



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/024
Judgment No.: UNDT/2015/011
Date: 3 February 2015
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

RONVED

v.

THE SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Stephen Margetts, ALS/OHRM

Introduction

1. The Applicant is employed as a Logistics Officer at the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (“MONUSCO”) at the P3 level.

2. He filed an Application on 27 May 2013 contesting the calculation of a lump-sum amount for his reverse education grant travel. He submitted that he was underpaid for his lump-sum travel as he was not compensated for the taxes, fees and surcharges added to the carrier’s fare.

3. The Respondent filed his Reply on 1 July 2013 stating that the lump-sum had been calculated in accordance with ST/AI/2006/4 (Official Travel) and in line with the Organisation’s practice for over 23 years. He submitted that the lump-sum option for travel is based on the carrier’s fare as published by the carrier and does not factor in taxes and surcharges.

Facts

4. On 31 October 2012, the Applicant submitted to the Travel Service Cluster in the Regional Service Centre Entebbe (“TSC/RSCE”), a request for education grant travel and chose the lump-sum option in respect of the education grant travel for his dependent child.

5. The Applicant’s son was studying in Copenhagen, Denmark. The Applicant requested to be travelled from Kinshasa to Copenhagen and for his daughter to be travelled from Aarhus, Denmark, to Copenhagen to meet with him and his son.

6. The TSC/RSCE utilises a Global Distribution System (“GDS”) which is a network enabling the automated booking and purchase of travel services between third-parties and booking agents in order to provide these services to the final consumer.

7. The TSC/RSCE, on 10 December 2012, identified the published fare for the Applicant's travel from Kinshasa to Copenhagen as USD2,271 giving the Applicant a 75% lump-sum payment of USD2,041.

8. A Travel Assistant contacted the Applicant informing him that the TSC/RSCE were unable to obtain a quote for his daughter's travel to Copenhagen as the fare was not published in the GDS. On 15 December 2012, the Applicant forwarded to the Travel Assistant a quote for his daughter's travel totalling USD639.41, of which the taxes were USD103.41.

9. On 17 December 2012, the TSC/RSCE sent the Applicant a quotation for the lump-sum amount payable for the education grant travel, which included both the Applicant's travel from Kinshasa to Copenhagen as well as his daughter's travel from Aarhus to Copenhagen. The calculation of the lump-sum was equivalent to 75% of the full economy fare, as set by the carriers, less the applicable taxes and surcharges for both the Applicant's journey as well as that of his daughter.

10. The Applicant submitted a management evaluation request on 13 February 2013 in which he contested the manner in which the TSC/RSCE had calculated his lump-sum payment. He contended that the lump-sum calculation should have been based on the full total sum paid for the transport without the subtraction of any tax or surcharges.

11. The TSC/RSCE observed that the lump-sum payment had been calculated in line with the guidelines prepared by the Travel and Transportation Section at the United Nations Headquarters ("TTS Guidelines"). The TTS Guidelines provide that taxes and surcharges, of any kind, and surface transportation costs to and from airports shall not be factored into lump-sum calculations.

12. The Management Evaluation Unit ("MEU") concluded that, in the context of the long history of the lump sum calculation methodology, the relevant provisions of the TTS Guidelines were consistent with the governing Administrative Instruction, ST/AI/2006/4. Accordingly, the MEU recommended

that the decision of TSC/RSCE to follow the standards provided by the TTS Guidelines in the calculation of the Applicant's lump-sum quotation be upheld.

Applicant's case

13. The Applicant's case as deduced from his pleadings is summarized below.

14. The MEU's position is that section 10.2 of ST/AI/2006/4 should read "base fare" instead of "fare", a technical term used by the airline industry, which excludes taxes, surcharges, fees and such, and that the TTS Guidelines only set standards that are consistent with the administrative instruction.

15. The Applicant cites *Warren* UNDT/2010/015 as authority that the TTS Guidelines are inconsistent with ST/AI/2006/4 and as such must be set aside in favour of the definition of "full economy fare" to include taxes, surcharges, fees and such.

