UNITED NATIONS DISPUTE TRIBUNAL

Original: English

Before: Judge Michael Adams

Registry: New York

Registrar: Hafida Lahiouel

WARREN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Self-represented

Counsel for respondent:
Kong Leong Toh, UNOPS

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Introduction

1. The case concerns the calculation of the applicant's lump sum entitlement for his home leave travel from Geneva to Canberra. The parties agree that the question depends on the correct interpretation of para 129 of UNDP/ADM/2003/29 of 7 April 2003 ("Home Leave") which stipulates that the lump sum is 75 per cent of "the cost

had applied "WFFEUR" which designates "economy premium" and not "economy class". The mileage limit specified as a condition of the Y fare identified by the applicant was 12,789 miles. The travel through London with British Airways which should have been used was 11,285 miles.

Respondent's submissions

5. The staff member should not make a profit from the lump-sum payment. The basis for calculating the applicant's lump sum was correct, since for UN purposes "full economy" is understood as "unrestricted economy". The JIU report that preceded the 2004 report (JIU/REP/95/10, "the 1995 report") noted that "the lump sum paid to a staff member was set Organization wide at 75 per cent of the full unrestricted economy-class ticket". The term unrestricted was "dropped" in the latter report but this was an editorial mistake.

6. DP/2005/16/Add.1 is not authoritative because this is a document to the Executive Board and not of the Board. Moreover, the views expressed by UNDP management in 2005 are not relevant for the purposes of interpreting a provision that was promulgated earlier (in 2003). If anything, the view of UNDP management of 2008 (to be inferred from the calculation of the lump-sum used here) should be applied, ie, that the correct airfare is "WFFEUR". Even if UNDP has adopted Recommendation 3 of the 2004 report, UNOPS's Home Leave Policy is different to UNDP's since it contains one requirement which is not mentioned in the JIU recommendation, namely that the fare must "be the least costly scheduled air carrier".

7. Regarding the use of IATA fares, "Y" and IATA fares cannot by definition be those of the least costly scheduled air carrier, since IATA is not a "scheduled air carrier". Furthermore, IATA fares are the same whichever airline is used and there will therefore never be a "least costly scheduled air carrier" for travel using IATA fares as required under UNDP/ADM/2003/29. If "Y" is not an appropriate fare because it is not a fare of a "scheduled air carrier", then the applicant must prove that some other non-IATA fares were available for August 2009 which could fairly be

Tribunal. Moreover, since refutation both of the apparent authority of the authors to make the relevant statements and the accuracy of those statements is within the peculiar capacity of the respondent to undertake, the failure to do so, or even to undertake the task should lead to the conclusion that the statements are correct. Quotations from a travel agent were copied into the written submissions made on behalf of the respondent. I have accepted those tickets at face value as there was no objection by the applicant. The applicant, without objection, tendered hard copies of information downloaded from several identified sites dealing with air fares. Again, I have accepted these at face value.

Interpretation of full fare economy class

11. A basic rule of interpretation is that a provision is to be understood as it is read in an ordinary and literal manner.[1] This principle applies both to statutory and contractual construction. Modifications are only allowed in certain instances, typically to avoid cruel or absurd results[2] or to cure ambiguities.[3] The United Nations Administrative Tribunal operated with a similar concept of "reasonable interpretation"[4]. For reasons which are explained below, there is uncertainty about the meaning of the phrase full economy class fare which, to some extent, is a technical term. In this situation extrinsic or expert evidence is admissible as to its meaning.

12. On the face of it, para 129's reference to the full economy class fare appears to be either a generic description denoting fares that might in the airline industry be known by other descriptions or it could be a specific description used in the industry to denote a particular fare with specific elements. It is is unlikely that the phrase was

[1] In common law, this principle is known as "the plain meaning rule" or the "literal rule". In the context of the Vienna Convention of Treaties this approach is also often referred to as "objective" interpretation (art 31 spells out the general rule of interpretation as "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").
[2] In statutory interpretation this is in English law known as "the golden rule" and in U.S. law as "the soft plain meaning rule".
[3] This is sometimes referred to as "the mischief rule".
[4] See, eg, (2007) Judgment 1352 and Meron (2004) Judgment 1197.

travel but this is focused upon the entitlement to what is called “higher than economy-class transportation”. However, what is meant by “economy class” is not discussed. Indeed, there is no discussion at all about variations at this level though it is clear that, even at this time, this description comprised many variants. The approach apparently commended by the JIU was to seek the “least costly air fare structure regularly available” by obtaining information from travel agencies and

20. Accordingly, the approach of the respondent, as ultimately put to the Tribunal, to obtain from a travel agent a fare described as "unrestricted economy", which is a fare for an actual ticket so described, only 75 per cent of which would be paid to the applicant, must be fundamentally mistaken, quite apart from differing from the language in para 129. I have mentioned the submission of the respondent that the report omitted the word "unrestricted" (used in the earlier report) by mistake. I think that the word "unrestricted" was omitted as mere surplusage, in the context being just a synonym for "full", but capable, it might have been thought, of ambiguity if there were indeed economy class tickets that, in the industry, were described as "unrestricted". Furthermore, the phrase "full economy fare" is used on a number of further occasions in the report as well as in Annex 7, which is a comparative table of lump-sum options for travel offered by various associated organizations, including UNDP, and presumably uses their descriptors. The word "unrestricted" is nowhere used. It is impossible to accept the argument that this is a mistake or oversight.

