



Civil Resolution Tribunal

Date Issued: January 16, 2024

File: SC-2023-000030

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Audette v. WestJet Airlines Ltd.*, 2024 BCCRT 038

BETWEEN:

JOHN WAYNE AUDETTE

APPLICANT

AND:

WESTJET AIRLINES LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Megan Stewart

INTRODUCTION

1. This dispute is about compensation for missing luggage.
2. John Wayne Audette says WestJet Airlines Ltd. (WestJet) lost his luggage while he was travelling home to Vancouver from Montreal. He claims \$1,961.81 as compensation for the lost luggage.

3. WestJet says Mr. Audette's luggage was delayed. So, it says Mr. Audette is only entitled to compensation for damages arising from the delay, not for the value of the luggage contents (to the maximum prescribed amount). WestJet says since it has already paid Mr. Audette \$338.19 for reasonable essential expenses he incurred during the delay, it does not owe him anything more. WestJet asks that I dismiss this dispute.
4. Mr. Audette is self-represented. WestJet is represented by legal counsel, Sean Hedley.

JURISDICTION AND PROCEDURE

5. 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.
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 without an oral hearing.
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.

Preliminary issue

9. WestJet says this proceeding is an abuse of process because Mr. Audette has another complaint about the allegedly lost luggage pending before the Canadian Transportation Agency (CTA). Mr. Audette says he withdrew his CTA complaint. Through CRT staff, I asked Mr. Audette to provide documentary evidence of the withdrawn CTA complaint, which he did. WestJet was offered the opportunity to comment on the additional evidence, which it did. Since it is clear Mr. Audette has now withdrawn his CTA complaint, I find the issue of whether this CRT proceeding is an abuse of process is moot. That is, it no longer gives rise to a live controversy between the parties. So, I have not considered it further.

ISSUE

10. The issue in this dispute is whether Mr. Audette is entitled to the claimed \$1,961.81 or another amount for his missing luggage.

EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, Mr. Audette as the applicant must prove his claims on a balance of probabilities (meaning more likely than not). I have read all the parties' submissions and evidence, but refer only to that which I find relevant to provide context for my decision.

The applicable law

12. The *Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention)* is an international treaty that establishes airline liability for lost, delayed or damaged luggage that is transported internationally. Article 17(3) of the *Montreal Convention* says if a passenger's checked luggage has not arrived more than 21 days after its expected arrival date, they are entitled to enforce the terms of the contract of carriage against the airline. Article 22(2) limits compensation for lost, delayed, or damaged luggage to 1,288 special drawing rights (SDR, about \$2,300

CAD) per passenger, unless the passenger made a special declaration of interest at the time the baggage was checked in and paid any required extra sum, which undisputedly did not occur here.

13. The federal *Air Passenger Protection Regulations* (APPR) apply the *Montreal Convention's* rules about liability for lost or damaged luggage to domestic services. This means under APPR section 23, where an airline is responsible for losing a domestic passenger's luggage, it must compensate them the same amount that would be payable under the *Montreal Convention*.

Background

14. The following background is undisputed.
15. On June 8, 2022, Mr. Audette and his family were scheduled to fly WestJet from Montreal to Vancouver, via Toronto. Mr. Audette checked 1 bag in Montreal, but it was not there when he landed in Vancouver. Mr. Audette immediately reported the missing luggage to WestJet. WestJet told Mr. Audette that once it found his luggage, it would arrange to have it delivered to his home address.
16. Over the next few weeks, Mr. Audette called WestJet several times to check his luggage's status. WestJet did not tell Mr. Audette his luggage was lost, only that it was working on returning his luggage to him. In the meantime, Mr. Audette purchased items to replace those in his missing luggage, including an electric shaver and underwear for \$311.63, and running shoes and socks for \$338.19. On July 1, WestJet delivered Mr. Audette's luggage to him by courier, 23 days after its expected arrival date.
17. On July 11, Mr. Audette requested compensation of 1,288 SDR under the APPR. WestJet offered Mr. Audette \$338.19 for his incidental purchases or \$450 in WestJet travel credit, plus an additional \$250 in travel credit. It denied Mr. Audette's request for the maximum payable compensation on the basis that his luggage had been returned to him.

