

**INITIAL ASSESSMENT BY THE UK
NATIONAL CONTACT POINT FOR
THE OECD GUIDELINES FOR
MULTINATIONAL ENTERPRISES**

Complaint from an individual in
India against a UK registered
company

30TH AUGUST 2012

Contents

SUMMARY OF THE UK NCP DECISION	3
BACKGROUND	3
THE COMPLAINT AND RESPONSE.....	3
THE UK NCP PROCESS SO FAR.....	5
UK NCP DECISION	6
NEXT STEPS	10

**Initial Assessment by the UK National Contact Point for the OECD
Guidelines for Multinational Enterprises**

**Complaint from Ms Z against X plc under the OECD Guidelines for
Multinational Enterprises**

SUMMARY OF THE UK NCP DECISION

- **The UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (the Guidelines) has decided to reject the complaint on the grounds that the allegations made in the complaint have not been supported by sufficient evidence and therefore have not been substantiated.**
- **This Initial Assessment concludes the complaint process under the Guidelines.**

BACKGROUND

1. On 16 January 2012 Ms Z's advocate wrote to the UK National Contact Point on behalf of his client stating that she had worked on several cruise ships owned by X plc between November 1999 to August 2008. During that time it is alleged that she contracted diabetes and other health related conditions as a result of negligent medical treatment by X plc.

THE COMPLAINT AND RESPONSE

2. The specific complaint raised by Ms Z relates to X plc's operations under Chapter II paragraphs 2, 6 and 7 and Chapter IV, in particular paragraphs 1(d) and 4(a), of the 2000 version of the Guidelines which can be found at: <http://webarchive.nationalarchives.gov.uk/20081230191906/http://www.berr.gov.uk/files/file46192.pdf>

Chapter II

Paragraph 2 [Enterprises should] respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.

Paragraph 6 [Enterprises should] support and uphold good corporate governance principles and develop and apply good corporate governance practice.

Paragraph 7 [Enterprises should] develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.

Chapter IV

Paragraph 1d [Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices] not discriminate against their employees with respect to employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social origin, unless selectivity concerning employee characteristics furthers established governmental policies which specifically promote greater equality of employment opportunity or relates to the inherent requirements of a job.

Paragraph 4a [Enterprises should] observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country.

3. A summary of the alleged complaint is as follows:
 - a) X plc failed to provide an effective operation-level grievance mechanism for those potentially impacted by the Company's operations, where there is no effective judicial or non-judicial mechanism available to her;
 - b) X plc has discriminated against the complainant on the basis of her national extraction.

4. X plc disputes these allegations and submits:
 - a) X plc do not agree that they have violated the OECD Guidelines and they do not consider that the OECD complaints procedure is the appropriate medium for bringing a personal injury claim given the nature of medical evidence that will need to be assessed.
 - b) X plc state that in Appendix II of Ms Z's employment contract it sets out a detailed and comprehensive formal and informal "*grievance policy & procedure*" which has a three stage process and the complainant can be accompanied by the trade union representative or work colleague.
 - c) X plc do not agree that the complainant is being discriminated against because of her national extraction as she is able to bring a personal injury claim against them under the Bermuda International Conciliation & Arbitration Act 1993 and they have advised her advocate to bring this action against them on several occasions.
 - d) X plc state that there is no evidence from Ms Z that her diabetes or other health related issues were not a pre-existing condition or that her health issues developed and were made worse as a result of the medical treatment she received.

5. On 28 February 2012 Ms Z's advocate gave a further submission on behalf of the complainant and claimed:

- a) Ms Z was not provided with any employment terms or conditions.
- b) X plc's grievance mechanism is ineffective and it doesn't cover Ms Z's current situation.
- c) Ms Z accepts that the complaint under the OECD Guidelines is not the proper forum for a personal injury claim.
- d) Any legal action against X plc is difficult for a resident in India.

