Civil Resolution Tribunal

Date Issued: December 19, 2017

File: SC-2017-003519

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kuehn v. Eurowings GmbH*, 2017 BCCRT 144

B E T W E E N :

Peter Kuehn

APPLICANT

A N D :

Eurowings GmbH

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION AND JURISDICTION

1. This final decision of the Civil Resolution Tribunal (tribunal) has been made without the participation of the respondent, due to the respondent's non-compliance with

the tribunal's directions as required, as discussed below. The parties are each self-represented.

2. The applicant claims a total of $5,000. His dispute is that the respondent airline failed to deliver the applicant's baggage at his international destination, which he says required him to spend $3,368.98 for replacement clothing. The applicant also claims $735.22 for 3 days of his vacation, time he says he spent shopping for the replacement clothing. The applicant also claims $500 for "emotional stress and health consequences" and $395.80 for his time in dealing with the dispute.

3. Section 36 of the *Civil Resolution Tribunal Act* (Act) applies if a party to a dispute fails to comply with the Act or its regulations. It also applies if a party fails to comply with tribunal rules in relation to the case management phase of the dispute, including specified time limits, or an order of the tribunal made during the case management phase. After giving notice to the non-compliant party, the case manager (facilitator) may refer the dispute to the tribunal for resolution and the tribunal may:

   a. hear the dispute in accordance with any applicable rules,

   b. make an order dismissing a claim in the dispute made by the non-compliant party, or

   c. refuse to resolve a claim made by the non-compliant party or refuse to resolve the dispute.

4. These are the formal written reasons of the tribunal. The tribunal has jurisdiction over small claims brought under section 3.1 of the Act. The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

5. Under tribunal rule 121, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

6. For the reasons that follow, I have allowed the applicant's claims in part.

ISSUES

7. To what extent is the respondent airline responsible for the applicant's claimed damages arising from the respondent's failure to deliver his luggage to his holiday destination?

EVIDENCE & ANALYSIS

Non-compliance

8. Through the tribunal facilitator, I previously told the parties of my November 22, 2017 summary decision to hear the dispute without the respondent's participation, due to its non-compliance. The details supporting that decision are set out below.

9. The respondent is the non-compliant party in this dispute and has failed to participate in the case management phase, as required by sections 25 and 32 of the Act and tribunal rules 94 to 96, despite multiple attempts by the facilitator to contact its representative with a request for a reply. In particular, the respondent filed its Response on August 10, 2017. The facilitator has advised me that he made the following attempts at contact, with no substantive response:

    a. *October 18, 2017*: An email was sent scheduling a November 1, 2017 teleconference at 10 a.m. (the conference). The facilitator's email warned the parties that attendance at the conference was mandatory and that non-participation by the respondent could result in an order granting all of the applicant's claims against the respondent, without further notice to the respondent. The facilitator used the email address provided by the respondent in its Dispute Response.

b. *October 18, 2017*: The respondent sent the facilitator an automated reply that acknowledged receipt of his email. Part of this email was in German and part in English.

c. *November 1, 2017*: The applicant and the facilitator remained on the conference call until after 10:15 a.m. The respondent failed to attend the conference. The respondent has not communicated at all with the facilitator since its October 18, 2017 email.

10. The facilitator referred the respondent's non-compliance with the tribunal's rules to me for a decision as to whether I should hear the dispute in the absence of participation from the respondent.

11. Should the tribunal hear the applicants' dispute?

12. As noted, the respondent filed a response but provided no explanation about why it suddenly stopped communicating with the tribunal as required. I find the facilitator made a reasonable number of attempts to contact the respondent. Parties are told at the beginning of a tribunal proceeding that they must actively participate in the dispute resolution process. Given the respondent provided its contact information in August 2017, only a little over 2 months before the facilitator's first attempt at contact, I find it is more likely than not that the respondent was aware of the facilitator's attempts to contact it.

13. The tribunal's rules are silent on how it should address non-compliance issues. I find that in exercising its discretion, the tribunal must consider the following factors:

a. whether an issue raised by the claim or dispute is of importance to persons other than the parties to the dispute;

b. the stage in the facilitation process at which the non-compliance occurs;

c. the nature and extent of the non-compliance;

d. the relative prejudice to the parties of the tribunal's order addressing the non-compliance; and

e. the effect of the non-compliance on the tribunal's resources and mandate.

14. First, there is no evidence before me that this claim affects persons other than the parties involved in this dispute.

15. Second, the non-compliance here occurred at the outset of the facilitation process and no substantive discussions between the parties occurred. The respondent has effectively abandoned the process after providing a response. Third, given the facilitator's attempts at contact and the respondent's failure to respond despite warnings of the consequences, I find the nature and extent of the non-compliance is significant.

16. Fourth, I see no prejudice to the applicant in hearing the dispute without the respondent's participation. The prejudice to the respondent of proceeding to hear the dispute is outweighed by the circumstances of its non-compliance. If I refused to proceed to hear the dispute, the applicant would be left without a remedy and that would be unfair to him.

17. Finally, the tribunal's resources are valuable and its mandate to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly is severely impaired if one party does not want to participate. I find that it would be wasteful for the tribunal to continue applying its facilitation resources on this dispute, such as by making further attempts to seek participation from the respondent.

18. In weighing all of the factors, I find the applicant's claims should be heard. In deciding to hear the applicants' dispute I have put significant weight on the following factors:

a. the extent of the non-compliance is significant;

b. the applicants are not prejudiced if such an order is made; and

c. the need to conserve the tribunal's resources.

