouse” as used in the Staff Regulations. The Panel did not, however, consider that the complainant should be awarded the moral damages she claimed, in view of “the Office’s *bona fide* efforts to address the issue through its Governing Body”.

By a letter of 4 February 2005, the Executive Director of Management and Administration informed the complainant on behalf of the Director-General that the latter did not share the Joint Panel’s conclusions. She explained that the Office’s recognition of two Canadian same-sex marriages was “predicated on the establishment of a spousal relationship, regardless of the sex of the officials’ spouses”, and that “this [did] not give rise to any practice, *de facto* or otherwise, authorizing the Office’s recognition of a domestic partnership”, which would require an amendment to the Staff Regulations duly approved by the Governing Body. Given that bulletins issued by the UN Secretary-General are not directly applicable to the ILO, there was no basis other than the Staff Regulations upon which the Office could rely to grant an application for change in family status. Consequently, the Director-General considered that there was no legal basis for the Joint Panel’s recommendation that the Office recognise domestic partnerships under the Staff Regulations currently in force. That is the impugned decision.

B. The complainant contends that a Danish registered partnership is in all material respects equal to a Danish marriage. She points out that for some countries, such as South Africa, where more than one type of marriage exists, the Organization recognises the different forms of marriage despite substantial differences in the rights and obligations of the spouses. In her view, the differences between a marriage and a registered partnership in Denmark are by no means greater than the differences between a civil marriage and a traditional marriage in South Africa, and the only reason why the registered partnership is not recognised by the Organization is that, unlike the South African marriages, it concerns homosexuals. She concludes that the Organization is discriminating against her on the grounds of her sexual orientation.

Referring to Judgments 1715 and 2193, she argues that she and her partner have the status of spouses within the meaning of the Tribunal’s case law. Consequently, she submits, even if the Tribunal does not agree that her personal status should be governed by the law of her country of nationality, it should nevertheless order the Organization to recognise her partner as her spouse in accordance with its case law.

According to the complainant, the argument that the Staff Regulations must be amended in order for registered partnerships to be recognised is incorrect. She points out that the Organization did not need the approval of the Governing Body in order to recognise two Canadian same-sex marriages: it simply followed the guidelines issued by the UN Secretary-General and interpreted the Staff Regulations so as to include same-sex marriages. Noting that the Staff Regulations already expressly prohibit discrimination on the basis of sexual orientation in connection with selection procedures, she submits that this prohibition should also apply to remuneration matters.

Lastly, the complainant contends that the Organization’s approach is inconsistent and discriminatory in several respects. In particular, the Secretary-General’s bulletin was described in the impugned decision as not binding on the Organization, yet in an earlier communication it was said to provide welcome guidance, and indeed the Office followed it to the letter when it chose to recognise two Canadian same-sex marriages in March 2004. Moreover, in processing requests for recognition of marriages, the Organization does not approach heterosexual marriage

certificates with the same scepticism and suspicion as it displays in connection with homosexual marriage certificates, which are subjected to closer scrutiny.

The complainant seeks the following redress: recognition of her partner as her spouse throughout her period of employment, i.e. from January 2002 to January 2005; compensation in respect of all benefits and allowances that she did not receive during that same period "as a result of the ILO's discriminatory practices"; compensation for the cost of the private medical insurance she had to take out for her spouse, and for all health-related costs which would otherwise have been covered by the Staff Health Insurance Fund (SHIF) for the period January 2002 to January 2005; compensation for financial damage caused by the fact that her partner did not obtain a visa until six months after the start of her appointment, "due to lack of timely assistance from the ILO"; moral damages; and costs.

C. In its reply the Organization contends that the complaint is irreceivable for failure to correct fundamental defects. The complainant filed her complaint by fax on 13 May 2005. According to the defendant, at that date the complaint did not satisfy certain basic requirements, since the complaint form was not signed, nor was it accompanied by a brief and supporting documents. The complainant was given 30 days in which to correct her complaint, then a further seven days. The Organization asserts that the complaint was finally corrected only 23 days after the second extension, and that it should therefore be considered null and void *ab initio* or, alternatively, time-barred.

On the merits, the Organization refers to Judgments 1715 and 2193 and submits that the complainant has failed to prove the existence of a marriage to support her claim, or the precise provisions of local law which demonstrate that her registered partnership is a marriage under Danish law, or indeed that the Danish Registered Partnership Act is applicable in the context of the spousal entitlements she is claiming under the Staff Regulations. It points out that, on the contrary, both the testimony of the Danish Ambassador and the statement issued by the Danish Ministry of Justice confirm that partners in a Danish registered partnership do not enjoy all the rights enjoyed by spouses under Danish marriage law, particularly as regards adoption, parental custody and separation.

