



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

ORTAYLI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Brian Gorlick, OSLA

Counsel for Respondent:
Andreas Ruckriegel, UNFPA

Introduction

1. The Applicant contests the 9 November 2012 decision by the United Nations Population Fund (“UNFPA”) to reject her request for an exemption on medical grounds from the Duty Travel Policy which only grants business class air travel for itineraries beyond a duration of nine hours.

Relevant background

Contested decision

2. On 7 November 2012, the Applicant submitted a Request for Exception, on medical grounds, to the Standards for Accommodation for Air Travel, namely that she be considered eligible for business class travel from New York to Geneva on 11 November 2012.

3. On 8 November 2012, the Medical Services Division (“MSD”) informed the Applicant that it did not support her request for an exception. That same day, the Applicant contacted the Chief, Facilities and Administrative Services Branch (“FASB”) and informed him that MSD had denied her request for an exception.

4. This case concerns the lawfulness of that decision.

Applicable law

5. UNFPA’s Policies and Procedure Manual, Duty Travel Policy, states:

G.2. Standard of Accommodation for Staff Air Travel (flight class of service)

G.2.1. With the exception of travel undertaken by the Under-Secretary-General and/or Assistant Secretary-General, all staff travel with scheduled flight duration of nine (09) hours or less will be in economy class while all travel with scheduled flight duration exceeding nine (09) hours will be in business class...

...

G.2.4. Any request for exception to upgrade the standard of accommodation for air travel has to be submitted to:

G.2.4.1. Headquarters: the Travel Unit, who will in turn refer the matter to the Chief, FASB.

G.2.4.1.1. Request to upgrade the standard of accommodation based on medical reasons must be accompanied by a signed certificate from the United Nations Medical Services Division (UNMSD). Upon receipt of the certificate from UNMSD, the Chief, FASB will decide on a case-by-case basis.

Issues

6. At a hearing held on 17 October 2013, the Applicant was represented by Mr. Gorlick from OSLA, and the Respondent by Mr. Ruckriegel.

7. At the beginning of the hearing, the Tribunal identified the issues as follows:

1. Whether the decision made on 9 November 2012 to refuse the Applicant's request for business class travel on 11 November 2012, was a lawful decision in accordance with the Respondent's policy of granting exceptions on medical grounds;

2. If it was not, what is the appropriate remedy to be awarded to the Applicant;

3. Counsel for the Applicant agreed that there being no specific decision, the issue regarding the Applicant's request to have business class travel for all journeys exceeding five hours was not before the Tribunal. The Tribunal makes no finding and expressed no comment regarding this request.

8. The Tribunal heard evidence from the Applicant and from three witnesses called by the Tribunal: Dr. Gillian Farmer, the Director of MSD; Dr. Laski, the Applicant's line manager; and Mr. Hesling, the Chief, FASB, at UNFPA.

Scope of the case

9. The Tribunal notes that in her application the Applicant refers extensively to her history of requests for exemptions to the travel policy that were previously

denied. Nevertheless, the only contested decision before the Tribunal is the decision that was communicated to her on 9 November 2012 regarding her anticipated travel on 11 November 2012.

10. UNFPA's Duty Travel Policy states that any request for an exception has to be referred to the Chief, FASB. Furthermore, the Duty Travel Policy adds that if the request for an upgrade is "based on medical reasons [it] must be accompanied by a signed certificate from [MSD]. Upon receipt of the certificate from [MSD], the Chief, FASB will decide on a case-by-case basis".

11. A review of the form requesting an exception to the travel policy based on medical grounds indicates that the section of the form that is reserved for official use is split into two parts. The first, which is to be used by MSD, is titled "Recommendation of Medical Services Division" and the second, which is to be used by the Chief, FASB, is titled "Decision of the Under-Secretary[-General] for Management".

