



# Civil Resolution Tribunal

Date Issued: February 6, 2023

File: SC-2022-002969

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Welsh v. Flair Airlines Ltd.*, 2023 BCCRT 107

B E T W E E N :

MATTHEW WELSH and ANDREW NICKEL

**APPLICANTS**

A N D :

FLAIR AIRLINES LTD.

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Chad McCarthy

## INTRODUCTION

1. This dispute is about late airline flights. The applicants, Matthew Welsh and Andrew Nickel, both booked the same domestic flights with the respondent, Flair Airlines Ltd. (Flair). The flights both departed and arrived late. The applicants claim \$440.77 in compensation and a refund under the *Canada Transportation Act's Air Passenger Protection Regulations* (APPR). Flair initially denied any liability, but in its

submissions agrees Mr. Nickel was eligible for \$125 in flight delay compensation under the APPR.

2. Mr. Welsh represents the applicants in this dispute. An authorized employee represents Flair.

## **JURISDICTION AND PROCEDURE**

3. These are the formal 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.
4. 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.
5. 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.
6. 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.
7. Flair submitted late evidence, namely flight and weather information and related submissions. The applicants commented on the late evidence and submissions, Flair

responded to those comments, and the applicants replied to Flair's response. The applicants object to the late evidence, although they do not say whether they would be unfairly prejudiced by it. I find the evidence is relevant, the applicants fully responded to it, and the applicants are unlikely to be prejudiced by it. So, given the CRT's flexible mandate, I allow the late evidence because I find there is no unfairness in doing so.

## **ISSUE**

8. The issue in this dispute is whether the applicants' flights were late for reasons within Flair's control, and if so, does Flair owe \$440.77 in compensation?

## **EVIDENCE AND ANALYSIS**

9. 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 the parties' submissions and evidence but refer only to the evidence and arguments I find relevant to provide context for my decision.
10. The applicants together booked direct roundtrip flights with Flair from Vancouver, BC to Kitchener Waterloo, ON and back again. The outbound flight departed on March 18, 2022, and the return flight departed on March 21, 2022. The parties agree that the outbound and return flights were each delayed by between 3 and 6 hours.
11. Mr. Welsh says the outbound flight delay meant he would arrive in Kitchener Waterloo in the middle of the night and would be unable to access his pre-arranged accommodations. So, shortly before the flight departed, he emailed Flair that the delayed flight no longer met his travel needs, although Mr. Nickel still flew. Flair undisputedly offered no alternate travel arrangements that accommodated Mr. Welsh's needs. Under the APPR, the applicants seek \$65.77 for a ticket refund for Mr. Welsh's unused flights, \$125 in compensation for each of Mr. Welsh's and Mr. Nickel's outbound flight delays, and \$125 for Mr. Nickel's return flight delay.

12. In multiple emails shortly before the flights departed, Flair said that the flights were delayed because of flight crew requirements, including rest requirements. It is undisputed that delays caused by such crew requirements would be within Flair's control for the purposes of the APPR. However, Flair now says the outbound flights were delayed primarily because weather delayed the same airplane on an earlier flight, which was outside its control. The applicants say the delays were within Flair's control. As explained below, whether the delays were within Flair's control is relevant to whether Flair is liable to pay the claimed compensation and refund. I begin with the applicable law about Flair's obligations to the applicants as passengers, as follows.

### ***The APPR***

13. The APPR apply to commercial air travel in Canada, and the parties do not dispute that those regulations apply to the flights at issue here. The APPR provide compensation, including ticket refunds in some cases, for an airline's delayed flights, among other disruptions. The parties agree that Flair is a "small carrier" as defined in the APPR, and given the lack of contrary evidence I find that is likely the case. With that in mind, the applicable APPR sections state (my bold emphasis added):

- a. If a flight is at least 3 hours late due to situations **outside** the carrier's control, the carrier must provide free alternate travel arrangements, or failing that, a ticket refund (sections 10(3)(b), 18(1), and 18(1.1)). The refund may be chosen anytime before receiving a confirmed alternate travel reservation (section 18(1.3)).
- b. Situations outside the carrier's control include, among others, meteorological conditions or natural disasters that make the aircraft's safe operation impossible (section 10(1)(c)).
- c. Delays are also considered to be outside the carrier's control if they are directly attributable to an earlier delay or cancellation due to situations outside the carrier's control, if the carrier took all reasonable measures to mitigate the impact of the earlier delay or cancellation (section 10(2)).