THE UK NCP PROCESS SO FAR

- 6. The UK NCP received Ms Z's complaint against X plc on 16 January 2012, this was forwarded onto X plc on the same day. All correspondence with Ms Z in this complaint has been through her advocate.
- 7. X plc responded on 21 February 2012 and this was forwarded to Ms Z for comment on 24 February 2012
- 8. Ms Z's advocate provided additional comments to X plc's comment on 28 February 2012 and this was sent to X plc on 7 March 2012. X plc made no further response to this.
- 9. The UK NCP sent a draft initial assessment to both parties on 15 May 2012 asking for factual comments by 29 May 2012. Ms Z's advocate submitted some further comments on 29 May 2012 asking for them to be reflected in the assessment. These were forwarded to X plc on 31st May 2012.
- 10. On 7 June 2012 Ms Z's advocate then made a further submission on behalf of the complainant referring to further evidence to substantiate the allegation of discrimination.
- 11. Ms Z's advocate contacted the UK NCP again in several emails on 8 June 2012 asking for the new evidence to be considered, either as part of the initial assessment or in a new complaint.
- 12. As the new evidence related to the existing allegations rather than raising new issues the NCP has reviewed it before finalising the initial assessment to determine whether it added support to the allegations.
- 13. The new supporting document – a contract agreement between a subsidiary of X plc and a UK trades union - was received by the NCP on 5 July and Ms Z's advocate then confirmed that all documents for consideration in the complaint are now with the NCP.
- 14. A revised draft was then sent to both parties on 9 August 2012. Ms Z's advocate made some further comments and minor changes were made to reflect this before this assessment was finalised.

UK NCP DECISION

15. The UK NCP has decided to reject the complaint from Ms Z on the grounds that the allegations made in the complaint have not been supported by sufficient evidence and therefore have not been substantiated. The reasons for this decision are explained below:

Identity of Ms Z and her interest in the matter:

16. The UK NCP is satisfied that Ms Z is a legitimate and credible person to make this complaint. It is agreed that Ms Z formally worked on operations run by X plc, although the correct identity of Ms Z's employer is disputed. The UK NCP considers that Ms Z is directly interested in the issues raised in the complaint.

Whether the issue is material and substantiated:

17. The UK NCP **does not** consider that the issues raised in the complaint have been substantiated. This is because the allegations are not supported by sufficient evidence. The reasons for this finding are set out below in relation to each allegation.

a) X plc failed to provide an effective operation-level grievance mechanism for those potentially impacted by the Company's operations, where there is no effective judicial or non-judicial mechanism:

- i. The NCP notes that Ms Z's advocate related this aspect of the complaint to obligations found in Chapter 2, paragraphs 2, 6 and 7 of the 2008 Guidelines, which applied during the period the complaint relates to. The NCP notes that in the version in force at the time of Ms Z's employment there is no specific reference to operational level grievance mechanisms or to judicial and non-judicial mechanisms. However, based on additional guidance on the Human Rights responsibilities of enterprises included in the revised Guidelines in 2011 the complainant has interpreted X plc's Chapter 2 responsibilities as including providing a grievance mechanism and X plc has not contested this.

Grievance policy during employment

- ii. There has been insufficient evidence provided to support this claim. X plc has supplied the UK NCP with a copy of Ms Z's last contract of employment. This was signed by Ms Z on 14 December 2007. Annex II on page 17 provides clear information about the company's grievance policy and procedure.
- iii. In his letter of 28 February 2012, Ms Z's advocate claimed that the grievance procedure was not applicable in Ms Z's situation, given the express provision in Annex II Paragraph 1.9 that "*All Grievances must be raised on-board and heard by the appropriate Manager*". However the UK NCP notes that the same paragraph goes on to say that "*where this*

has not been possible then they should contact the Personnel & Development Manager or Personnel & Training Manger (PDM/PTM) where carried in the first instance or in the absence of the PDM/PTM, the Fleet HR Team as soon as possible". In addition the UK NCP notes that paragraph 4.2 expressly refers to the situation where a seafarer is not on-board. The UK NCP notes comments by Ms Z's advocate that paragraph 4.2 relates to the appeal stage of a complaint. The UK NCP nonetheless considers that paragraph 1.9 and 4.2 together indicate that the grievance mechanism provided by X plc makes provision throughout the process for the situation where an employee is not on board.