16. The MEU referred to the General Assembly's resolution A/C.5/67/L.23 (Special subjects relating to the programme budget for the biennium 2012-2013) and the Secretary-General's Report on proposals for a more effective and efficient utilization of resources for air travel (document A/66/676) to support their interpretation of "fare" to mean the technical industry term "base fare". It is then remarkable that the draft Administrative Instruction on Official Travel circulated for comments introduces, at section 13.2, the text "the least restrictive economy class base fare, excluding taxes and surcharges". The Applicant submits that this comes very close to an admission from the Administration that a rewording of the Administrative Instruction is required for the current practice to be legal.

17. The MEU claimed that the long practice of excluding taxes, surcharges and fees when calculating the lump-sum supports the practice. However, an internal guideline cannot directly contradict higher level documents but may only support a reasonable interpretation especially when the guidelines, as in this case, are not published and when the lump-sum offer is only made available to staff members as a total without any explanation or calculation.

18. The MEU's interpretation can lead to the absurd result that the least costly scheduled air carrier might have higher base fare than the most costly one and result in a higher lump-sum. This would be the case if the least costly carrier has no or few surcharges and consequently a high base fare while the most costly has an artificially low base fare but high surcharges as is increasingly observed by low-cost carriers in a de-regularized market. This introduces a random element to the calculation based on the interest of airlines to advertise an unrealistically low price while the real price is much higher and would take away the incentive to elect the lump-sum option which was introduced to reduce the administrative burden of the organization.

19. As such, it is prayed that the Tribunal Order the Respondent to calculate the lump-sum payment without the subtraction of any taxes or surcharges and pay the Applicant an additional sum of USD475.75.

Respondent's case

20. The Respondent's case is summarized as follows.

21. Section 10.2 of ST/AI/2006/4 stipulates, in relation to lump-sum option for travel on home leave, family visit or education grant travel and travel on repatriation or separation from service, that for travel by air and train the lump sum payable under the section shall amount to 75% of the full economy-class fare by the least costly scheduled air carrier.

22. On 20 June 2007, the Under-Secretary-General for Management (USG/Management) provided the Assistant Secretary-General for Peacekeeping Operations the TTS Guidelines.

23. The TTS Guidelines were prepared for dissemination to field missions following delegation of authority for the calculation of the lump-sum entitlements of field personnel to field missions effective 1 July 2007.

24. The TTS Guidelines expressly stipulate that the following additional charges should not be factored into the lump-sum calculations: taxes; surcharges

of any kind such as fuel, security or week-end travel; and surface transportation to and from airports or on intermediate sectors along the route.

25. The Applicant contends that the word “fare” in section 10.2 of ST/AI/2006/4 should be interpreted as money paid for a journey on public transport, and should therefore include the cost of the trip, including the taxes. He claims this is the ordinary meaning of the word “fare”. The Applicant’s claim is without merit for a number of reasons.

26. The Secretary-General’s interpretation is in line with the airline industry definition. A fare, according to the official International Air Transport Association (IATA) definition, is the amount published by a carrier as the charge for transportation between two points. This amount does not include taxes, which are not set by the carrier but instead by local authorities as airport usage fees, or surcharges such as fuel, security or weekend travel which are added separately and as such are not part of the fare.

27. The practical usage of the word fare in the airline industry refers to the sum charged by the carrier, not additional taxes and charges. The Organization bases the lump-sum calculation on the fare published by the carriers. This is the amount the Organization will base the lump-sum calculation on. The fare and the total price are distinct items. Taxes are not included in the fare.

28. When the Organization calculates the lump-sum based on the fare published by the carrier, it takes into account the fare, not the total price. For this reason, section 10.2 does not refer to the cost of the travel, it refers to the fare charged by the carrier.

29. Contrary to the Applicant’s submission, the “ordinary” usage of the word “fare” is not inconsistent with the industry practice. The word “fare” is not ordinarily held to mean the sum that a person must pay to a public transport provider and any additional sum to be paid by way of taxes to the Government or surcharges. The fare is the price specified as the fare by the carrier. Taxes and surcharges are added to the fare. This is the demonstrated practice in the industry; it is the “ordinary” usage.

