



Civil Resolution Tribunal

Date Issued: November 25, 2020

File: SC-2020-004135

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Serbinenko v. Air Canada*, 2020 BCCRT 1330

B E T W E E N :

ANNA SERBINENKO

APPLICANT

A N D :

AIR CANADA

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Chad McCarthy

INTRODUCTION

1. This dispute is about refusing to transport a passenger on an airline flight. The applicant, Anna Serbinenko, says the respondent, Air Canada, improperly refused to let her board an international flight it operated. She claims \$886.93 for the full cost of a replacement flight on a different airline, and \$945 in lost income because the later replacement flight time caused her to miss work. This totals \$1,831.93.

2. Air Canada says it was justified in refusing to allow Dr. Serbinenko to board, and that it is not responsible for her claimed losses because they are entirely her fault. Air Canada says that in any event, the applicable flight tariff limits Dr. Serbinenko's damages to a ticket refund, which Dr. Serbinenko does not claim in this dispute.
3. Dr. Serbinenko is self-represented in this dispute. Air Canada is represented by an employee, Nicolas Drolet, who is a lawyer.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.
5. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Although the parties' submissions each call into question the credibility of the other party in some respects, the credibility of interested witnesses cannot be determined solely by whose personal demeanour in a proceeding appears to be the most truthful. The most likely account depends on its harmony with the rest of the evidence. Further, in the decision *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always needed where credibility is in issue. Keeping in mind that the CRT's mandate includes proportional and speedy dispute resolution, I find I can fairly hear this dispute through written submissions.
6. Section 42 of the CRTA says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

7. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money, or make an order that includes any terms or conditions the CRT considers appropriate.
8. Before this adjudication, Dr. Serbinenko withdrew her claims for “moral compensation” and apologies from Air Canada staff for alleged discrimination, so those issues are not before me in this decision.
9. Dr. Serbinenko requested that the CRT disallow Air Canada’s late evidence in this dispute. Dr. Serbinenko says that Air Canada delayed responding to her before this CRT dispute, asked for an extension of time during the CRT facilitation stage, and had sufficient time to submit its evidence by the deadline. Dr. Serbinenko says she met the applicable deadlines, but I note that she also provided an item of evidence late, after Air Canada’s late evidence. Dr. Serbinenko does not say she was disadvantaged by Air Canada’s late evidence, and I find she had an opportunity to respond to all of Air Canada’s evidence. I find that allowing Air Canada’s late evidence is not unfair to Dr. Serbinenko, so I admit that evidence and weigh it in my analysis below.

ISSUE

10. The issue in this dispute is whether Air Canada’s refusal to transport Dr. Serbinenko was justified, and if not, how much does Air Canada owe in damages for return air fare and lost income, if anything?

EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, Dr. Serbinenko, as the applicant, must prove her claims on a balance of probabilities. I have read all the submitted evidence, but I refer only to the evidence I find relevant to provide context for my decision.
12. It is undisputed that Dr. Serbinenko had a valid ticket and boarding pass for a December 13, 2019 Air Canada flight from Las Vegas, Nevada, USA, to Vancouver,

British Columbia. It is also undisputed that on December 13, 2019, Air Canada refused to let Dr. Serbinenko board that flight, due to her allegedly disruptive behaviour. Dr. Serbinenko denies any inappropriate behaviour, and says that Air Canada staff at the boarding gate acted disrespectfully and inappropriately toward her, and had no valid reason to prevent her from boarding.

13. It is undisputed that Dr. Serbinenko and Air Canada's gate staff disagreed about the size and number of carry-on bags Dr. Serbinenko was allowed on the flight. Although Dr. Serbinenko provided several arguments about how she should have been permitted to carry on this luggage, rather than checking it at the gate, that is not the reason she was denied boarding. I find, and the parties do not deny, that Air Canada refused to transport Dr. Serbinenko because of her allegedly disruptive behaviour during the carry-on baggage disagreements.
14. Dr. Serbinenko accuses Air Canada's gate staff of discriminatory, racist behaviour. Dr. Serbinenko explains that she is Caucasian and has an eastern European accent, and that the gate staff belonged to a different, visible minority group. I acknowledge that Dr. Serbinenko alleges the gate staff acted arrogantly and disrespectfully toward her, and I note that she repeatedly points out the difference between her race and that of the gate staff in her submissions. She says that she felt generally discriminated against because of the alleged tone and demands of the gate staff, their allegedly false accusations about her behaviour, and the decisions they made, including refusing to transport her. However, Dr. Serbinenko does not directly explain how the gate staff's alleged behaviour and refusal to transport her was discriminatory or racist, apart from the fact that their race was different than hers. Further, as noted, Dr. Serbinenko withdrew her claims for "moral damages" and apologies for discrimination. In any event, such claims about discrimination and racism would likely involve the application of the *BC Human Rights Code*, and under CRTA section 11(1)(d) I would have refused to resolve them.