- d. If a delay of at least 3 hours is **within** the carrier's control but is not for safety reasons, the carrier must also provide alternate travel arrangements or a ticket refund to a passenger who desires such arrangements (section 12(2)(c)).
  - e. If alternate travel arrangements offered due to a non-safety-related delay within the carrier's control do not accommodate the passenger's travel needs, the carrier must refund the unused portion of the ticket (section 17(2)).
  - f. If, less than 14 days before departure, a passenger is informed of a non-safety-related delay within the carrier's control, of at least 3 hours but less than 6 hours, a small carrier must pay the passenger \$125 in compensation for inconvenience. \$125 must be paid even if the passenger's ticket is refunded because alternate travel arrangements do not meet the passenger's travel needs (sections 12(2)(d), 19(1)(b)(i), and 19(2)(b)).
14. So, the above APPR sections provide different remedies for non-safety related flight delays within a carrier's control, and delays that are outside the carrier's control.

### ***Mr. Nickel's Return Flight***

15. Flair agrees that Mr. Nickel's return flight was delayed for non-safety-related reasons within its control, which a Flair email identified as "flight crew requirements." It is undisputed, and I find, Mr. Nickel is entitled to \$125 in compensation under APPR section 19(1)(b)(i) for that delay. I allow that aspect of the applicants' claim.

### ***The Applicants' Outbound Flights***

16. The applicants say the outbound flight delay was for non-safety-related reasons within Flair's control. As noted, multiple Flair emails shortly before departure said the delay was due to flight crew rest requirements, which were within Flair's control.
17. However, while not directly denying that flight crew rest requirements were a factor, Flair now says the "most significant" reason for the delay was "up-line weather" that was outside its control. Specifically, Flair says an earlier flight was diverted and delayed due to weather, which caused the applicants' outbound flight to be delayed

because it used the same airplane. I find Flair argues that the earlier flight's delay was due to weather beyond its control that made safe aircraft operation impossible, under APPR section 10(1)(c). I also find Flair argues that the parties' outbound flight delay was caused by the earlier delay, and so was also allegedly outside Flair's control under APPR section 10(2).

18. Turning to the evidence, I find evidence of an earlier flight delay, including the delay's cause and effects, is likely information that Flair controls or possesses, and that the applicants do not. Parties are told during the CRT process that relevant evidence must be provided, and I find weather and delay evidence is clearly relevant to Flair's defence in this dispute. Further, although not binding on me, I find persuasive the reasoning about evidence in the Nova Scotia Small Claims Court decision identified by the applicants, *Geddes v. Air Canada*, 2021 NSSM 27. In particular, at paragraphs 43 to 45, the court said that because an airline was the only party with knowledge of the reasons for and circumstances surrounding a flight cancellation, fairness required the airline to demonstrate with evidence that it was justified in cancelling the flight and denying compensation under the APPR. I find the same principle applies in this dispute, because Flair alleges that the delay was caused by a situation outside its control, and I find it is likely the only party with access to evidence about that.
19. First, Flair says the earlier flight was delayed on its way to a third city, when weather caused it to land at another airport before continuing to the third city. The airplane then flew from the third city to Kitchener Waterloo, and then to Vancouver, where Mr. Nickel boarded its outbound flight to Kitchener Waterloo. So, the airplane made 2 other complete flights between the original, allegedly delayed flight and the applicants' outbound flight. However, I find the evidence does not show whether those 2 intervening flights contributed to the outbound flight delay, or the reason for any further delay. There is also no evidence showing that Flair took any steps to make up for the alleged earlier delay on the 2 intervening flights.
20. Second, Flair submitted no witness evidence, including any evidence from the pilots, other flight crew, or others. However, Flair submitted an unaddressed and undated

email excerpt, apparently intended for delayed passengers, saying weather delayed the earlier flight. I find that excerpt is only Flair's assertion about the cause of the earlier flight delay. As discussed below, that assertion is not supported on the evidence before me, so I place little weight on it.