30. The usage of the word “fare” is consistent with the language used in section 10.2 of ST/AI/2006/4. Section 10.2 provides that the lump-sum “shall amount to 75 per cent of the full economy-class fare by the least costly scheduled air carrier”. This provision contemplates that the fare is the amount set “by” the “least costly scheduled air carrier”. There is no reference to taxes and charges in section 10.2. The express mention of the fare “by” the carrier, excludes any suggestion that other charges are to be included. If this provision had been intended to include taxes and surcharges it would have expressly stated that these charges, set by entities other than the carrier, were included.

31. The Dispute Tribunal in *Morsy* UNDT/2009/036 held that where a statute uses a word that may be unclear, long-standing practice may give clarity to the meaning of the term.

32. For the past 25 years, the concept of “fare” in the United Nations has consistently been interpreted and applied as the base fare without taxes and surcharges. The first Administrative Instruction which regulated the lump-sum option for travel, ST/AI/2000/20 (Official Travel), was intended to codify the procedure for the calculation of the lump-sum. It was not intended to introduce a new methodology. Taxes were not taken into account for many years before the Administrative Instruction was drafted. Therefore, the provision should be interpreted accordingly.

33. When the authority for the calculation of lump-sum entitlements was delegated to the field missions in 2007, the Travel and Transportation Section developed the TTS Guidelines. The TTS Guidelines were intended to provide detailed information to administrative officers responsible for managing travel arrangements on how to calculate the lump-sum travel and thereby ensure that the calculations were consistent throughout the Organisation. The TTS Guidelines reflect the way lump-sum has been calculated since its inception. It clearly stipulates that taxes and surcharges shall not be factored into the calculations, hence confirming that the word “fare” was always intended to be interpreted in its technical sense. The TTS Guidelines do not contradict the administrative instruction but, instead, provide practical instructions to administrative officers to

ensure that they apply ST/AI/2006/4 consistently in accordance with its consistent and reasonable interpretation

34. For practical reasons, the Secretary-General must base the calculation of the fare on a reference which is constant, reliable and published, in order to provide reliable estimates and accurate calculations of the lump sum entitlement. Taxes and surcharges are set independently of the fare and cannot be reliably incorporated into estimates of entitlements since they are not constant. Accordingly, in light of the administrative difficulties inherent in predicting the taxes and surcharges that may apply at any specific time, it was never the intention to take into account taxes and surcharges in the lump-sum calculation.

35. As such the Respondent prays that the Tribunal reject this Application in its entirety.

Issue

36. The legal issue arising for consideration in this case is whether the TTS Guidelines used by the Respondent in the calculation of the lump-sum payment due to the Applicant were inconsistent with ST/AI/2006/4.

Considerations

37. Section 10.2 of the then applicable ST/AI/2006/4 stipulated as follows:

10.2 For travel by air and train the lump sum payable under this section shall amount to 75 per cent of the full economy-class fare by the least costly scheduled air carrier between the staff member's duty station and:

(a) The closest airport to the established place of entitlement for home leave or family visit travel; or

(b) The established place of home leave or the educational institution, whichever is the less costly, for education grant travel.

For children entitled to reduced-fare tickets, the lump sum shall be 75 per cent of the applicable reduced fare.

38. The relevant part of the TTS Guidelines provides:

The following additional charges should not be factored into lump-sum calculations:

- Taxes
- Surcharges of any kind such as fuel, security or weekend travel.
- Surface transportation to and from airports or on intermediate sectors along the route.

39. The Applicant's case is that the TTS Guidelines are inconsistent with ST/AI/2006/4 and as such must be set aside in favour of the definition of "full economy fare" to include taxes, surcharges, fees and such. The Respondent, on the other hand, submitted that the TTS Guidelines expressly stipulate that the following additional charges should not be factored into the lump-sum calculations: taxes; surcharges of any kind such as fuel, security or week-end travel; and surface transportation to and from airports or on intermediate sectors along the route.