Assessment of damages

19. Having decided to hear the dispute without the respondent's participation, I turn then to the merits of the dispute. Where a respondent filed a response but has since failed to comply with the tribunal's directions as required, as is the case here, an adverse inference may be drawn against that respondent. This simply means that if the person or organization refuses to participate, then it is generally reasonable to assume that the applicant's position is correct on the issue at hand. This concept is similar to where liability is assumed when a respondent has failed to provide any response at all to the dispute and is in default.

20. Here, I find the respondent was responsible for the applicant being without his luggage for his 6-day trip to Germany.

21. However, where the dispute involves non-debt claims, as in this case, I find I must assess the value of the claims in order to make the appropriate orders.

22. In its Dispute Response, the respondent acknowledged that the applicant's luggage was not available to him during his stay in Germany from April 19 to 24, 2017. The applicant acknowledged in his application to the tribunal that his missing luggage was eventually delivered to his home address on May 18, 2017, after he returned home from his holiday. The respondent stated in its Dispute Response that it had offered compensation in the amount of 75 Euro for "each day without luggage" plus 50 Euro for toiletries, resulting in a total amount of 500 Euro or about $760.00 in Canadian dollars.

23. The respondent further stated in its Dispute Response that costs for transportation and accommodation do not fall under the scope of its legal liability in the event of a luggage delay, and that under the "Montreal Convention" the air carrier is not liable for intangible damages, such as the applicant's claimed emotional stress and health consequences. The respondent stated in its Dispute Response that the

amount claimed is “absolutely out of proportion” in relation to a luggage delay of 6 days, and that by law the applicant is required to mitigate his costs and buy only necessities.

24. At my request, the facilitator asked the applicant for his evidence in support of his claims.

25. I accept the applicant’s evidence that the purpose of the trip was to attend 2 separate 80th birthday parties and the 1st holy communion of a great-nephew. The applicant’s flight from Canada left on April 19, 2017. The events were on April 21, 22, and 23, 2017. He left for home on April 24, 2017.

26. The applicant submitted that he travelled in casual clothing, unsuitable for the celebrations. The applicant says he bought: a suitcase, 2 formal suits, white dress shirts with different ties, proper shoes, a coat, undergarments, and toiletries. The applicant and his son say they had no time to spare given the timing of the celebrations. The applicant says he was prudent in his choice of replacement items and they were of far lesser value than the originals that had been in his luggage.

27. The applicant provided copies of some receipts, but they are mostly in German and I cannot read the item descriptions. However, in the context and given the descriptions by the applicant, I find the receipts totalling $1,055.27 Euro, or $1,600.00 CAD, are for clothing, a suitcase, and toiletries. There is no explanation before me as to why the receipts do not match the total claimed by the applicant. I find that the applicant’s claim for the replacement luggage and contents is limited to this sum. While I have found this limitation to the claim appropriate given the receipts provided, I also find that for a 6 day trip it was not reasonable to purchase 2 formal suits and multiple ties. Overall, while I acknowledge the holiday’s purpose was to attend special occasions, I find the claim of over $3,400.00 for lost clothing and a suitcase to be excessive.

28. While liability is assumed, it is also appropriate to consider the relevant aspects of the Montreal Convention[1]. It is a treaty that has been in effect in Canada since 2003 with the last revision in 2009. The Montreal Convention provides that air carriers are strictly liable for proven damages up to 100,000 special drawing rights (SDR), which is a mix of currency values established by the International Monetary Fund equal to about $182,000 CAD. As noted in *Wettlaufer v. Air Transat A.T. Inc.*, 2013 BCSC 1245, the Montreal Convention has the force of law in Canada with respect to an air carrier's liability, to the extent the Montreal Convention provisions apply as they do here. Further, as noted in Wettlaufer, the Montreal Convention does not provide compensation for purely mental injury, such as emotional stress or inconvenience, in the absence of a physical injury.

29. For lost luggage, under the Montreal Convention airlines are required to fully compensate travelers the cost of replacement items purchased until the baggage is delivered, to a maximum of 1,131 SDR, which is currently about $2,058.49. However, given the applicant's receipts provided which total about $1,600.00 CAD and is a figure I also consider to be reasonable overall, I order the respondent to pay $1,600.00 to the applicant for the replacement items.

30. I turn then to the applicant's other claims. First, the $735.22 for the 3 days of his vacation he says he lost shopping for the replacement items, which includes claims for taxi fare. Second, the $500 for "emotional stress and health consequences". I have no doubt not having his luggage caused the applicant some frustration and added effort during his trip. However, as noted above, the Montreal Convention does not allow for these types of awards. Third, the applicant's claim for $395.80 in dealing with the dispute was based on an hourly rate for his time. As noted in prior decisions[2], compensation for time spent dealing with a dispute is typically not appropriate, bearing in mind also the tribunal's

[1] The Montreal Convention is formally known as the Convention for the Unification of Certain Rules for International Carriage by Air.

[2] See for example *Segal v. McCarthy Tetrault LLP*, 2017 BCCRT 134

general mandate that includes self-representation. I find such an award would be inappropriate here.

31. In keeping with the Act and the tribunal's rules, I order the respondent to reimburse the applicant $175 in tribunal fees.

ORDERS

32. Within 30 days of this decision, I order the respondent to pay applicant a total of $1,775.00, comprised of:

    a. $1,600.00 as compensation for the applicant's delayed luggage, and

    b. $175.00 in tribunal fees.

33. The applicant is entitled to post-judgment interest under the *Court Order Interest Act*.

34. Under section 48 of the Act, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.

35. Under section 58.1 of the Act, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Shelley Lopez, Vice Chair