21. Third, Flair submitted excerpts of what it says was aircraft weather and flight information. Flair says this information showed poor weather caused the earlier flight to divert to a different airport on its way to the third city. I find the submitted evidence consists almost entirely of unexplained numbers, acronyms, and codes, whose meaning is far from obvious, and which I do not understand. Flair is a sophisticated litigant and has been a respondent in other CRT disputes. So, I find Flair likely knew, or should have appreciated, that this evidence was subject matter outside ordinary knowledge and experience. I find this evidence is highly technical, and requires expert evidence to explain whether it shows weather that made safe aircraft operation impossible, and if that weather diverted the earlier flight (see *Bergen v. Guliker*, 2015 BCCA 283 at paragraph 124 and *Schellenberg v. Wawanese Mutual Insurance Company*, 2019 BCSC 196 at paragraph 112).
22. However, there is no expert evidence before me. So, I find the submitted evidence is not sufficient to show the earlier flight was delayed due to weather that was severe enough to make the aircraft's safe operation impossible. Accordingly, under APPR section 10(1), I find the evidence does not show that the earlier flight's weather conditions caused a delay that was outside Flair's control.
23. Fourth, even if the earlier flight was delayed for situations beyond Flair's control, for the applicants' later outbound flight delay to also be considered beyond Flair's control, APPR section 10(2) says Flair must have taken all reasonable measures to mitigate the impact of the earlier delay. I find the submitted evidence does not show Flair took any steps to mitigate the earlier flight delay, and does not show that no mitigation measures were reasonably available. So, I find the section 10(2) mitigation requirement was not satisfied, and Flair has not shown the outbound flight delay was outside its control.

24. Beyond the earlier alleged weather delay, Flair does not argue that any other non-safety-related reason outside its control caused the applicants' outbound flight delay. So, for the above reasons, I find the evidence does not show the applicants' outbound was delayed for reasons outside Flair's control. I find the outbound flight was likely delayed because of flight crew requirements, including rest, which Flair originally told the applicants was the reason. As noted, that reason is within Flair's control.
25. I find this means Mr. Nickel is entitled to \$125 in compensation for the delayed outbound flight under APPR section 19(1)(b)(i).
26. Turning to Mr. Welsh, given that Flair undisputedly offered him no alternate travel arrangements, I find he is entitled to a refund of his ticket under APPR section 17(2). I find the undisputed flight reservation confirmation in evidence shows Mr. Welsh paid \$131.54 for the 2 identical tickets, and the remaining \$907.36 balance was satisfied by an unexplained transaction that likely did not cost the applicants anything. Mr. Welsh claims a refund of \$65.77, which is equal to half the \$131.54 paid for the 2 tickets. In the circumstances, I find Mr. Welsh is entitled to the claimed \$65.77 refund. As a result, I find he is also entitled to \$125 in compensation under APPR section 19(2)(b).
27. In summary, I allow the applicants' claims for a total of \$440.77.

### ***CRT Fees, Expenses, and Interest***

28. The *Court Order Interest Act* (COIA) applies to the CRT. I find that under the COIA, the applicants are entitled to pre-judgment interest on the \$440.77 owing. The applicants gave Flair an April 29, 2022 compensation deadline, which satisfied APPR section 19(4)'s maximum 30-day response period. So, I find interest is reasonably calculated from April 29, 2022 until the date of this decision. This equals \$6.11.
29. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. Here, I see no reason not to follow that general rule. The

applicants were successful, so I find they are entitled to reimbursement of \$125 in paid CRT fees.

30. I also allow the applicants' requested reimbursement of the proven \$13.73 postage and envelope expense for serving the Dispute Notice on Flair. Given that the existence of flight delays was undisputed, I dismiss the applicants' requested \$1.44 reimbursement for a flight tracker app. I also dismiss the applicants' \$22 reimbursement request for Flair-related documents, as those documents and their purpose are unexplained. Next, CRT rule 9.5(5) says the CRT does not award compensation for time spent except in extraordinary circumstances, which I find are not present here. So, I dismiss the applicants' \$555.60 request for dispute-related time and effort. Finally, I dismiss Flair's \$500 request for "costs," as the CRT does not award court-like costs, and Flair was unsuccessful in any event.

## **ORDERS**

31. I order that, within 30 days of the date of this order, Flair pay the applicants a total of \$585.61, broken down as follows:
- a. \$440.77 in debt,
  - b. \$6.11 in pre-judgment interest under the COIA,
  - c. \$125 in CRT fees, and \$13.73 in CRT dispute-related expenses.
32. The applicants are also entitled to post-judgment interest under the COIA, as applicable.
33. I dismiss the applicants' remaining expense reimbursement requests. I dismiss Flair's request for reimbursement of "costs."

34. 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.

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Chad McCarthy, Tribunal Member