UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/037/ JAB/2008/078
Judgment No.: UNDT/2010/015
Date: 27 January 2010
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

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 of the full economy class fare by the least costly scheduled air carrier and by most direct route". They dispute what is meant by the phrase *full economy class fare*, since the respondent had calculated the applicant's lump sum based on an *economy premium* fare quoted by a travel agent. Although the applicant was employed by UNOPS, the parties agree that UNOPS had adopted para 129 as its applicable obligation.

Applicant's submissions

2. The lump sum received from the respondent was insufficient since it was not based on the correct flight fare, namely "full economy class fare". Had the respondent used this fare, the basis for calculation would have been a fare from British Airways which amounted to USD11,288. The applicant should therefore have been paid USD31,747 (USD8,466 for each of three adults and USD6,349 for a child), but the respondent only paid him USD10,354. The residual amount is therefore USD21,393.

3. In DP/2005/16/Add.1 of 20 April 2005, the Executive Board of UNDP stated that it had implemented a number of the key recommendations of a Joint Inspection Unit (JIU) report (JIU/REP/2004/10, "the 2004 report") that identified the full economy fare as that published by the International Air Transport Association ("IATA").

4. The economy fare should have been based on the code designators established by the IATA which, for "economy class" are "S" and "Y". However, the respondent

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

described as "full economy class fares". If no such non-Y fare existed then the fare that substantially (although not absolutely) meets the requirements of the UNOPS should be used, ie, the WWFEUR.

8. The fares referred to by the applicant are not "by the most direct route", since this means minimal or no changes in (or deviation from) the route. The fares referred to by the applicant would allow deviation of up to 2,065 miles (or 19.26%) vis-à-vis the Frankfurt route.

Note on evidence

9. Before assessing the evidentiary value of the evidence tendered before me, I should briefly state my view as to the admissibility of evidence. In my opinion, any material capable of rationally bearing on the issues in dispute is admissible, including hearsay. The crucial questions are relevance and cogency or weight. There is a residual discretion to exclude evidence where it would be unfair to a party to admit it or its admission would unnecessarily add to the expense, inconvenience, or complexity of the trial. In this case the reports of the JIU have been tendered, in effect, by agreement. In my view they are admissible, not only as reports of the opinions of the JIU but as evidence of the facts stated in them, including as to the practices of the UN. The weight to be accorded to this material depends, of course, on the appropriate weight to be given to any contrary or qualifying evidence that has been adduced.

10. The applicant also relies on DP/2005/16/Add.1. This, as is correctly contended by the respondent, appears to be an agenda item for the June 2005 annual session of the Executive Board of UNDP and UNFPA concerning reports of the JIU, rather than any decision of the Board. It takes the form of setting out briefly the nature of the report and, where relevant, identifying particular recommendations which are then commented on by persons who, one should infer, are responsible within the organizations for the matters in question. Where those comments make statements of fact, the document is evidence of that fact for the purposes of the

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.

intended to be used in the latter sense because there is no reference to any industry source or published or ascertainable material that would divulge the technical content or define the term, which would conventionally be done when a technical term is used. Nor have the researches of the applicant and the respondent – which have been extensive – discovered any industry use of this term.

13. Counsel for the respondent submitted that the phrase was a mistake. Indeed it is, but not in the sense he meant. Many hours have been spent in attempting to understand its meaning, not only by the parties but also by the Tribunal. The evidence discloses a high degree of complexity embedded in apparently simple descriptors such as "economy" and the codes used to denote variants, which is virtually impossible for the uninitiated to understand. This is a disgraceful waste of time and should have been avoided by the use of a description that would immediately yield its meaning or refer to a document generally available that would do so. A staff member (and management, for that matter) should not need to speculate amongst a variety of possible calculations, all feasible to some extent or other, to ascertain the entitlement of the staff member and the obligation of the Organization.

14. The only viable approach is to give the term as ample a meaning as the phrase *full economy class* reasonably bears and identify those fares which it logically and reasonably denotes. This task is informed (but, regrettably not definitively) by the 1995 and 2004 reports of the JIU, since they were prepared by or with the assistance of experts, refer to the actual practice of the UN following extensive inquiry and have been relied on by the Administration in applying its policies. The authors of the reports should be, for present purposes, regarded as experts.

15. The 1995 report used as its starting point for the discussion on the air fares former staff rule 107.9 referring to the normal route for *duty travel* as "the most direct and economical route", and pointed out that changes in the way in which air travel actually occurred rendered the term "'the most direct route' obsolete and invalid" [117]. The report ([127]-[135]) contains an extensive discussion of classes of air

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 giving administrative assistants access to the online air schedules and information as well as encouraging the traveling staff "to get more involved in securing the most economical and efficient use of their travel funds" [122].