UNFPA discretion

12. UNFPA's Duty Travel Policy identifies two separate instances under which a staff member is required to submit a request for an exception to the standard travel policy: (a) based on medical reasons (rule G.2.4.1.1.) or (b) based on any other reason (rule G.2.4.1.2.)

13. In both instance, the Chief, FASB, is required to review the request and formulate his decision on a case-by-case basis. However, if the request for an exception is based on medical grounds, this request has to be accompanied by a signed certificate from MSD which is to be obtained prior to the request being submitted to the Chief, FASB.

Findings of fact

14. The Tribunal finds the following facts proven on a preponderance of evidence.

15. As part of her normal duties with UNFPA the Applicant was required to make, on average, six journeys per annum by air to various destinations including the West Coast of the United States, Europe and Africa. She travelled frequently to Geneva from her duty station in New York. The scheduled air travel time to Geneva is in the region of eight hours but could be longer if there are delays. However, these flights do not qualify for the exception to normal economy fare flights, because their scheduled duration is below the threshold of nine hours.

16. Although the Applicant had surgery to her lower back, she continues to suffer pain and discomfort and finds it difficult to sit for any extended period of time. In accordance with the prescribed requirements, the Applicant asked her manager, Dr. Laski, for an exception to the rule restricting her to economy class travel for the trip, commencing 11 November 2012. The form requesting the exception was submitted to MSD. It was accompanied by a note dated 25 October 2012 from the Applicant's physician, supporting the request for business class travel.

17. Dr. Gillian Farmer, the Director, MSD, agreed that she personally considered the Applicant's request, which she was unable to support after an examination of the medical evidence on record including the supporting notes provided by the Applicant's treating physicians. She explained that the central issue to be considered in reviewing a request for an exception is whether the staff member would suffer harm as a result of being required to travel in economy class. She made the point that discomfort is not equivalent to a medically dictated need and that there are degrees of discomfort depending on the circumstances of the case. When asked what was the standard adopted by MSD to decide whether or not to support a request for an exception to the travel policy, Dr. Farmer stated that what was required was more than an expression of an opinion and that "[i]f in fact all we needed was an

opinion, you wouldn't need the medical service because administrative decision makers would be able to just apply the opinion of whichever doctor's certificate the staff chose to supply". She explained that there were occasions when there would be a difference of professional opinion between the treating physician and MSD. In this particular case, MSD considered that the Applicant's treating physicians did not provide a report or document containing sufficient, or robust enough, details and adequately supported medical opinion to enable MSD to evaluate the Applicant's case differently and to arrive at a recommendation other than that the case for an upgrade had not been made out.

18. Dr. Farmer explained that the Applicant's diagnosis was not in dispute. What was in dispute was whether the facts, as presented, warranted an upgrade to business class. She explained that MSD had a well-established document chain of recorded medical data relating to the Applicant's condition and treatment. The medical reports submitted by the Applicant did not provide sufficient information justifying the opinions expressed therein, bearing in mind that MSD was familiar with the Applicant's condition, and were able to form their own clinical opinion, rather than to rely on opinions of other practitioners. Dr. Farmer strongly refuted the suggestion that her review of the medical evidence and the opinions of the other medical practitioners in MSD was in any way influenced by a policy consideration to refuse requests for upgrades to business class. When asked whether she was "aware of any concerns expressed by member states about the extent of what may have been suspected as an abuse of the system for business class travel", Dr. Farmer stated that she had "[i]n fact [just given] evidence at the 5th Committee about this. In response to a further question, Dr. Farmer clarified that any such concerns would not affect her decision making, which would be based purely on medical need. In any event, at the time she made the contested decision she was not aware of any institutional concerns.

19. When asked whether pain in and of itself would be an adequate reason to grant an exception, Dr. Farmer had no hesitation in disagreeing on the grounds that

there were other alternative ways of dealing with pain, rather than upgrading to business class. When pressed by Mr. Gorlick to state whether it was her view that pain would never be an adequate grounds for granting an exception Dr. Farmer responded by saying that she was not an absolutist and each case would be evaluated on its individual merits. When pressed further, she replied that if a staff member was experiencing a degree of pain such that analgesics did not relieve the pain, the issue regarding fitness to work would arise rather than fitness to travel. She said, “we get into the whole realm of not fit to work or not fit to travel”.

20. The Tribunal indicated to Dr. Farmer that this was the first occasion that the Applicant had received a clear explanation as to the reasons why the supporting medical documentation that she had provided were not considered to meet the criteria applied by MSD. It was further pointed out to her that the system would appear to have failed the Applicant in that had she been provided with the explanation that she was now being offered, she would have been put on notice as to the kind of medical report that she would have had to produce in support of any request for a business class upgrade. Dr. Farmer acknowledged that it would constitute good practice to provide staff members in these circumstances with an explanation rather than simply ticking a box indicating no support for the request.

21. Dr. Laski gave evidence briefly as to her role and function in relation to this matter. The Tribunal notes the Applicant’s allegation in her application that when Dr. Laski called MSD to enquire about the reasons for not recommending the request she was informed by the former Director, MSD that there were too many requests for upgrades based on medical conditions, and therefore her request could not be supported. This was a serious allegation of procedural impropriety since it would suggest that decisions were being made on policy grounds and not on a case by case basis, on medical grounds, as required by G.2.4.1.1. of the Duty Travel Policy. However, since Dr. Laski was not cross-examined, this allegation was not put to her during her testimony. There is accordingly no evidence to support this allegation of

procedural irregularity. The Tribunal finds that this allegation lacks substance and is rejected.

22. The Applicant's case, that there was a failure on the part of the Respondent to consider her request on its own merits, was fully explored during cross-examination of Mr. Hesling who made the decision to deny the request. The Applicant's request had to be dealt with on short notice. Mr. Hesling was not in the office on the day the decision had to be made. Since it was urgent he received an email from the Applicant informing him that her request was not being recommended by MSD. In the circumstances Mr. Hesling decided that the request for an upgrade to business class be refused on the ground that MSD did not support the request and the Applicant was informed accordingly. Mr. Helsing did not accept that as a senior administrator, he ought to have been aware of the Applicant's medical condition and ought to have exercised his discretion in questioning MSD's lack of support for an upgrade. Mr. Hesling stated that medical conditions are private matters and if MSD made a recommendation, whether in support of or against a request, it was not for him to question the particular decision. He was adamant that he did not have medical expertise and was reliant upon the advice of MSD and that it was reasonable for him to do so.

23. It was put to Mr. Hesling that since he did not know the reasons why MSD decided not to support the request he ought to have made an enquiry to that effect. The implication of this was that until he knew what the reason was he would not be able to exercise any discretion he had as to whether or not to approve of business class travel. Mr. Hesling responded that he would not have expected to have been provided with a reason in any event because whatever the reason might have been he would not be in a position to know whether it constituted a good reason. All he wanted was a definitive decision so that he could decide whether or not to authorize the request. He added that the staff member had a choice whether to travel or not to travel and could in any event have taken advantage of UNFPA's internal appeal procedure. Upon informing the Applicant that he was denying her request,

Mr. Hesling also stated that she had the right to appeal his decision to the Deputy Executive Director, who had the power to intercede. He confirmed that in the past staff members had exercised such a right of appeal

24. The Tribunal notes that when the Applicant gave evidence, she explained the reason why she decided not to follow Mr. Hesling's advice to appeal to the Deputy Executive Director, but instead to take the matter up through the formal process of an application for a management evaluation and a claim to the Tribunal.

25. Following the evidence given by Dr. Farmer and Mr. Hesling, the Applicant is now fully aware of the precise steps leading up to the decision and the basis upon which this decision was reached. Given that regular travel was an essential part of the Applicant's performance of her duties, the Tribunal considered that it would be helpful for the parties to engage in without prejudice discussions for the purpose of arriving at an understanding regarding future requests for upgrades. This suggestion did not bear fruit. In the circumstances, the Tribunal proceeded to receive final closing submissions.

Considerations

26. The Respondent's case, briefly, was that MSD carefully considered the Applicant's request, reviewed her medical records, and gave due consideration to the opinions expressed by the Applicant's treating physicians. The Respondent stood by the reasons given by Dr. Farmer and insisted that there were no procedural errors in MSD's approach. Furthermore, Mr. Hesling's decision to rely on the opinion of MSD was not in breach of the applicable procedures. Finally, Mr. Ruckriegel submitted that the recommendation of MSD was a decision that was properly made on the evidence before Dr. Farmer, and that there was no hidden policy against granting approval for business class upgrades without regard to the merits dictated by a staff member's medical need. Furthermore, in making the decision to refuse the Applicant's request, Mr. Hesling acted procedurally correctly.

27. It was the Applicant's case that, in essence, there was no evidence of a medical reason in support of the decision, but simply the expression of a conclusion by MSD. As to the Applicant's decision not to exercise her right of appeal to the Deputy Executive Director, Mr. Gorlick submitted that it would not have been helpful to go up the decision-making chain when no reasons were provided for MSD's lack of support of the Applicant's request, and when the decision maker based his decision solely on the recommendation of MSD.

28. Mr. Gorlick is correct in pointing out the unsatisfactory nature of the procedures to date whereby the staff member acting in good faith produces what she considers to be supporting documentation from her treating practitioners and then being provided with an adverse decision without any reasons being given. The Tribunal agrees that it is difficult to challenge a decision if no reasons are provided in support of that decision. However, whilst this may be a legally correct position to take, it ignores practical reality in that the Applicant had been advised that she could take the matter up with the Deputy Executive Director to review the request, whereas the decision maker Mr. Hesling did not have power to do so. It would be a matter of speculation to surmise as to what could have been the outcome if the Applicant had exercised this right. However, it must be observed that failure to follow advice to exercise a right to request a review or to appeal is not helpful in such circumstances.

29. The primary question for the Tribunal to consider is whether the Respondent acted lawfully or in breach of procedure in deciding that absent a positive recommendation from MSD the Applicant's request for an upgrade from economy class to business class, on grounds of health, should be refused.

30. The Tribunal rejects as lacking in substance the Applicant's contention that there was a policy to refuse business class travel. In the first place, Dr. Farmer emphatically rejected any suggestion that she allowed any financial considerations to cloud her medical judgment. In the second place, Dr. Laski was not questioned

regarding the allegation that the former Director, MSD, had told her that there had been such a policy at that material time.

31. The requirement that the Organization's MSD should be asked whether they support a request for business class travel on medical grounds is eminently reasonable. Any employer is entitled to impose such a requirement subject to ensuring that those responsible in the chain of decision-making act in good faith and with integrity and propriety. There is nothing in the facts of this case to question the decision on the basis of a breach of procedure or to suggest that impermissible considerations contaminated the decision-making process.

32. The fact that the Applicant had not been provided with a reason as to why the treating physicians opinions were not accepted is a different issue which Dr. Farmer, as the current director of the MSD, said that she would be looking into in relation to future practice. Such a failure to provide reasons does not of itself impugn the integrity of the decision. It should also be borne in mind that at no stage was a formal request made to provide reasons for the decision. For the avoidance of doubt, the Tribunal makes it clear that the reasons provided in evidence by Dr. Farmer were accepted as being based on proper grounds and Mr. Hesling's reliance on MSD's recommendation was not improper nor was it an impermissible option for him to take within the ambit of his responsibilities.

33. There is no evidence before the Tribunal that would suggest that the Chief, FASB, did not follow any of the applicable rules in relying on MSD's recommendation.

Conclusion

34. The application is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 8th day of November 2013

Entered in the Register on this 8th day of November 2013

(Signed)

Hafida Lahiouel, Registrar, New York