



Civil Resolution Tribunal

Date Issued: March 16, 2021

File: SC-2020-005158

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Hulewicz v. Flair Airlines Ltd.*, 2021 BCCRT 287

B E T W E E N :

ALaura Hulewicz

APPLICANT

A N D :

FLAIR AIRLINES LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Micah Carmody

INTRODUCTION

1. This dispute is about lost baggage on a domestic flight.

2. The applicant, Alaura Hulewicz, boarded a flight with the respondent, Flair Airlines Ltd. One of the applicant's 2 checked bags did not arrive at the destination and has not been found. The applicant claims \$2,325 to replace their lost personal items, \$98.91 for interim necessities, and a \$105 refund of the baggage fee they paid.
3. The respondent says the Civil Resolution Tribunal (CRT) cannot resolve the dispute because the applicant agreed in the contract of carriage that any dispute would fall under the exclusive jurisdiction of the Canadian Transportation Agency (CTA). It also says it requires receipts to prove the value of items in a lost baggage claim.
4. The applicant is self-represented. In-house legal counsel Mohamed Barre represents the respondent.

JURISDICTION AND PROCEDURE

5. These are the CRT's formal written reasons. 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.
6. 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. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.
7. 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.

8. 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. I address below the respondent's argument about the CRT's jurisdiction.

ISSUES

9. The issues in this dispute are:
 - a. Should the CRT refuse to resolve this dispute under section 11(1)(a) of the CRTA?
 - b. If not, what were the applicable terms of the contract?
 - c. What compensation, if any, is the applicant entitled to?

EVIDENCE AND ANALYSIS

10. In a civil dispute like this one, the applicant must prove their claims on a balance of probabilities. However, a party seeking to rely on terms and conditions of a contract, in this case the respondent, must prove the existence and acceptance of those terms. The respondent provided no evidence in support of its submissions, despite having the opportunity to do so. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain my decision.
11. From the applicant's uncontested evidence, I find on March 28, 2020 they took a direct flight from Edmonton, AB to Vancouver, BC, operated by the respondent. They checked 2 bags, paying an additional \$105 fee for the second bag. Upon arrival in Vancouver, 1 of the 2 bags did not appear on the baggage carousel. Under instruction from one of the respondent's employees, the applicant completed the respondent's

“Property Irregularity Report” (PIR) and submitted it to the respondent. In the PIR, the applicant described the bag’s contents as books, clothing, makeup and hair products.

12. Over the next month, the applicant corresponded with representatives of the respondent about the missing baggage. As it became less likely the baggage would be found, the respondent requested receipts for the missing items. The applicant found that to be “an inappropriate solution” and filed a CRT claim. I infer that they did not have receipts, which I address below.

Should the CRT refuse to resolve this dispute under CRTA section 11(1)(a)?

13. Under section 10 of the CRTA, the CRT must refuse to resolve a claim that is not within the CRT’s jurisdiction. On its face, this is a claim for damages for breach of contract, which falls within the CRT’s small claims jurisdiction over debt or damages in section 118 of the CRTA. The claim is also below the CRT’s \$5,000 monetary limit. I find the CRT has jurisdiction over this claim.
14. Under section 11(1)(a)(i) of the CRTA, the CRT may refuse to resolve a claim within its jurisdiction if the claim would be more appropriate for another legally binding process or dispute resolution process.
15. In its Dispute Response, the respondent said its contract of carriage with the applicant contained a term under which the applicant agreed that if they were unable to resolve their issue directly with the respondent, then the CTA had exclusive jurisdiction.
16. On October 14, 2020, another CRT member issued a preliminary decision addressing the respondent’s jurisdiction argument. The CRT member concluded that the applicant did not have access to the contract of carriage containing the terms and conditions the respondent sought to rely on. The CRT member found the applicant only agreed that they could file a complaint with the CTA and did not agree that the CTA would have exclusive jurisdiction over claims about lost baggage.

17. I am not bound by the preliminary decision, but I agree with the CRT member's reasoning and conclusion. The respondent has not provided any additional evidence in this dispute, and has made only brief submissions. In particular, the respondent did not provide a copy of the tariff or any evidence indicating it brought the tariff to the applicant's attention. I find there is no basis to reach a conclusion different from that in the preliminary decision. I find the applicant did not agree that the CTA would have exclusive jurisdiction over claims about lost baggage.
18. The CRT member did not address whether the CTA may be a more appropriate forum for the dispute despite the applicant not having agreed to the CTA's exclusive jurisdiction.
19. As noted, the respondent provided no evidence and its submissions are brief. The respondent did not explain why the CTA may be a more appropriate forum.
20. The CRT has refused to resolve certain disputes between cellular telephone service providers and customers (*Tang v. Rogers Communications Canada Inc.*, 2020 BCCRT 1408, *Mekies v. Fido Solutions Inc.*, 2020 BCCRT 176). However, in of those decisions, the CRT referred to court decisions that said the *Telecommunications Act* included a clear expression by Parliament that disputes involving contracts to provide telecommunications services should be resolved by the Canadian Radio-television and Telecommunications Commission. I am not aware of an analogous provision in the *Canada Transportation Act* or the APPR, or analogous court decisions indicating disputes should be resolved by the CTA.
21. As a result, I decided to hear this dispute. I note the CRT has already decided a dispute involving the APPR, *McNabb v. Air Canada*, 2021 BCCRT 100.

Contract terms

22. The respondent relies on certain terms and conditions limiting compensation for lost baggage that it says are found in its tariff. A tariff is a document that sets out an air carrier's rates and terms and conditions and that normally makes up the "contract of

carriage” between the passenger and carrier. However, as noted above, there is no tariff in the evidence.

23. The applicant provided a copy of their flight itinerary. It says:

If you are denied boarding or your baggage is lost or damaged, you may be entitled to certain standards of treatment and compensation under the *Air Passenger Protection Regulations*. For more information about your passenger rights please contact your air carrier or visit the Canadian Transportation Agency’s website.

24. The itinerary also provides a website link to view the “tariff applicable to your travel”. Near the bottom, the itinerary says, “Local Domestic Tariff” and “Contract of Carriage” but there appears to be no active links to those documents.

25. The applicant says the tariff was inaccessible to them. They say when they clicked the link for the tariff it led to an error page. They say they only saw the *Air Passenger Protection Regulations* (APPR).

26. Embedded links to websites are generally unreliable evidence in a CRT proceeding because the information provided at the link may have changed since the dispute started. There is generally no way to verify that the information on the current website is the same as what the party who visited the link saw. As a result, I have not relied on any information that was only accessible by clicking on a link embedded in the itinerary.

27. In any contract, the essential terms must be communicated. On the evidence, I agree with the applicant that the respondent’s tariff was inaccessible to them. I find it not necessary to consider whether the applicant had an obligation to make inquiries about the inaccessible tariff because, as noted, there is no copy of the tariff in evidence. The respondent’s submissions refer to terms and conditions that are not before me. I find that the respondent has failed to prove that its tariff was incorporated into the contract and failed to prove the tariff’s terms.

Compensation for lost baggage

28. I find the APPR applies to this dispute, which was stated in the itinerary and is not disputed. Section 23(1) of the APPR requires airlines to refund a passenger's baggage fees if their baggage is damaged or lost. I find the respondent must refund the applicant \$105 for the baggage fee.
29. Section 23(1) of the APPR applies the same baggage liability limits for domestic flights as those the *Montreal Convention* sets out for international flights. The respondent says the *Montreal Convention* limits liability for lost baggage to 1,121 "special drawing rights" (SDR). SDR is the unit of account of the International Monetary Fund (IMF) that can be exchanged for IMF member currencies. The applicant says the respondent's liability is 1,288 SDR.
30. Article 22 of the Montreal Convention limits liability for lost, damaged or delayed baggage to 1,000 SDR. However, article 24 says the International Civil Aviation Organization will review Article 22's limits at 5-year intervals, and revisions are binding on the parties. I find the baggage liability limit for flights after December 28, 2019 is 1,288 SDR for each passenger.
31. Article 23 says conversion of SDR into national currency is calculated in accordance with the method applied by the IMF. I find 1,288 SDR is \$2,322 today.
32. The respondent says its tariff also limits reimbursement for necessary interim expenses to \$50. As noted above, I find the respondent cannot rely on the terms of a tariff it did not provide in evidence and the applicant was unable to view.
33. I agree with the applicant that the PIR does not disclose a \$50 limitation. I also accept the applicant's unchallenged evidence that the respondent's representatives who provided the PIR did not advise the applicant about a \$50 limitation. It is undisputed that the respondent has reimbursed the applicant nothing. I accept the applicant's drug store receipt as proof of the expenses and allow \$98.91 for interim expenses.