16. Staff rule 107.9 deals with duty travel and therefore not with the entitlements of staff to home, education grant and family visit travel. This is a vital distinction which, to my mind, was insufficiently appreciated by those responsible for calculating the applicant's lump-sum entitlements. The inspectors stated that the data "quite convincingly prove that the procedure is beneficial to the United Nations in terms of savings in administrative work and costs" but that the question "not yet properly resolved is the rationale and methodology for establishing a proper level of cash incentive for the staff" and noted that –

> Since the inception of this practice, the lump-sum paid to the staff member was set Organization-wide at 75 per cent of the [price of a] *full unrestricted economy class ticket*". ([88]. Italics added.)

The report further observed –

> [89] The argument was that the 75 per cent scheme would, on the one hand, still create significant savings for the Organization (as a result of the elimination of payment of DSA, terminal expenses, shipment of unaccompanied luggage) and, on the other, allow the staff member to buy his or her own ticket at a lower price. The 75 per cent figure was across the board, somewhat arbitrary and without much in the way of specific supportive calculations. What was an acceptable arrangement at the experimental stage of lump-sum practice is no longer convincing as part of the procedure which might become standard and permanent in the whole of the United Nations. The setting of the incentive level is still a weak point of current lump-sum procedure.

17. Regrettably, the inspectors did not explain what was meant by the italicised phrase. However, it is obviously not intended as a technical description of a particular kind of economy ticket but rather to indicate that the amount to be discounted was to be calculated by reference to an economy class ticket which gave the most favourable conditions able to be obtained in economy class and was not subject to any restrictions of any kind. Had it been intended to use the phrase or any part of it in a technical sense as used in the airline industry, it is inevitable that its source and a reference would have been identified. The adjective "economy" did not need a reference since it was used generically to describe the lowest of the three available classes, the others being first class and business class. It follows that it cannot be inferred that a ticket which is named in the industry by one or more carriers or one or more travel agencies as "unrestricted economy" as a *technical* description would fall within the class described in the report, let alone whether it would satisfy the requirement of para 129. It either case it would be necessary to examine the particular attributes of such a ticket to see whether it did so.

18. It is significant that the 2004 report took the same approach as the 1995 report, also discussing the class of air travel without analysing, in relation to what was called "economy class", the many (and confusing) variants in this category. As with the earlier report, there is an extensive discussion of the lump-sum option, noting that it had been used in the UN for some time and, incidentally, noting that OECD also pays a lump sum "ranging between 55 per cent and 75 per cent of the *full economy fare* according to the country/area". The 2004-report goes on to say –

> [59] Further, it is understood that the amount of cash paid should in principle serve as an incentive for the staff to opt for it in order to meet the goal of reducing administrative workload. Since most organizations applying the 75 per cent rate acknowledged that this percentage is adequate, a higher ratio appears to be excessive…
>
> [60] In the Inspector's view, the correct balance should be sought between the need to encourage use of the lump sum and the need to ensure rational use of resources in order to achieve economy, efficiency and effectiveness in the process. It is also imperative to attain a certain level of uniformity in the entitlements of staff across

> the board and rectify the unfavourable conditions of those staff originating from/serving in countries where it is not possible to finance travel costs with the lump sum amount received, and the resulting adverse impact on the mobility of staff. Consequently, the Inspector estimates that if all organizations of the system were to align to 75 per cent of the full economy affair on home leave, family visit and educational travel (which has proved to be successful in terms of cost saving for the organization applying it and has provided sufficient motivation for the staff to use it), considerable savings could be achieved.

19. This discussion follows essentially the same line as did the earlier report. The particular type of economy fare is not identified in any technical or precise sense but is obviously meant generically as an amount, even discounted by 25 per cent, which will induce an individual staff member to accept in lieu of requiring the Organization, at considerably greater expense, to purchase an appropriate ticket and pay the other concomitants of travel. Of course, this inducement must be financial and it is necessary that the economy fare in the calculus must be a sum significantly above that which the staff member would pay for his or her own economy ticket and related costs of travel so that, despite the discount, there will in the result be a financial advantage obtained by accepting the lump-sum. It would be inconsistent with this objective to stipulate a fare payable to a carrier or a travel agent representing a sum actually to be paid or close to such a sum. In the 1995-report, the Inspectors explained this advantage by stating that –

> [91] The Inspectors have also examined the objections raised and concluded that the principal reservations about the lump-sum practice are often of a conceptual character - whether it is proper for the United Nations staff member to make and retain legally savings on exercising his or her entitlement to travel under the Staff Rules. Looking at the lump-sum practice from that conceptual viewpoint, one can point to its positive side since it promotes a general and welcome tendency to economize (by doing the same thing for less). If the funds earmarked for home leave and related travel had been disbursed anyway and gone to commercial companies external to the United Nations, one can argue that it is still better that our own staff (which, in the words of current and previous Secretary-Generals, are the most valuable assets of the Organization) should profit from these funds.