According to the defendant, there is no basis to find that the impugned decision was illegal, or that it was in any way manifestly mistaken in law or fact, procedurally flawed or an abuse of authority. On the contrary, it considers that, had it followed the Joint Panel's recommendation, its decision would have been unlawful, since the Office would have unilaterally taken action that only the Governing Body is authorised to take. It contends that, although in November 2001 the Governing Body decided to authorise the Director-General, subject to the reservations and opposition of certain Member States, to take various steps with respect to domestic partners, the basis for its decision was that the term "spouse" in the Staff Regulations could not be interpreted automatically by the Director-General to include domestic partnerships without prior Governing Body approval.

The defendant asserts that in taking the impugned decision, the Director-General correctly relied on the Organization's consistent practice. In the absence of a definition of the term "spouse" in the Staff Regulations, it refers to the law of the country of the official's nationality in order to ascertain "whether the institution of marriage is in effect between that official and the individual claimed as a 'spouse'". It acknowledges that this practice has resulted in the acceptance of applications from staff members in diverse forms of marriage. In the complainant's case, however, it considers that reference to national law compels the conclusion that she is not recognised as being married under Danish law, but is recognised as having a registered partnership, which is "a separate and distinct institution giving rise to a status different than marriage under Danish law".

Lastly, the ILO submits that its practice is not discriminatory, but rather is based on sound administrative reasons, and represents a fair and reasonable outcome in view of circumstantial differences. The practice cannot be said to have as its *purpose* to discriminate on the grounds of sexual orientation, since same-sex marriages are treated in the same manner as opposite-sex marriages. Whilst it might be considered to have a discriminatory *effect* in certain cases involving countries where same-sex marriage is legally impossible, this would result from the laws of the country concerned, and the practice might nevertheless be justified by broader considerations, which warrant its continuing application "until such time as there is a change in underlying circumstantial differences, particularly in the direction of national laws which currently reflect the diversity of opinion on the subject among Member States of [the] Organization and the United Nations".

D. In her rejoinder the complainant explains that her complaint is receivable since she complied with the requirements of the Statute and Rules of the Tribunal as well as the instructions of the Registrar. She submits that

the Organization's arguments on the merits are based on the incorrect assumption that she and her partner are living "in a domestic partnership, and not, as is the case, in a spousal relationship equal to that of marriage". She also argues that the differences mentioned by the defendant between the rights of spouses and those of registered partners under Danish law are irrelevant to the issue of whether a relationship is a spousal one for the purposes of the Staff Regulations.

E. In its surrejoinder the Organization states that, were the Tribunal in a position to verify the dates of receipt on which the complainant relies in asserting that her complaint is receivable, it would withdraw its objection to receivability. On the merits, it maintains its position and submits that the key question is whether it erred in finding, according to its consistent practice, that the complainant has not discharged the burden of proving that her partner is a spouse under the Staff Regulations.

CONSIDERATIONS

1. The complainant, a Danish national, was employed by the ILO from 3 January 2002 to 2 January 2005 as an associate expert based in Pretoria. On taking up her functions, she submitted a Certificate of Registered Partnership dated 17 October 2001 drawn up in accordance with the Danish Act of 7 June 1989, amended in December 1989 and June 1999, which provides that "[t]wo persons of the same sex may have their partnership registered", and which establishes the rules governing such registration. The complainant asked to be granted dependency benefits, designating her partner as her spouse. On 25 June 2002 the Administration agreed to provide assistance in obtaining a visa for the complainant's partner from the South African authorities, but the request for dependency benefits was formally rejected on 11 September 2002. After numerous attempts to intervene on her behalf had failed, and having received no reply from the Administration to her written communications until a negative decision was given on 24 September 2004, the complainant lodged a grievance on 30 September 2004, which was referred to the Joint Panel.

2. After a very thorough examination of the case, in which a number of witnesses, including the Danish Ambassador and Permanent Representative to the United Nations Office and Other International Organizations in Geneva, were heard, on 15 December 2004 the Joint Panel issued a recommendation supporting the complainant's claims. It noted the evolution of the legislation in numerous countries concerning the recognition of same-sex marriages and "domestic partnerships", the changes brought about by the United Nations Secretary-General's bulletins of 20 January and 24 September 2004, and the fact that the World Bank, the International Monetary Fund, the European Monetary Institute and the Office of the United Nations High Commissioner for Refugees had recognised same-sex partnerships. It then pointed out that the Danish Ministry of Justice had certified that the registration of a partnership had the same legal effects as the contracting of a marriage, except for a reservation regarding the right to adopt children, and that in the absence of a definition of the term "spouse" in the Staff Regulations, the case could be considered as giving rise to a "*de facto* situation", as referred to in the Tribunal's Judgment 1715, creating the status of spouse. Moreover, since the Organization had already given a broad interpretation to the term "spouse" by recognising the validity of two same-sex marriages involving Canadian nationals, it should follow the same practice in the present case, for not doing so "would not only violate basic principles of equal treatment of staff but would produce an increasing number of situations in which staff members were denied basic rights they enjoyed in their countries of origin". The Joint Panel recommended that the Office consider the fact that the Permanent Mission of Denmark to the United Nations Office and Other International Organizations in Geneva had confirmed that the complainant's registered partnership was legally recognised under Danish law and give full legal effect to that recognition.