40. This case calls for an interpretation of how the phrase "full economy fare" in section 10.2 of ST/AI/2006/4 should be constructed. Each of the parties in their submissions have called upon the Tribunal to favour their preferred interpretations. Adams J in *Warren* articulated the basic rule of interpretation that a "provision is to be understood as it is read in an ordinary and literal manner. This principle applies both to statutory and contractual construction. Modifications are only allowed in certain instances, typically to avoid cruel or absurd results or to cure ambiguities"¹.

41. Meeran J stated in *Basanta Rodriguez* UNDT/2014/50 that:

The Organization may develop procedures and practices and adopt guidelines regulating various aspects of human resource management, provided that they are consistent with properly promulgated issuances, are not manifestly unreasonable, do not require formal promulgation under the Organization's existing rules and, above all, are not unlawful.²

42. Though the TTS Guidelines are not at a first glance inconsistent with ST/AI/2006/4, the Tribunal, is hesitant to accept that they are manifestly unambiguous. It is the Tribunal's opinion that whereas procedures and guidelines

¹ At para. 11.

² At para. 20.

may be developed by the Organisation to implement promulgated issuances, it is unreasonable for said guidelines to be so far reaching as to effectively add new provisions to the overarching issuance. This would amount to a usurpation of the legislative powers of the General Assembly.

43. It is reasonable to expect that the Secretary-General and those to whom he delegates his authority to administer the Organization's Staff Regulations and Rules will seek to establish criteria to practically apply the broad principles of human resources policy espoused in the promulgated issuance or indeed to reasonably flesh out the wording of the same. What is to be considered reasonable will be a matter of fact to be determined in each case based on the wording of the issuance and the spirit of the law.

44. In the present case it is the Tribunal's opinion that the TTS Guidelines go beyond this benchmark. The broad principle behind ST/AI/2006/4 was to allow a staff member to claim a lump-sum payment in lieu of a reimbursement. It is an entitlement and it cannot be proper for the Administration to reduce the said entitlement without it being unambiguously stipulated in the relevant promulgated issuance.

45. To insert a method of calculating the lump-sum payment which requires the removal of taxes and surcharges is too great a decision to be delegated to the managers responsible for the payment of lump sums and reflects an attempt by the USG/Management to enact a new rule. The power to enact such a new rule is properly vested in the General Assembly in accordance with the United Nations Charter.

46. It is instructive that section 12 of ST/AI/2013/3 (Official Travel) which abolished and replaced ST/AI/2006/4 now makes it explicitly clear that taxes and surcharges are excluded from the lump sum calculation. This new issuance reflects a genuine intention by the General Assembly to exclude taxes and surcharges from the lump sum calculation, an intention that was not unambiguously evident in ST/AI/2006/4. Section 12 is reproduced below:

Section 12

Lump-sum option for travel on home leave or family visit or education grant travel

12.1 For travel on home leave or family visit or education grant travel, staff members may opt for a lump-sum payment in lieu of all entitlements related to the particular travel.

12.2 For travel by air, including where there is a combination of other modes of transportation involving the purchase of a ticket (e.g. ferry, ship or train), the lump sum payable under this section shall amount to 70 per cent of the least restrictive economy class base fare, excluding taxes and surcharges, as determined in accordance with section 4.2 above, by the least costly scheduled air carrier between the staff member's duty station and:

(a) The closest airport to the established place of entitlement for home leave or family visit travel or an approved alternate, whichever is the less costly; or

(b) The established place of home leave or the educational institution, whichever is less costly, for education grant travel.

For children entitled to reduced-fare tickets, the lump sum shall be 70 per cent of the applicable reduced fare of the least restrictive economy class base fare, excluding taxes and surcharges, by the least costly scheduled air carrier, provided that the purchased ticket allows the child to occupy a seat on the approved mode of transportation.

Judgment

47. The Applicant is entitled to judgment. The Respondent is ordered to pay the Applicant USD475.75 plus interest at the US Prime Rate applicable at the date the entitlement was due to the Applicant to the date of payment of the compensation awarded by the Tribunal.

(Signed)

Judge Nkemdilim Izuako

Dated this 3rd day of February 2015

Entered in the Register on this 3rd day of February 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi