Civil Resolution Tribunal

Date Issued: October 12, 2022

File: SC-2022-001281

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Mackoff v. Air Canada*, 2022 BCCRT 1121

B E T W E E N :

JOEL MACKOFF and MIA MACKOFF

APPLICANTS

A N D :

AIR CANADA

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Sherelle Goodwin

INTRODUCTION

1. This dispute is about alleged refusal to transport passengers by plane.

2. The applicants, Joel Mackoff and Mia Mackoff, booked seats on an international flight operated by the respondent airline, Air Canada. The applicants say the respondent misinterpreted its own COVID-19 policy and improperly refused to allow either of them

to board due to Mrs. Mackoff's positive COVID-19 test result 10 days earlier. The applicants say they are entitled to $2,400 each under the *Air Passenger Protection Regulations* (APPR) for "denial of boarding". The applicants also claim reimbursement of hotel, transportation and other expenses, but limit their total claim to $5,000, which is the small claims monetary limit for the Civil Resolution Tribunal (CRT).

3. Air Canada denies refusing to transport Mr. Mackoff, but acknowledges it refused to allow Mrs. Mackoff to board due to her positive test result. However, Air Canada says the APPR compensation guidelines for "denial of boarding" do not apply here. It also says the applicants failed to provide sufficient proof of loss, or mitigate their damages, as required by the parties' agreement, which includes the *Montreal Convention*.

4. Mr. Mackoff represents the applicants. An owner or employee represents Air Canada.

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.

ISSUES

9. The issues in this dispute are:

    a. Did Air Canada breach the parties' contract by refusing to transport either applicant?

    b. Do the APPR denial of boarding provisions apply here?

    c. If either answer is "yes", what is the appropriate remedy?

EVIDENCE AND ANALYSIS

10. In a civil proceeding like this one the applicants must prove their claims on a balance of probabilities (meaning "more likely than not"). I have read all the parties' submissions and weighed the evidence, but only refer to that which is relevant to explain my decision.

11. The applicants booked seats on a February 15, 2022 Air Canada flight from Los Angeles to Vancouver. Neither applicant boarded that flight. They travelled on an Air Canada flight the following day, February 16, 2022. None of this is disputed.

Breach of Contract

12. I find the parties entered into a contract when the applicants agreed to pay Air Canada and Air Canada agreed to fly them from Los Angeles to Vancouver on February 15, 2022. The terms of the contract include the COVID-19 requirements to enter Canada

13. The applicants provided a February 15, 2022 screenshot of Air Canada's website. It said that a passenger was permitted to fly to Canada with proof of a positive COVID-19 test result taken between 10 and 180 calendar days before departure. The provided example said if a positive test was taken on January 1st, the earliest flight departure allowed would be January 11, 2022. Further details about test requirements were included, which I find are not relevant to this dispute.

14. Although the applicants did not provide a copy of Mrs. Mackoff's February 5, 2022 COVID-19 test result, I accept that the test was positive, based on Mrs. Mackoff's signed statement. Further, Air Canada does not dispute it.

15. The applicants say that, using the example on the Air Canada website, they determined they were permitted to fly on February 15, 2022, as Mrs. Mackoff's positive COVID-19 test had been taken 10 calendar days before that, on February 5, 2022. In its submissions, Air Canada did not address this calculation or whether it breached the COVID-19 travel policy.

16. Based on the policy wording and example used on Air Canada's website, I agree with the applicants' calculations. I find Mrs. Mackoff met the COVID-19 test result requirement on February 15, 2022.

17. In his June 10, 2022 signed statement, Mr. Mackoff says he attempted to check in for the flight at the Los Angeles airport. He says an Air Canada agent said "they" were not permitted to fly that day, due to Mrs. Mackoff's February 5, 2022 positive test result. Mr. Mackoff says he spoke to the agent's supervisor and a local manager (A), who both confirmed the applicants were not permitted to fly until the following day, due to Mrs. Mackoff's test result. Mr. Mackoff said another Air Canada agent at the

Los Angeles airport booked “them” on a different flight to Vancouver for the following day. He specifically says that none of the Air Canada employees he spoke with told him he was permitted to board the February 15, 2022 flight without Mrs. Mackoff. Rather, Mr. Mackoff says the Air Canada employees referred to both applicants together when refusing them boarding and when rebooking their flights.

18. Air Canada says it never refused to allow Mr. Mackoff to board the February 15, 2022 flight. It also says that Mr. Mackoff asked to be rebooked with Mrs. Mackoff, which Mr. Mackoff specifically denies. Air Canada provided no supporting evidence such as witness statements of any of the 3 Air Canada employees Mr. Mackoff spoke to that day to support its argument.

19. In his statement, Mr. Mackoff described distinct conversations he had with each employee, provided the supervisor’s name, and submitted the diagram he drew while trying to explain to the employees how to count the 10 calendar days. As Mr. Mackoff’s witness statement includes so much detail, and as Air Canada has produced no contrary statement, I accept that Air Canada refused to transport both Mr. and Mrs. Mackoff on February 15, 2022 and so breached its contract with them. I will address the appropriate remedy further below.

Do the APPR denial of boarding provisions apply here?

20. The applicants say Air Canada denied boarding to them and so they are entitled to compensation under section 20 of the APPR. Air Canada says the APPR does not apply in these circumstances. For the below reasons I agree.

21. Section 1 of the APPR is entitled “Definitions and Interpretation”. Section 1(3) says that, for the purposes of the APPR, “there is a denial of boarding” when a passenger is not permitted to board the plane because there are less seats available than there are passengers who are booked and ready to travel in those seats. In other words, when the plane has been overbooked.

22. The applicants say section 1(3) does not strictly define “denial of boarding” as only occurring when a flight is overbooked, because the section does not use the word “define” or “mean”, which is used in sections 1(1) and 1(2). They also argue that section 1(3) does not contain words like “only” which would limit “denial of boarding” only to overbooking situations.

23. As explained at paragraph 26 of *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, when interpreting legislation “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”. I find the same modern approach applies to interpreting Regulations, as well as statutes. So, I look to other sections of the APPR which consider “denial of boarding”.

24. APPR sections 11(5)(b) and 12(4)(b) say that, in the case of a denial of boarding, an airline must deny boarding in accordance with section 15.

25. Section 15 of the APPR says an airline must not deny boarding unless it first asks all passengers if anyone is willing to give up their seat. It also prohibits an airline from denying boarding to a passenger already on board. If “denial of boarding” is necessary, the airline must give priority for boarding to certain passengers including children, disabled persons, families, and passengers previously denied boarding.

26. I find the wording of section 15 only logically applies to denied boarding due to overbooking. Setting up a process of prioritizing some passengers over others or asking for volunteers to give up their booked seats does not make sense in any context other than overbooking. So, I find section 1(3), when read in the context of the rest of the APPR, can only be interpreted to mean that “denial of boarding” explicitly means denial of boarding due to overbooking.

27. I acknowledge the applicants’ argument that the plain meaning of “denial of boarding” includes all denials, not just those based on overbooking. However, the plain meaning approach to statutory interpretation does not apply where there is a specific interpretation of a phrase, as I find is the case in APPR section 1(3).

28. On balance, I find the APPR denial of boarding provisions specifically apply to overbooking and do not apply to a refusal to board based on COVID-19 test results.

29. Based on Air Canada's undisputed Netline printout, the February 15, 2022 flight left Los Angeles with 71 unoccupied seats. So, I find there was no denial of boarding to the applicants, within the APPR's terms. As such, I find neither applicant is entitled to compensation for a denial of boarding under section 20 of the APPR.

30. However, I find the applicants are entitled to compensation for Air Canada's breach of its contract to transport them to Vancouver on February 15, 2022, as explained below.

Remedy

31. The *Montreal Convention* is an international treaty with the force of law in Canada under the federal *Carriage by Air Act* (see *Thibodeau v. Air Canada,* 2014 SCC 67). It applies to all international air carriage of baggage, cargo, and people, such as the applicants. The *Montreal Convention* limits the scope and type of claim that a person can make against an air carrier like Air Canada.

32. As the applicants' flight was international, they are bound by the terms of the *Montreal Convention*, in addition to the terms and conditions of their tickets (Tariff).

33. Article 19 of the *Montreal Convention* says an airline is liable for damages caused by delay. I find the applicants' travel was delayed because Air Canada refused to allow them to board the February 15, 2022 flight. It is undisputed the applicants flew from Los Angeles to Vancouver on February 16, 2022.

34. Article 19 also says an airline is not liable if it shows that its agents took all measures that could reasonably be required to avoid the damage, or that it was impossible to take such measures. Contrary to its submissions, I do not find Air Canada's agents took all reasonable measures to avoid the applicants' damages. Specifically, I find Air Canada's agents caused the applicants' extra expenses by misinterpreting the

COVID-19 travel restriction policy. So, I find Air Canada is not exempt from liability under Article 19.

35. Contrary to Air Canada's argument, I do not find that Mr. Mackoff failed to mitigate his damages by choosing not to fly on February 15, 2022. This is because, as noted above, I accept Mr. Mackoff's statement that Air Canada employees told him "they" could not fly on February 15, 2022, meaning neither applicant. In any event, I agree with the applicants that their hotel and cab expenses would be the same whether for 1 or 2 people and any difference in food expenses would be minimal.

36. Based on the applicants' receipts, I find they spent a total of $318.51 USD on food, hotel, and transportation in Los Angeles on February 15, 2022. The evidence shows Mrs. Mackoff paid a $150 USD flight change fee, although there is no indication Mr. Mackoff paid such a fee. The applicants did not explain how their submitted Vancouver travel expenses resulted from the delayed flight, so I find the Vancouver travel expenses are not compensable. However, I find the rest of the submitted expenses resulted from their delayed travel, caused by Air Canada's contract breach.

37. I find the applicants' proven damages are $468.51 USD. Based on the Bank of Canada's February 15, 2022 conversion rate, I find this equals $595.93 CAD.

38. Article 22(1) of the *Montreal Convention* limits the air carrier's damages caused by delay, and the limits are revised every 5 years. However, as the applicants' proven damages of $595.53 Canadian is well below the damages limit set out in Article 22(1), I find the limit does not apply here.

39. The *Court Order Interest Act* applies to the CRT. The applicants are entitled to pre-judgment interest on the $595.53 from the February 15, 2022 flight refusal to the date of this decision. This equals $3.88.

40. 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. So, I find the applicants are entitled to reimbursement of $175 in paid CRT fees. They claimed no dispute-related expenses.

ORDERS

41. Within 14 days of the date of this order, I order Air Canada to pay the applicants a total of $774.81, broken down as follows:

    a. $595.93 in damages,

    b. $3.88 in pre-judgment interest, and

    c. $175 in CRT fees.

42. The applicants are entitled to post-judgment interest, as applicable.

43. 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. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Sherelle Goodwin, Tribunal Member