3. The Director-General did not follow that recommendation and the complainant was duly informed of his refusal in a letter of 4 February 2005 from the Executive Director of Management and Administration. He considered that whilst the Office had recognised the same-sex marriages of Canadian officials, it had done so because Canada had recognised that such marriages are valid under Canadian law; however, in the absence of approval by the Governing Body of an appropriate amendment to the Staff Regulations, this had no consequences for the recognition of domestic partnerships.

4. The complainant challenges the decision of 4 February 2005 and seeks recognition of her partner as her spouse for the period during which she was employed by the ILO. She claims compensation for losses incurred owing to the non-recognition of her partner as a spouse and to the delay in obtaining a visa for the latter, as well as moral damages. She reiterates the arguments she put forward before the Joint Panel, whilst drawing attention to

what she considers to be the Office's discriminatory attitude towards homosexuals.

5. In its reply the Organization asks the Tribunal to find the complaint irreceivable on the grounds that the complainant failed to send the Registrar the documents required to correct her complaint in time, despite the extensions she was granted. But in response to the arguments put forward by the complainant on this issue in her rejoinder, the defendant in its surrejoinder merely states that it "would propose that its arguments on receivability in the reply not be further considered" if the Tribunal were in a position to verify the dates of receipt alleged by the complainant. In the circumstances, after checking the dates of the exchanges of correspondence between the Registrar and the complainant, and in the absence of any further information, the Tribunal finds that the objections to the receivability of the complaint have been withdrawn.

6. On the merits, the nub of this case is whether the Office could and should have regarded the complainant's partner as her "spouse" in the meaning of the Staff Regulations and allowed her the benefits normally granted to the dependent spouse of a member of staff.

7. While it is true that the rules that apply to United Nations staff are not binding on the specialised agencies and organisations of the common system, it must be recalled that, like the United Nations, the defendant refers to the personal status of staff members, as determined by reference to the law of their nationality, to ascertain whether a union is considered valid and qualifies them to receive the entitlements provided for spouses. This rule is considered by the United Nations as ensuring respect for the social, religious and cultural diversity of Member States and of their nationals. The Organization points out that this practice is applied by the Office not because it is in line with the bulletins of the United Nations Secretary-General on which the complainant relies, but because it is in accordance with the principles of international administrative law, whereby "international organisations themselves have no power to establish or decide the personal or family status of their officials". This is why, according to the defendant, the practice of the Organization "is to consider as 'spouses' persons recognised by their national law as legally married, whether in opposite-sex or same-sex marriages, and to apply the Staff Regulations equally to both types of marriage".

8. This practice is not incompatible with the Tribunal's case law. According to Judgment 1715, under 10, "[a]s 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 Judgment 2193 the Tribunal refers back to Judgment 1715 and states that it thus "establishes a link between the word 'spouse' and the institution of marriage, whatever form it may take". After analysing the provisions of French law governing the "civil solidarity contract" (*pacte civil de solidarité* or PACS), it concluded that "these texts draw a clear distinction between spouses bound by marriage and partners bound by a PACS" and that 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".

The United Nations Administrative Tribunal on the contrary decided in its Judgement No. 1183 that the PACS gave entitlement to spousal benefits, though this solution may be explained by the amendments to the rules applicable to United Nations staff introduced as a result of a bulletin issued by the Secretary-General.

9. In the present case, no decision has been taken by the competent authorities of the defendant Organization to settle a problem which has been the subject of debate ever since the 282nd Session of the Governing Body held in November 2001. On that occasion the Governing Body authorised the Office to provide assistance in obtaining residence permits for domestic partners and to assume responsibility for their safety in the event of an evacuation from a duty station. It also authorised the Office to pay the travel costs of domestic partners on appointment, transfer and repatriation of the official, subject to the agreement of the International Civil Service Commission (ICSC), and to approach the ICSC, the Management Committee of the Staff Health Insurance Fund (SHIF) and the United Nations Joint Staff Pension Fund (UNJSPF) in order to address the issue of the recognition of domestic partners.

