

DECISION 2009-02-26

Travel Agency Commissioner Area 2

Helene Cedertorn
Karlavägen 30
172 76 Sundbyberg
Sweden

The Matter:

Request for Review of action by Member Airline;
now question of the jurisdiction of the Travel Agency Commissioner

Applicants:

Please see attachment 1
The majority of the agents are represented by:
Ms Waturi Matu, Chief Executive Officer
Kenya Association of Travel Agents
Kenya

Respondent:

British Airways
Represented by:
Mr. Suneel Tyagi
Commercial Manager East & Central Africa
4th Floor, The Citadel Muthiti Road Westlands
Nairobi, Kenya

Background:

34 agents in Kenya (listed in attachment 1) have requested Travel Agency Commissioner Review by letters with similar arguments. The majority of the agents are represented by the CEO of KATA (Kenya Association of Travel Agents).

The background is that British Airways (BA) sent a letter the 31st of October 2008 to IATA accredited agents in Kenya, with a notice of change of remuneration. The letter stated that with effect the 1st of February 2009 British Airways would stop paying 1 % commission on published fares, which were sold on its behalf. BA further required the agent to sign an acknowledgement of the letter and return before the 28th of November 2008. If not British Airways would assume that the agent did not agree to the terms, and the letter should in this case be seen as formal notice of termination of the Agency Appointment to act as British Airways agent, with such termination to take effect at midnight on Saturday 31st of Jan 2009. According to KATA many of the agents have not signed the acknowledgement letter, and the appointment as agents for British Airways is subsequently now terminated.

1(6)

Office phone: + 46 (0)8 28 03 04
Cell phone: + 46 (0)70 309 44 50
Fax: + 46 (0)8 503 11 362
E-mail: Area2@tacommissioner.com
Website: travel-agency-commissioner.aero

The agents' requests for review are mainly based on the ground that the action by British Airways constitutes a violation of Resolution 824, and that the agents are aggrieved by this amendment to their Passenger Sales Agency Agreements.

British Airways requests that the requests for Travel Agency Review should be rejected on the basis that this is a commercial dispute between the agents and the airline, and falls outside the scope of the Commissioner.

The Applicants arguments in summary

The agents have executed the standard Passenger Sales Agency Agreement in the form prescribed by the IATA Passenger Agency Conference and published as Resolution 824. That Agreement lays down the key contractual terms applicable between the travel agency and all IATA Members that have appointed the agency. Section 9 of the Agreement provides that "... the Carrier shall remunerate the Agent in a manner and amount as may be stated from time to time and communicated to the Agent by the Carrier. Such remuneration shall constitute full compensation for the services rendered to the Carrier." British Airways is seeking to amend the above contractual provision, unilaterally, by asserting that as from 1st February 2009 it will no longer pay any sales commission whatsoever to the travel agency. Until that date, the rate payable was 1%. Furthermore, British Airways threatens that unless the travel agency signs into the unilaterally imposed new conditions, which change those of the Passenger Sales Agency Agreement, they will cancel the appointment to act as their agent. This threat constitutes an act of coercion and is demonstrably unfair.

Furthermore it constitutes an unauthorized attempt to amend the Passenger Sales Agency Agreement in which the payment of remuneration is a key element. Only a formal act by the Passenger Agency Conference can amend Resolution 824 and the agents are not aware from Conference records of any such act having been executed.

British Airways is in violation of Resolution 824 and of its Passenger Agency Conference obligations and that, improper pressure is being exerted on this travel agency to become complicit in those wrongful actions. Accordingly, the agents request a Travel Agency Commissioner review of the above matter on the grounds that British Airways' actions amount to a de facto amendment to the Passenger Sales Agency Agreement of which they are aggrieved.

British Airways can vary the manner and amount of remuneration as and when it suits them. However, in their letter dated 31st October 2008 to Agents giving them notice of change of remuneration and in all subsequent meetings and communications with KATA as the representative body of the agents British Airways has not stated explicitly how Agents will be remunerated. BA has also not stated what remuneration will be other than to say that Agents will be paid other "remuneration" in the form of service fees charged by the agents to their customers.

The Passenger Sales Agency agreement imposes an obligation on the airline to remunerate the Agent. The purpose of doing so is to compensate the Agent for the sale of air transportation and ancillary services. There is an established way in which the PSAA can be amended, however BA has chosen to ignore this and instead gone to such extraordinary lengths to consolidate its de facto departure from an IATA resolution to which it is a willing party.

KATA has suggested to BA that to uphold the PSAA, Agents would be willing to accept one USD per ticket as remuneration.

