



Administrative Tribunal

Distr.
LIMITED

AT/DEC/1063
26 July 2002

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1063

Case No. 1169: BERGHUYS

Against: The United Nations
Joint Staff Pension
Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha A. Echols; Ms. Brigitte Stern;

Whereas, on 10 December 2000, Ronald Ernest Berghuys, domestic partner of the late Mr. Nikolaas Roger Zegers de Beijl, a participant in the United Nations Joint Staff Pension Fund (hereinafter referred to as UNJSPF), filed an Application containing pleas which read as follows:

"Second section: Pleas ...

The [A]pplicant requests:

1. to review the decision dated 8 August 2000, taken by the Standing Committee of the ... UNJSPF to uphold the decision, dated 24 March 2000, that had been taken by the Chief Executive Officer of the Pension Fund,

...

2. to reconsider [the] [A]pplicant's claim to the [UNJSPF] for a benefit under the terms of articles 34 and 35 (survivor's benefit) of the [UNJSPF] Regulations and Rules ...

...

3. the right to have this case reconsidered at a later date, pending on [the United Nations] progress on the matter of recognition of domestic partnerships. ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's Answer until 15 June 2001;

Whereas the Respondent filed his Answer on 4 June 2001;

Whereas the Applicant filed Written Observations on 10 May 2002;

Whereas the facts in the case are as follows:

The Applicant was the domestic partner of Nikolaas Roger Zegers de Beijl (the Deceased), who was a staff member of the International Labour Organization and a participant in the UNJSPF from 1993 until his death on 29 July 1999. On 30 June 1999, the Applicant and the Deceased, both nationals of the Netherlands, formalized their relationship by entering into a domestic partnership agreement under Dutch law.

On 8 March 2000, the Applicant submitted to the UNJSPF a claim for a survivor's benefit, in accordance with the provisions of articles 34 and 35 of the UNJSPF Regulations and Rules. By letter dated 24 March, the Chief Executive Officer (CEO), UNJSPF, denied the Applicant's request, stating that under the UNJSPF Regulations and Rules, a widow's or widower's benefit is paid only to a legally recognized surviving spouse. However, since the Deceased was unmarried at the time of his death, as reflected by various documents including his death certificate, the Applicant, as his designated beneficiary, received the residual settlement, in accordance with article 38 of the UNJSPF Regulations and Rules. The CEO also confirmed that the United Nations does not recognize formally registered partnerships other than marriage.

On 15 April 2000, the Applicant requested a review of the CEO's decision and, on 27 June, he was informed that his request would be placed before the Standing Committee at its next meeting. On 8 August, the CEO informed the Applicant that the Standing Committee had

upheld the decision "on the grounds that the UNJSPF Regulations and Rules, as presently in force, did not provide for a survivor's benefit that might become payable to a 'domestic partner'".

On 10 December 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The UNJSPF Regulations and Rules do not define the term "spouse", leaving room for interpretation.
2. The Applicant's domestic partnership agreement with the Deceased was recognized by Dutch law and should have been considered a legally recognized partnership equivalent to marriage. Previous decisions of the UNJSPF recognized other "common law marriages" when recognized under national law.
3. The Organization must implement its own principles of non-discrimination concerning the recognition of domestic partnerships of both the same and opposite sexes; denial of the Applicant's request as a consequence of any consideration of gender or sexual orientation would be contrary to the Organization's principles of non-discrimination.
4. The United Nations should not lag behind developments outside the Organization in relation to equitable access to entitlement, benefits and facilities for legally recognized domestic partners.

Whereas the Respondent's principal contentions are:

1. Paragraph 34 (a) of the UNJSPF Regulations and Rules clearly refers to the "spouse" as having been "married" to the Fund participant.
2. The domestic partnership agreement between the Applicant and the deceased, though legally sanctioned by a Member State, does not constitute a legally recognized marriage.

The Tribunal, having deliberated from 3 to 26 July 2002, now pronounces the following Judgement:

- I. This case presents the interesting and significant question whether the Applicant is a surviving "spouse". He is the surviving partner in a same-sex relationship recognized as a

special partnership with rights under the national law of the Deceased. The meaning of the word spouse is crucial to this case, because a widower's benefit is payable to the "surviving male spouse of a participant" under article 35 of the Regulations of the UNJSPF. Although the word spouse is not new, its meaning is evolving and broadening in some nations, as are notions of the types of partnerships possible, the parties to those agreements and the consequences for public and private administrations. However, in spite of modern cultural notions of relationships and partners, the answer to the question is that the Applicant is not the surviving spouse of the deceased participant, because they were not married. Consequently, his application for widower's benefits must be rejected.

II. Article 35 is brief, because it cross-references the more detailed article 34: "[a] widower's benefit, at the rates and under the conditions applicable in article 34 to a widow's benefit, shall be payable to the surviving male spouse of a participant". Article 34, regarding widow's benefits, also uses the word spouse.

There is no definition of the word spouse in the UNJSPF Regulations. The UNJSPF has defined the word on a case-by-case basis by using the definition applicable under the national law of the participant. It follows the 15 December 1981 opinion of the Office of Legal Affairs, which issued the following statement regarding common law marriages:

"The law of a staff member's home country is used by the [United Nations] as the point of reference in determining a staff member's marital status for [United Nations] administrative purposes i.e. the home country is the forum state. Consequently, if a common law marriage [is] valid where contracted [and] is recognized by the law of a staff member's home country, the [United Nations] will also recognize it. But, if the marriage is not valid where contracted, or, even if it is valid where contracted, it is not recognized by the home country then, equally, the [United Nations] will not recognize it for the purpose of entitlements under [United Nations] Regulations and Rules."