- iv. No evidence has been offered that Ms Z attempted to use X plc's grievance procedure when she had concerns about her immediate treatment during her period of employment from 2005 to 2008 (for example when her requests for immediate medical leave were refused).

Post-employment grievance procedure

- v. Ms Z's advocate submits, and the UK NCP accepts, that after the expiry of her contract in September 2008, the "operational level" grievance procedure in Annex II of her contract was no longer the mechanism for taking forward a complaint arising from her employment. It was replaced by the disputes provision in Article 14 of the contract. This Article provides for disputes to be resolved by arbitration under Bermuda law (unless a collective bargaining agreement or government-mandated contract provides otherwise).
- vi. Ms Z's advocate has claimed that Ms Z did not receive proper responses (or in some cases, any response) when she complained to the agency through which she had been employed, after her employment ceased. The parties also dispute whether Ms Z was directed to the arbitration process during her contacts with either the hiring agency or X plc from October 2008. The record of these contacts is incomplete (a number were in person or by telephone). However, the UK NCP notes that the existence of the arbitration clause was clearly indicated on the "Acceptance of Employment Terms and Conditions" signed by Ms Z on 14 December 2007.
- vii. Ms Z's advocate also submits that the arbitration process is not an effective mechanism, because it is difficult for Ms Z to use given her low income and residence in India, and also prevents her accessing a local legal remedy.
- viii. The UK NCP notes this comment but believes the evidence before it illustrates that Ms Z was able to get sufficient legal advice to pursue legal action even though she resides in India.
- ix. Evidence has been provided by Ms Z's advocate demonstrating his attempts to pursue Ms Z's claim directly with X plc. The evidence shows that X plc engaged in correspondence with Ms Z's advocate on this point

(although Ms Z's advocate was not satisfied with the response). However no evidence has been submitted in relation to attempts or enquiries made by or on behalf of Ms Z in connection with actually bringing proceedings, either under the Arbitration clause or in an alternative jurisdiction. The NCP finds that there is not enough evidence to substantiate the claim that the difficulty faced by Ms Z makes the arbitration process inaccessible to her.

b) X plc has discriminated against the complainant on the basis of her national extraction (Chapter 4, paragraph 1d of the Guidelines):

- i. The UK NCP considers that insufficient evidence has been provided by Ms Z to substantiate these allegations. X plc denies the allegations, and has stated that Ms Z needs to commence arbitration proceedings and bring a legal claim in accordance with the information on pages 8 & 9 of the contract of employment which Ms Z has signed.

Additional evidence provided by Ms Z's advocate

- ii. In his letters of 28th May and 7th June, Ms Z's advocate claims that UK residents employed by X plc would have a local contact for grievances, would be employed by the company directly rather than through a hiring agency, and would (because of their direct employment) have access to a local legal remedy for contract disputes. In support of this claim Ms Z's advocate referred to an agreement between a subsidiary of X plc and a UK Union, a copy of which was provided on 5 July 2012.
- iii. Ms Z's employment contract was with a hiring agency providing services to X plc. The agency is based in Bermuda, but Ms Z was employed through its local agent in India. By her own account, she was able to discuss her complaints in person with a local contact of her employer (although she was not satisfied with the response).
- iv. It is not unusual for a multinational enterprise with a range of subsidiaries to use a variety of employment routes including staffing agencies. The NCP considers that the use of varying employment routes is not, in itself, sufficient evidence of discrimination.
- v. In his letter of 7 June, Ms Z's advocate refers to an agreement between a subsidiary of X plc and a UK union (subsequently provided on 5 July) as supporting the claim of discrimination. In particular, he notes that provisions in the agreement state that although the employer is a Hong Kong company, the agreement will be governed by English law and the parties submit to the jurisdiction of the English courts, and also draws attention to provisions that restrict the application of the terms of the agreement to British Officers and state that "*Non-British Officers may also be employed on these vessels on different terms and conditions from time to time, at the company's discretion*".