Whereas the manner and the amount of remuneration BA is required to pay agents for services rendered to it may be a commercial matter, failure to remunerate agents at all or to advise them what the intended form of the remuneration following non-payment of 1 per cent will be constitutes a flagrant violation of the provisions of the Passenger Sales Agency Agreement (PSAA). BA has sought unilaterally to amend PSAA by putting considerable pressure on its appointed agents to sign a document that contradicts the long-standing payment of remuneration clause in the PSAA. There is an established way in which the PSAA can be amended. As this is a contractual matter, it must fall under the scope of the Commissioner's oversight.

The action by BA to coerce the agents into signing formal acquiescence under threat of withdrawal of their appointment must fall under the scope of the Commissioner's oversight.

BA has made good its threat and has terminated the appointments of agents who have not signed the document. They should immediately be reinstated until such time when the Commissioner rules on the matter. It should then be for the agents to decide whether they wish to retain their appointments or not.

The Travel Agency Commissioner therefore should intervene in this matter.

The Applicants have submitted the following documents:

A copy of British Airways' letter to the agents dated 31st Oct 2008

British Airways letter dated 18th December to KATA

Example of letter sent to agent's corporate clients with name of Corporate Client deleted to protect identity

The Respondents arguments in summary

The allegation that British Airways' action violates Resolution 824 and, in particular, Section 9 is ill founded. Section 9 clearly acknowledges the position that remuneration will be subject to variation and will be payable "... in a manner and amount as may be stated from time to time and communicated to the Agent by the Carrier...." [emphasis added].

British Airways gave three months notice of this change, and subsequently undertook consultation with Agents regarding the change in remuneration policy, including convening a meeting with the representative body, KATA. Furthermore, by letter dated 12 February 2009 addressed to the CEO of KATA, British Airways has advised that those agents who now feel that they do not wish to accept the new arrangements can terminate their appointment as British Airways' agent by notifying British Airways in writing.

British Airways has adopted the correct and due process, given ample advance notice of the policy change and, as such, the Commissioner is not afforded authority to intervene in circumstances of this commercially motivated dialogue between British Airways and its agents.

The commission policy is in line with commercial practices on a worldwide basis and by no means exclusive to the Kenyan market. Since commission policy is a commercial matter, it is British Airways' prerogative to set and establish its policy in this respect and such decision must necessarily fall outside the scope of the Commissioner's oversight. Given that Carriers in IATA no longer meet to discuss or set commission levels (nor have they done so for more than a decade), carriers commercial interests should not be frustrated by any action involving a Travel Agency Commissioner.

When British Airways notified the agents of the decision to replace the existing commission of 1% with a service fee regime, British Airways relayed the message that the new arrangement afforded agents full flexibility to determine the prices they sought to charge customers for ticket sales by applying their own scale of charges which they could freely set based on experience in their specific markets. Such services fees represent compensation for services rendered by the agent, the level of which is a commercial matter for agents.

The policy British Airways has applied in this case is no different from other commission change notifications. This is because an agent, who does not find the commission policy satisfactory, may cancel its agency appointment with British Airways.

Rules of interest and reasons for decision by the TAC

The Office of the Travel Agency Commissioner and its mandate

The procedures under which the Travel Agency Commissioner (hereafter referred to as TAC) operates are contained in IATA Resolution 820e. The Commissioner shall initially decide whether or not a credible case for review has been made, according to section 1.2.3 of this Resolution. - The first initial question is therefore if this matter falls under the jurisdiction of the TAC. To investigate the framework for a TAC Review it is necessary to seek guidance in the resolutions through which the TAC Office is set up, and also to reflect on the IATA Agency Programme with regard to its position in matters relating to remuneration and commissions.

The Office of the TAC is created by Resolution 820d. In Attachment A of this resolution it is described that the TAC is an independent arbiter appointed jointly by the International Air Transport Association the Universal Federation of Travel Agency Associations and the World Travel Agency Associations Alliance, to conduct reviews and act with respect to decisions and/or actions affecting Agents and applicants under the IATA Agency programme. The TAC Job Description, which is also part of Attachment A, states that a Commissioner shall act only as described to make reviews requested under the terms of Resolution 820e.

-It is hereby clearly established that the TAC is part of the IATA Agency Programme, and that only matters that falls within the scope of the IATA Agency Programme could be reviewed by the TAC. In addition the TAC Reviews are limited to the terms contained in Resolution 820e.

Based on the requests and argument from the Applicants, what could potentially be of interest in this matter is a review based on the grounds as described in Resolution 820e section 1.1.9.; The Commissioner shall review and rule on cases initiated by an Agent who is aggrieved by an impending amendment to its Passenger Sales Agency Agreement.

The PSAA and other resolutions of interest

To become an accredited agent an agent signs a Passenger Sales Agency Agreement (hereafter referred to as PSAA) in accordance with IATA Resolution 824. The PSAA becomes effective between the Agent and the Carrier upon the appointment of the Agent by such Carrier in accordance with the Sales Agency Rules in effect in the country of the Agent's Location. – Accordingly Resolution 824 becomes part of the contractual relationship between the Carrier and the Agent upon appointment by the Carrier (or Member with another term used in other resolutions).