Since then the issue has still not been settled, and in order to justify its refusal to recognise that the complainant's partner has the status of "spouse", the defendant falls back on the lack of any formal decision by the Governing

Body enabling it to give a broad interpretation to the term “spouse” and approving an amendment to the Staff Regulations in accordance with Article 14.7.

10. On this point the Joint Panel rightly noted that the Office agreed to interpret the term “spouse” in favour of the persons concerned when it recognised same-sex marriages under the law of the Canadian province of British Columbia notwithstanding several references in the Staff Regulations to spouses as man and wife. This interpretation was possible and may well have engendered a practice which the Organization does not deny: in a letter sent by the Office of the Director-General to the Ambassador and Permanent Representative of Denmark in Geneva, it is stated that “the Office is in a position to recognise same-sex marriages immediately where the legislation of the country of the staff member’s nationality recognises such marriages. It has in fact recently recognised such same-sex marriages where the national legislation defines same-sex marriages as spousal relationships.”

11. The question is whether the broad interpretation of the term “spouse” already given by the Office in the case of a marriage recognised by the legislation of the country of the staff member’s nationality should have been extended to unions between same-sex partners which are not expressly designated as marriages under the national law of the staff member concerned. The Tribunal feels that a purely nominalistic approach to this issue would be excessively formalistic and is inappropriate in view of the fact that the situation varies from one country to another and that great care must be taken not to treat officials placed in comparable situations unequally: it is not because a country has opted for legislation that admits same-sex unions while refusing to describe them as marriages that officials who are nationals of that State should necessarily be denied certain rights. As pointed out in Judgment 1715 cited above, there may be situations in which the status of spouse can be recognised in the absence of a marriage, provided that the staff member concerned can show the precise provisions of local law on which he or she relies. It is therefore necessary to determine whether in the present case the provisions of Danish law enable the complainant and her partner to be considered as “spouses” in the meaning of the applicable regulations.

12. Although the Danish Act of 7 June 1989, amended in December 1989 and in June 1999, draws a distinction between the “registered partnership” it institutes and marriage, it specifies quite clearly that “[t]he provisions of Danish law pertaining to marriage and spouses shall apply similarly to registered partnership and registered partners”, while excluding the latter from the application of the provisions of the Danish Adoption Act. A statement by the Danish Ministry of Justice, produced on 8 March 2004 by the Ambassador and Permanent Representative of Denmark in Geneva, indicates that according to section 3(1) of the Registered Partnership Act the registration of a partnership has the same legal effects as the contracting of a marriage and that, “[b]oth with regard to the mutual relations between the parties as well as in relations towards public authorities and private third parties, registered partnership is thus considered equal to marriage”. The defendant argues that in several respects, regarding not only adoption but also joint parental custody, the rules governing artificial insemination or those providing for the conciliation services of a priest in divorce proceedings, registered partnerships differ from marriage, but none of these differences is such as to cast doubt on the policy of assimilation pursued, subject to certain exceptions, by Danish law.

13. The Tribunal finds that under these circumstances the Director-General was wrong, in the impugned decision of 4 February 2005, to refuse to recognise the status of spouse for the complainant’s partner. The ILO must give full effect to this ruling by granting the complainant the benefits denied to her during the time of her employment and by providing the Staff Health Insurance Fund with a written statement recognising her partner as a dependent spouse so that the Fund can take appropriate action with regard to the coverage of her health expenses, insofar as these expenses may not have been entirely covered by her private insurance. Subject to presentation of receipts, the Organization shall refund the complainant the cost of taking out private health insurance for her partner. It shall also pay the complainant 10,000 Swiss francs in compensation for all damage caused by its refusal to recognise her rights and by its delay in providing assistance to obtain a visa for her partner from the South African authorities, despite the fact that the Office had been authorised by the Governing Body in November 2001 to assist staff members with such formalities.

14. As she succeeds, the complainant is entitled to costs, which are set at 3,000 francs.

DECISION

For the above reasons,

1. The impugned decision of 4 February 2005 is set aside.

2. The case is referred back to the ILO for consideration of the complainant's rights in accordance with 13 above.

3. The Organization shall pay the complainant compensation in the amount of 10,000 Swiss francs.

4. It shall also pay her 3,000 francs in costs.

In witness of this judgment, adopted on 12 May 2006, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, Mr Seydou Ba, Judge, Ms Mary G. Gaudron, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

James K. Hugessen

Seydou Ba

Mary G. Gaudron

Claude Rouiller

Catherine Comtet

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