- vi. The NCP understands the agreement between the subsidiary of X plc and the UK union to be a collective bargaining agreement. Article 1 of the terms and conditions of Ms Z's contract provide that "*These terms apply in addition to any applicable collective bargaining agreement....governing the crew member's employment*", and add that "*In the case of any inconsistency between these Terms and such document, the latter will prevail to the extent of such inconsistency only.*"
- vii. There are further references to collective bargaining agreements in individual provisions of the contract signed by Ms Z. In particular, Article 14, which refers to the Governing Law, Arbitration and Venue in case of disputes, provides that disputes shall be "*governed by the laws specified in the applicable seaman's collective bargaining agreement (CBA), if any, or Government-mandated contract....and arbitrated exclusively according to the terms specified in any applicable CBA or Government-mandated contract*". It goes on to state that, in the absence of a CBA or Government-mandated contract, arbitration in Bermuda shall apply to all disputes. Ms Z's contract therefore provides for a collective bargaining agreement similar to the one between the UK union and the X plc subsidiary to supersede the Bermuda arbitration provision. The NCP does not consider that the evidence submitted demonstrates that Ms Z and other non-UK employees could not access such agreements.
- viii. The UK NCP therefore does not find sufficient evidence to substantiate the allegation that X plc has discriminated on the basis of nationality.

c) Ms Z was not provided with her employment terms:

- i. The evidence seen by the UK NCP does not support this allegation. Page 12 of the acceptance of Employment Terms & Conditions states: "*Acknowledgement of Receipt and acceptance; by signing below I hereby acknowledge that I have received, reviewed and accept the terms & conditions of my employment*". Ms Z signed this page on 14 December 2007.

d) Complaint under the OECD Guidelines is not the proper forum for a personal injury claim:

- i. The UK NCP notes that in his letter of 28 February 2012, Ms Z's advocate accepts that the complaint under the OECD Guidelines is not the proper forum for a personal injury claim but says that he is using it to illustrate the difficulties of bringing any claim. The UK NCP notes that, by their very nature, personal injury claims that are contested are difficult and time consuming and they will ultimately rely on independent expert medical knowledge.
- ii. The NCP is not a judicial process but a voluntary one. The UK NCP has no power to award financial compensation for personal injury claims, nor should it be used just to highlight the difficulties encountered in bringing a personal injury claim.

Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines:

18. One of the stated aims of the Guidelines, specifically the role of the NCPs, is for the NCP to “offer *good offices*” in an effort to contribute informally to the resolution of the issue”. To this effect, the UK NCP considers that, had there been sufficient supporting evidence to deem the allegations material and substantiated, the UK NCP could have tried to facilitate a mediated solution to the complaint.

NEXT STEPS

19. This Initial Assessment concludes the complaint process under the Guidelines.

30 August 2012

UK National Contact Point for the OECD Guidelines for Multinational Enterprises

**Steven Murdoch
Danish Chopra
Liz Napier**

© Crown copyright 2012

You may re-use this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/> or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or e-mail: psi@nationalarchives.gsi.gov.uk.

This publication is available on our website at www.bis.gov.uk/nationalcontactpoint

Any enquiries regarding this publication should be sent to:

UK National Contact Point for the OECD Guidelines for Multinational Enterprises
Department for Business, Innovation and Skills
3VIC3
1 Victoria Street
London SW1H 0ET
Tel: 0044 (0)20 7215 5756

If you require this publication in an alternative format, email

uk.ncp@bis.gsi.gov.uk, or call 0044 (0)20 7215 5756.

URN 12/1229