III. While this approach can lead to different results from country to country, it is a wise and justifiable position that does not appear to infringe on rights. This flexible approach is consistent with the Organization's appreciation of the world's many cultures and reflects the truth that there is no common understanding of the meaning of the word spouse among the peoples of the world. For example, this flexibility has allowed the UNJSPF to pay widow's benefits to the survivors of a participant with more than one legal spouse as permitted under certain national laws. It also

recognizes the survivor of a customary marriage, when such a marriage is recognized under the national law of the participant. However it appears that, before this case, the UNJSPF has never been called on to consider whether to pay benefits to the survivor of a same sex partnership.

IV. As stated, this case turns on the meaning of the word spouse. In Judgement No. 942, *Merani* (1999), another case involving the UNJSPF, the Tribunal applied the "general international practice, which refers to interpretation according to the 'ordinary meaning' of the terms 'in their context and in the light of [their] object and purpose'", citing articles 31.1 and 31.4 of the Vienna Convention on the Law of Treaties.

The Tribunal also notes the injunction in the Convention to take into account all relevant rules of international law that are applicable between the parties at the time of the interpretation. This rule was followed by the International Court of Justice (ICJ) in its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South - West Africa) Notwithstanding Security Council Resolution 276 (1970)* I.C.J. Reports, 1971, the so-called *Namibia* case. In that Advisory Opinion the ICJ, after considering the historical development of international law regarding non-self governing territories, proceeded to interpret the instrument at issue, taking into account the fact that concepts in the document, such as "well-being and development" and "sacred trust", "were not static, but were by definition evolutionary". It continued,

"[t]he parties to the Covenant must ... have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of the law ... Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."

V. The Tribunal recognizes that the interpretation it must make has great significance for certain participants under the circumstances presented. Before turning to the plain meaning of the word spouse, it must note the Charter of the United Nations, which enshrines the notion of equality. Under Article 8 of the Charter, the United Nations "shall place no restrictions on the eligibility of men and women to participate *in any capacity* and under *conditions of equality* in its principal and subsidiary organs". (Emphasis added.) This is a promise of equality given by

the world community. It applies to the interpretation of the rights of participants, including rights regarding their participation in the Pension Fund. International agreements regarding civil rights, such as article 26 of the International Covenant on Civil and Political Rights, which concerns equality before and equal protection of the law, express the same view. In fact, non-discrimination and equality of treatment have been major issues for the proponents of same sex marriage and rights, building in part on the language of article 26. These commitments, which form part of the identifying principles of the United Nations, must influence the UNJSPF interpretation of the word spouse

VI. The word spouse derives from the Latin word *sponsus*, which is from the past participle of *spondere*, meaning to pledge. This led to the old French word *spous*. The Latin word *sponsalia* (betrothal) led to the old French *espousaille* and the middle English *spousaille* (marriage). (The American Heritage Dictionary of the English Language, 1992.) Each carries the idea of a pledge and a partnership, although, of course, they envisioned a male-female partnership.

Most current dictionary definitions of spouse are related to one type of pledge: marriage. The first definition of spouse is a "marriage partner; a husband or wife" in The American Heritage Dictionary. This broad definition recognizes the possibility that a marriage partner might not be a husband or wife in the traditional sense. On the other hand, the prevalent definition – "a person's husband or wife" - is found in the Cambridge International Dictionary of English (1995). In both dictionaries, the wife is a woman and the husband is a man.

These dictionary definitions of marriage are outdated, since the national laws of several countries recognize that a pledge of marriage may be made by persons of the same sex. The Tribunal notes the very recent ruling by the German Constitutional Court that the national law legalizing same sex marriages is not contrary to the German fundamental law. (See BVerfG, 1 Bv 1/01 (17 July 2002)). The Netherlands, whose law guides the analysis of this application, is one of those countries. Its Same-Sex Marriage Act, which went into effect on 1 April 2001, makes it possible for two men to make a pledge of marriage that is legally recognized. According to its article 30.1, a "marriage can be contracted by two persons of different sex or of the same sex". The same law makes it possible to convert a registered partnership, such as the one between the Applicant and the Deceased, into a marriage (article 80 f.1). However, the

Deceased died on 29 July 1999, before the enactment of the Same-Sex Marriage Law. The Applicant and the Deceased benefited from the 1 January 1998 Dutch registered partnership law only.

VII. While the state of the law in some nations is evolving so that marriage and spouse no longer only connote a pledge between persons of opposite sexes, the word spouse is still linked to a pledge of marriage. The participants in a registered partnership are not spouses. As a consequence, the Applicant cannot prevail in this case.

VIII. The Tribunal notes the evolution of the pledges being made by couples and, especially, the changing nature of the parties involved. Other bodies, from the International Civil Service Commission to the Committee on Human Rights, the World Bank and many others outside the United Nations system, are considering and ruling positively on the implications of this social change that is affecting part of the world. These efforts are in keeping with the principles of the Charter. However, as stated, law and custom still interpret a spouse as a partner in a legal marriage, whatever the nature of that marriage.

IX. For the reasons stated and having considered the pleas, contentions of the parties and the record, the Tribunal denies the Application in its entirety.

(Signatures)

Mayer GABAY
President

Marsha ECHOLS
Member

Brigitte STERN
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG
Executive Secretary