21. Again, having regard to the purpose of the report and the obvious expertise of those who assisted in its preparation, it seems to me that I should accept the correctness of the statement that it was the practice of the UN in respect of lump sum entitlements to pay 75 per cent of the full economy fare, as specifically stated in the report, in preference to the submission of counsel for the respondent that "for UN purposes" the phrase should be read by substituting unrestricted in the sense of identifying a particular ticket in actual use as distinct from merely being a synonym for full. Unlike the 1995 report, the 2004 report does give some assistance in respect of the meaning of full economy fare, though it is not explained in the text, by the characterisation of the fare by reference to the IATA "published fare" in Recommendation 3 of the 2004 report as distinct, of course, from that derived from any other source.

22. It was submitted by counsel for the respondent that, since para 129 refers to the "least costly scheduled air carrier", recommendation 3 is mistaken since it does not contain this requirement. This submission is without merit. The recommendation

practice to UNDP, this is a matter very much within the knowledge of the respondent and the absence of such evidence leads to the conclusion that UNOPS' practice was the same as that of UNDP, just as their rules were identical.

27. I return then to the requirement that the relevant fare is that specified by IATA. On the assumption that the codes contained in the ticket tendered by the respondent are those prescribed by IATA, it appears to me it falls within the class H, namely economy restricted. I can see how commonsense might suggest that avoiding the considerable difficulty of interpreting the IATA code by going straight to a travel agent is a good idea but I am unable to see how a ticket which the code designates economy/restricted can nevertheless be correctly regarded as an unrestricted economy ticket as named by the agent. Since the matter must be determined by reference to the IATA fare and, hence, IATA descriptors, the fact that a travel agent (possibly using a carrier's descriptor) names a ticket "unrestricted economy" must be regarded as irrelevant though, perhaps, interesting. This approach, though not without its own difficulties, at least resolves the paradox. The applicant's evidence demonstrates that the Y code class is now the only class described as "Economy unrestricted" and is available from scheduled airlines under the booking codes YRT and YIF.

28. The first calculation made by the respondent used as its basis the premium economy fare, identified by travel agents, and bearing the Primary Code W. This is an economy fare, but a fortiori, not a full economy class fare. Its selection appears simply to have been arbitrary, though maybe it was hoped that it would, even discounted by 25 per cent, induce the applicant to accept it. The process of reasoning that led to its selection is, somewhat surprisingly, not in evidence. Nothing in the respondent's submissions, let alone the evidence, either explains or justifies it. It amounts to an implicit admission that the respondent was unable to find a full economy fare as such and chose the premium economy fare as an approximation.

29. Counsel for the respondent contended that the web pages tendered by the applicant indicated that the "carrier" was deemed to be IATA. This is mistaken. The code is that designated by IATA for use by the carrier, as is apparent from the top of

the relevant pages, which reference British Airways, Singapore Airlines, Swissair, Alitalia and Lufthansa. The applicant submits (and it is accepted by the respondent) that the distance Geneva – Rome – Singapore – Sydney – Canberra is 10,728 miles, through Frankfurt is 10,724 miles and through London, 11,285 miles. The ticket bought under codes YIF or YRT would permit any of these routes to be taken. Accordingly, the respondent argues, the "most direct route" requirement is not satisfied. I have already referred to the criticism in the 1995 report of this notion but, since it is still in the rules, it must be complied with. However, it needs to be understood realistically. The respondent does not propose any other ticket that can be designated with the Y code which would have more limited route availability. In my view, the variation in distance allowed by the ticket proposed by the applicant is not so great as to take this fare outside the rule.

Conclusion

30. The administrative decision of 25 March 2008 that the lump sum entitlement payable to the applicant is USD10,354 was calculated on the wrong basis and failed to comply with the applicable rule.

Compensation

31. The fare information extracted from the applicant's evidence shows that the cheapest available fare as at early September 2009 was offered by Alitalia at USD10,919. It is possible that in August 2008 this fare would have been higher but it might also have been lower. More than enough time has alreaPagTJ400.0TT2

32. The starting point for assessing the compensation is thus the identified Alitalia fare rounded up for ease of calculation. The fares for the three adults would therefore total USD33,000. No information is available as to the amount of the child's fare. I have therefore chosen to apply the ratio between adult and child's fares applied in the British Airway fares referred to by the applicant. Although this may seem somewhat arbitrary, it is the only rational solution at hand from a common sense perspective. This ratio is approximate 3:4, and I therefore allow a child's fare of USD8,200. In total, this amounts to USD41,200 of which the applicant is entitled to 75 per cent, ie, USD30,900. From this must be deducted USD 10,354 paid by UNOPS on 25 March 2008, leaving a balance of USD20,546 to be paid to the applicant.

Order

33. The respondent is ordered to pay the applicant the sum of USD20,546 plus interest at 8 per cent per annum from 25 March 2008 to the date of payment.

(Signed)

Judge Michael Adams

Dated this 27th day of January 2010

Entered in the Register on this 27th day of January 2010

(Signed)

Hafida Lahiouel, Registrar, New York