- The Sales Agency Rules for Kenya are contained in Resolution 814. I note that Resolution 824 prevails if there is any conflict, contradiction or inconsistency between any of the provisions in Resolution 814 and Resolution 824 (see Res 824 section 2.4). Resolution 814 is however useful in order to understand the contractual relationship between Agents and Members, and the context of remuneration to Agents within the IATA Agency Programme.

Resolution 824 section 9 states that for the sale of air transport and ancillary services by the Agent under the PSAA the Carrier shall remunerate the Agent in a manner and amount as may be stated from time to time and communicated to the Agent by the Carrier. Such remuneration shall constitute full compensation for the services rendered to the Carrier.

According to Resolution 814 a Member (the Carrier with the term used in Res 824) may appoint and cancel an Agent at its own discretion (see Attachment A section 3.4 and 3.5).

In section 9 of Attachment A there are rules relating to conditions for payment of commission and other remuneration. Under the heading "Rate of commission or amount of remuneration" it is stated that the rate of commission and/or the amount of other remuneration paid to Agents for the sale of international air passenger transportation shall be as may be authorised from time to time by the Member. In this section the term "recommended" is used when stating that: "It is recommended that changes of notification of changes to such commission or other remuneration will be given well in advance."

Under the heading "Authority to pay commission and other remuneration" it is stated that "Agents duly appointed by the Member shall be paid commission or other remuneration for the sale of international air passenger transportation." There are also some rules relating to conditions for paying commission that includes other procedural matters and definitions.

Conclusions

The Agency Programme does set certain standards when it comes to definitions and the procedures relating to remuneration and/or commission. There are also some recommendations in this area that are not binding. The words *shall remunerate* are used in Resolution 824. In Resolution 814 one can find the words *shall pay* but also words like *as may be authorised from time to time by the Member* in relation to remuneration.

However it is clearly so that the IATA Agency Programme does not in any way leave room for interference in the agent-airline relationship when it comes to levels or business models relating to remuneration. This is logical as in many jurisdictions any cooperation relating to levels or business models of remuneration between the airlines, within or outside the context of IATA, could potentially be seen as in violation of antitrust or competition laws.

The wording of Resolution 824 using the term “shall” must be seen in this context and an action by a Member to change its business model, or the level of commission, or even to stop paying commission does therefore not create a matter that falls within the scope of the IATA Agency Programme.

Purely procedural matters could potentially have been within the scope of a TAC Review in this particular situation – however as I have described above the notification of change is *recommended* to be given well in advance. British Airways did give notice three months ahead, and as the recommendation of the resolution is vague I find it hard to say that this is not an appropriate noticing period, and in any case it is only a recommendation by the resolution. Furthermore the threat by British Airways to cancel the appointments of agents not signing an acceptance acknowledgement letter is not something that could be challenged by use of the IATA Agency Programme. – It is, according to Resolution 814, within British Airways’ rights to terminate an appointment of an agent at its own discretion.

With this being said I can only conclude that this matter as it stands does not fall within the remit of the TAC. I therefore have to dismiss the requests in accordance with Resolution 820e section 1.2.3.

Decision

The Requests for Travel Agency Commissioner Review are dismissed.

Decided in Sundbyberg 2009-02-26

Helene Cedertorn

Signed original copies of this decision will be sent by postal mail to the British Airways and CEO of KATA.

Sent this date by e-mail to: British Airways and the Agent’s Representatives

Note:

The parties may, if considered aggrieved by this decision, seek review by arbitration in accordance with the provisions of Resolution 818, section 12.

Attachment 1

List of Agents:

Kate Freight and Travel Ltd
Crane Travel & Tours Ltd
Fourways Travel Service(A) Ltd
Basel Tours & Travel Ltd
Holiday Bazaar Ltd
Charleston Travel Ltd
Dodoworld Kenya Ltd
Tour Africa Safaris Ltd
Travelshoppe Ltd
Travel Creations Ltd
Archers Tours And Travels Ltd
Crown Tours and Car Hire Ltd
Incentive Travel Ltd
Shah Travel Agencies
Georgetown Travel and Tours Ltd
Travel Affairs Ltd
Palbina Travel Ltd
Phoenix Safaris (k) Ltd
Ameet Travel&Tours Ltd
Crater Travel Agencies Ltd
Speedbird Travel & Safaris Ltd
Travellers Den Ltd
Kilindini Travel Centre
Travel´n Style
Tripple Tours & Travel Ltd
Famous Travel Agency
Catalyst Travels Ltd
Travel Associates Ltd
Tayler´s Nakuru Travel Centre Ltd
Bunson Travel Services Ltd
Uniglobe Northline Travel Agency
The Travelmart Ltd
Sagal Travel & Tours Agency Ltd
Raydoll Tours and Travel Ltd