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

assumes that this condition will apply and is concerned only with identifying the benchmark percentage and the IATA reference.

23. What then, is the IATA *full economy class fare*? It is not disputed that the codification of air travel is based upon IATA Resolution 728 – "Code Designators for Passenger Ticket and Baggage Check". The version tendered by the applicant without objection is dated July 2003. This resolution, however, does not refer to a *full economy fare* as such. It specifies a "Fare Basis Code", which "gives information regarding type of fair, class entitlement, minimum and maximum validity, reservations entitlement, seasonality, days of travel and advertising or sales restrictions". The various elements of the Code are combined in descending order, commencing with the Prime Code and going on to the Seasonal, Part of Week, Part of Day, Fair and Passenger Type Codes, ending with a Fare Level Identifier. The first of these kinds, the Prime Code, is the only presently relevant code. This category contains thirteen codes under the heading "Economy / Coach Class Category", of which the first mentioned is "Economy/Coach Premium", designated W, the first, second and third are "Economy/Coach" simpliciter, designated S and Y respectively, whilst all the others are called "Economy/Coach discounted" and are designated with various other letters. Since this third category is described as "discounted", it is plainly neither "full" nor "unrestricted", whilst the first category is described as "premium" and thus apparently departs from "full" in the opposite direction. It seems to me that, by reference to the IATA code, a fare described as *unrestricted full economy class, full economy class* and, for that matter, *unrestricted economy class* would also fall into the category designated "Economy/Coach", thus Y or S. If this is so, it would explain why the authors of the reports or, at least, the second report, did not think it necessary to analyse these terms. It should be noted, as well, that many ticket variations account for the other codes, essentially, lists of restrictions of various kinds applying to the tickets.

24. The applicant tendered at the hearing various extracts of online material taken from sites with access to IATA fares information as at early September 2009. I

accept the material accurately depicts material available from these sites. Six of these pages list all available fares from scheduled air carriers which were selected as they operated from locations on the shortest direct route between Geneva and Canberra. The lists of airline fares show the fare conditions, which state, ia, the fare type in accordance with the booking codes. The term *full economy fare* is not used, nor is the term *unrestricted economy*. The term used that is closest to *full economy* is *economy unrestricted*. Based on this material, the prices in this category vary between USD10,932 and USD11,038.

25. The respondent's case is to ignore altogether the reference in the recommendation to IATA fares and calculate the appropriate lump sum by obtaining a quote for a so-called "unrestricted economy" ticket from a travel agent. It is contended that this approach is justified because para 129 does not refer to the IATA fare.

26. I find this argument unpersuasive. The most obvious point is that para 129 does not refer and never referred to an *unrestricted economy ticket.* Nor has the respondent tendered any evidence that the price for such a ticket is the same as a *full economy fare.* His case (which I have rejected) is that the use of this latter phrase is a mistake. Nor do I accept that it represents UN practice, in light of the reports of the JIU, as distinct from the habit of the particular official who made the decision here in question. Moreover, it is clear that those responsible for the report to the Executive Board considered that UNDP had been applying the recommendation of the 2004 report for some time, certainly well before the applicant's contract expired, which is the relevant date for ascertaining the rule that applied to his lump sum entitlement. It seems to me, even on the assumption that the practice involved a mistaken interpretation of the rule, that the respondent is estopped from applying to the applicant a different practice than that it had evidently been applying to its other employees and gave a particular meaning to para 129 which was part of the contract of employment. This conclusion involves rejection of the submission that the conditions of UNOPS contracts are relevantly different. If UNOPS had a different

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 already been spent on this case and, since the respondent has not provided information on any alternative fares than that of UNOPS's initial payment to the applicant, or even made any claims or submissions to this end, I have no other option than to rely on the information provided by the applicant. Although the applicant submitted that the actual calculation could be determined in an independent audit, it would impose further administrative costs on the Organization and delay the conclusion of the matter without any guarantee of a significantly more precise outcome.

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