34. As for the lost personal items, I find the applicant is not required to provide receipts because they did not agree to the tariff's terms, which again are not proved. I also find it is unreasonable to expect a passenger to have a receipt for every item in a suitcase.
35. The applicant provided a detailed spreadsheet listing each item they lost. I find the applicant's evidence about the items is reliable. I accept their evidence that they used many of the items, such as makeup and hygiene products, on a daily basis. I also accept that the applicant was returning home from university, bringing books and other personal items. Although the applicant's list is more detailed than what they initially provided to the respondent, I accept that it took some time to account for all the missing items. One does not pack a bag anticipating the bag being lost.
36. The applicant's evidence included the purchase cost and replacement cost of most of the items, with supporting documentation for many. The respondent has not disputed any of the items' replacement costs.
37. The applicant claims \$2,325, which is more than the stated replacement cost of the items. They say several of the items have significant sentimental value, such as book signed by the author and a necklace gifted by a formerly estranged relative.
38. The usual starting point for damages is the replacement cost of the lost or destroyed items. This is because the replacement cost is most likely to restore the party to the position they would have been in if the loss had not occurred: *Nan v. Black Pine Manufacturing Ltd.* (1991), 1991 CanLII 1144 (BC CA). As for items of sentimental value, the general principle is that sentimental value cannot be considered because doing so would make assessment of damages too imprecise and uncertain: *Smith v. British Columbia*, 2011 BCSC 298.
39. I accept the applicant's replacement cost evidence. However, I find the makeup and hygiene products, which the applicant said were used regularly, would be partially depleted. I therefore reduce the replacement cost of those categories by 30%. The applicant provided no replacement cost for a laptop charger and a necklace. On a

judgment basis, I find these items are worth \$50. I have allowed nothing for sentimental value of any items. I find the applicant is entitled to \$1,635.20 for the lost items.

40. Together with the \$98.91 for interim expenses and the \$105 baggage fee refund, the applicant is entitled to \$1,839.11.
41. The *Court Order Interest Act* applies to the CRT. The applicant is entitled to pre-judgment interest on the \$1,839.11 damages award from April 18, 2020, which is 21 days after the flight when the APPR deems the baggage lost, to the date of this decision. This equals \$13.05.
42. 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. I find the applicant is entitled to reimbursement of \$125 in CRT fees. Neither party claimed any dispute-related expenses.

ORDERS

43. Within 14 days of the date of this order, I order the respondent to pay the applicant a total of \$1,977.16, broken down as follows:
 - a. \$1,839.11 in damages,
 - b. \$13.05 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$125.00 in CRT fees.
44. The applicant is entitled to post-judgment interest, as applicable.
45. Under section 48 of the CRTA, the CRT 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 CRT's final decision. The Province of British Columbia has enacted a provision under the *COVID-*

19 Related Measures Act which says that statutory decision makers, like the CRT, may waive, extend or suspend mandatory time periods. This provision is expected to be in effect until 90 days after the state of emergency declared on March 18, 2020 ends, but the Province may shorten or extend the 90-day timeline at any time. A party should contact the CRT as soon as possible if they want to ask the CRT to consider waiving, suspending or extending the mandatory time to file a notice of objection to a small claims dispute.

46. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT 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 CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Micah Carmody, Tribunal Member