15. Dr. Serbinenko does not request any specific remedies related to the *Human Rights Code* in her remaining claims for damages. I find that I have jurisdiction to decide those claims under section 118 of the CRTA.
16. I now turn to whether Air Canada can deny boarding to disruptive passengers. I find that Air Canada's international tariff undisputedly applied to Dr. Serbinenko's ticket, and forms part of the parties' contract of carriage. Under tariff rule 75(B)(2)(c), Air Canada may refuse to transport a passenger when it reasonably decides that the passenger has engaged in prohibited conduct. Rule 75(B)(1) sets out various types of prohibited conduct, where Air Canada may find it reasonably necessary to take action to ensure the physical comfort or safety of passengers or Air Canada employees, the safety of the aircraft, the unhindered performance of crew duties, or safe and adequate flight operations. Under that rule, prohibited conduct includes abusive, offensive, and otherwise disorderly conduct. Prohibited conduct also includes a person failing to observe the instructions of Air Canada and its employees, including instructions to cease prohibited conduct.
17. Tariff rule 75(B)(3) says that if Air Canada refuses to transport a passenger for prohibited conduct, Air Canada's liability is limited to the refund value of the unused portion of the passenger's ticket, subject to other tariff rules about refunds. I find that Air Canada refused to transport Dr. Serbinenko, but she does not claim a refund of the unused portion of her ticket. Rather, Dr. Serbinenko claims \$886.93 for the full cost of a replacement flight on a different airline 5 hours later, and \$945 in lost income, because she says Air Canada's refusal caused her to miss work.
18. Dr. Serbinenko says she did not engage in prohibited conduct, so Air Canada's refusal to transport her was not reasonable, and was not permitted under the tariff. As the applicant in this dispute, Dr. Serbinenko bears the burden of proving that Air Canada's refusal to transport her was not reasonable. I find this requires her to prove that she did not engage in alleged prohibited conduct that reasonably led to the refusal.

19. The parties differ considerably in their versions of how the flight boarding events unfolded. Dr. Serbinenko says that Air Canada's gate staff were rude, arrogant, dominant, and made unreasonable demands. Dr. Serbinenko says she had two carry-on bags that should have been permitted on the flight. She says that the gate staff told her the carry-ons were not permitted and needed to be checked unless she repacked them. Dr. Serbinenko says her carry-ons contained fragile items that she did not want checked, so she repacked them twice on the floor of the gate area. She says that the gate staff then demanded she check a bag anyway, and accused her of hostile and abusive behaviour, which she denies. Dr. Serbinenko agrees that after speaking with the flight crew, the gate staff denied her boarding. Dr. Serbinenko says she then insisted that she speak to the aircraft captain, but was refused by the gate staff. Dr. Serbinenko does not explain why she asked to speak to the captain. She says that airport security then arrived and removed her from the gate area.
20. Dr. Serbinenko says she complained to Air Canada about the incident in January 2020. While her complaint is not in evidence, a January 23, 2020 Air Canada email acknowledges receiving the complaint and includes a copy of it. I find the complaint largely mirrors Dr. Serbinenko's CRT submissions. However, I find there are no witness statements or records from around the time of the incident that support Dr. Serbinenko's version of events.
21. On the other hand, Air Canada says that Dr. Serbinenko behaved in a hostile manner that was prohibited conduct, leading it to refuse her boarding. Air Canada submitted a Disruptive Passenger Report prepared by one of its gate staff on December 13, 2019. The name of the report's author is redacted, but Dr. Serbinenko does not dispute that the report was prepared by one of the Air Canada gate staff involved in the incident. So, I consider the report and give it appropriate weight even though the author's name was redacted.
22. The report said that Dr. Serbinenko initially arrived at the gate with more than 2 carry-on bags, although I again note this dispute hinges on passenger behaviour and not bag allowances. The report said that Dr. Serbinenko became rude and demanded to

speak to the aircraft's captain after she was told that she exceeded her carry-on allowance and needed to gate check her remaining luggage at no charge. The report said that Dr. Serbinenko grabbed her passport from gate staff and tried to proceed down the jetway, but was stopped. The report said that gate staff advised her to calm down, but she continued to cause a scene, so gate staff called security and denied her boarding because of her behaviour. According to the report, Dr. Serbinenko became hysterical after the transport refusal, which she denies. The report said that gate staff told Dr. Serbinenko she could not fly with Air Canada in the next 24 hours, and she was then escorted away by security. I find this account is consistent with a separate "Passenger Name Record" document submitted by Air Canada.

23. Air Canada also submitted a September 25, 2020 witness statement from FVG, the lead flight attendant on the December 13, 2019 flight. I find FVG's statement contains no direct evidence about Dr. Serbinenko's behaviour. I find the statement only mentions what Air Canada gate staff told FVG about that behaviour, which I find is consistent with the Disruptive Passenger Report. While the CRT may accept hearsay evidence such as this, I give it no weight in considering whether Dr. Serbinenko engaged in the behaviour described by gate staff. However, I accept FVG's statement that she did not feel comfortable flying with a passenger who exhibited the described behaviour, which she felt represented a safety risk.
24. Dr. Serbinenko says she is a licensed pilot and a well-known professional in the aviation industry, and suggests that this is proof she was not causing trouble. I find that Dr. Serbinenko's pilot status and any renown in aviation circles has no bearing on the relative truth of the parties' statements, and whether she engaged in prohibited conduct as a passenger boarding the December 13, 2019 Air Canada flight. Dr. Serbinenko also says that she checked a carry-on bag on the gate staff's instructions before proceeding to the jetway, and that the gate staff's behaviour was objectionable, which Air Canada denies. I find that even if Dr. Serbinenko successfully gate-checked a carry-on bag and the gate staff were rude and disrespectful, this does not confirm that Dr. Serbinenko's behaviour at that time was reasonable and permitted under the tariff. Further, I find the evidence fails to show that Air Canada

gate staff fabricated or exaggerated their accounts of the incident, as Dr. Serbinenko's arguments suggest, because of racism or for any other reason.

25. As noted, Dr. Serbinenko bears the burden of showing that she should not have been refused boarding for prohibited behaviour, on a balance of probabilities. Also as noted, Dr. Serbinenko's version of events is unsupported by any documentary evidence created around the time of the incident, while Air Canada's version is supported by a Disruptive Passenger Report and Passenger Name Record created around that time. On balance, I find the weight of the evidence favours Air Canada's version of events. I find that Dr. Serbinenko has failed to show she did not engage in abusive or disorderly behaviour that could have seriously disrupted the flight crew or passengers. I find she has failed to show she ceased such behaviour on the instructions of Air Canada's gate staff. So, I find It was reasonable for Air Canada to refuse to transport Dr. Serbinenko in the circumstances, as permitted by its tariff.
26. Under tariff rule 75(B)(3), I find Air Canada's liability is limited to the refund value of the unused portion of Dr. Serbinenko's ticket, which she does not claim here. Given my conclusion above, I find that Dr. Serbinenko is not entitled to recover replacement flight costs or lost income, up to the refund value of her ticket, that are related to the missed December 13, 2019 flight. Specifically, on the evidence before me, I find that Air Canada's refusal to transport Dr. Serbinenko was entirely due to her own prohibited conduct. So, I find Air Canada is not responsible for those costs under article 20 of the *Montreal Convention*, which has the force of law in Canada under the federal *Carriage by Air Act* (see *Wettlaufer v. Air Transat A.T. Inc.*, 2013 BCSC 1245). I also note that although Dr. Serbinenko provided proof of her replacement flight cost, I find she did not provide any documentary evidence showing that she missed work or lost income due to flight-related delays. So, even if I had found Air Canada improperly denied her boarding, I would not have allowed the lost income claim.
27. I find that Dr. Serbinenko is not entitled to the claimed \$886.93 for her replacement flight or \$945 for lost income. I deny Dr. Serbinenko's claims.

CRT FEES AND EXPENSES

28. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. Air Canada was successful but paid no CRT fees. Neither party claimed CRT dispute-related expenses. So, I order no fee or expense reimbursements.

ORDER

29. I dismiss Dr. Serbinenko's claims, and this dispute.

Chad McCarthy, Tribunal Member