18. Mr. Audette accepted WestJet’s offer of \$338.19 for some of his incidental purchases, but he was generally dissatisfied with WestJet’s response. Mr. Audette filed this application for dispute resolution with the CRT on January 2, 2023.

Mr. Audette’s missing luggage and incidental purchases

19. Mr. Audette says since his luggage was missing for more than 21 days it was “deemed lost”, and under the APPR, WestJet must compensate him in line with its domestic tariff (the contract between a carrier and its passengers). Rule 120 of the domestic tariff says that after a 21-day delay, WestJet will provide a settlement, summarized as follows:

- a. If no luggage value is declared, the lesser of the value of the delayed luggage and 1,288 SDR, or
- b. If the luggage value is declared, the lesser of the value of the delayed luggage and the declared sum.
- ...
- e. Whether or not a passenger declares a luggage value, WestJet’s liability shall not exceed a passenger’s “actual loss”, which must be proven.

It is undisputed that Mr. Audette did not declare any luggage value. However, he provided photographs of the luggage contents, which he took after the luggage was returned to him. Mr. Audette says that along with estimates of the individual items’ cost, he has provided sufficient evidence of the luggage contents’ value, which exceeds 1,288 SDR. So, he says he is entitled to a settlement of \$2,300 minus the \$338.19 WestJet has already reimbursed him, which is \$1,961.81.

20. Regarding “actual loss”, Mr. Audette says it does not matter that WestJet eventually returned his missing luggage to him. He says the important point is that since this happened more than 21 days after the luggage’s expected arrival date and for the tariff’s 21-day delay window to serve any meaningful purpose, he must be compensated as though his luggage was lost for good. In support of this, Mr. Audette

relies on CTA Decision No. 36-C-A-2018 (Scordo). In Scordo, a passenger's luggage arrived 25 days after its expected arrival date. Even so, the CTA deemed the luggage lost, and found Air Canada liable to pay \$1,811.76 for the value of its contents, less any amounts already paid, because the luggage had arrived more than 21-days late.

21. WestJet disagrees with this position. It points to other CTA decisions that have departed from Scordo. In these decisions, the CTA found Article 17(3) of the *Montreal Convention* creates a "rebuttable presumption" of luggage loss where a passenger's luggage is located and returned to them after 21 days (see, for example, CTA Decision No. 98-C-A-2020 and CTA Decision No. 98-C-A-2021). So, while the CTA found the passengers were entitled to reimbursement for reasonable incidental expenses, they were not entitled to compensation for the value of their luggage contents, since it determined their luggage was not ultimately lost.
22. I am not bound by prior CTA decisions. However, I find that reimbursing Mr. Audette for the value of his luggage contents in these circumstances, where his luggage was returned to him shortly after the expiry of the 21-day delay window, would overcompensate him. In *Maruf v. Air China Limited*, 2021 BCCRT 796, a tribunal member reached the same conclusion. There, the applicant's luggage was missing for about 3 months before it was returned to her. Though the tribunal member awarded compensation for reasonable purchases the applicant had to make while her luggage was missing, he found ordering full reimbursement of the value of the luggage contents would result in a windfall. Again, previous CRT decisions do not bind me, but I agree with the reasoning in *Maruf*.
23. Mr. Audette suggests that rather than a windfall, awarding the full value of the luggage contents is better characterized as a "significant financial penalty" against WestJet. I find there is nothing in the *Montreal Convention* or the APPR to support a finding that liability for lost, damaged or delayed baggage includes financial penalties, or that such a penalty would be payable to a passenger in any event.
24. For these reasons, I find Mr. Audette is not entitled to the claimed \$1,961.81.

25. Having said that, I find the \$338.19 WestJet paid Mr. Audette does not fully compensate him for his incidental expenses. WestJet says the replacement shaver and 4 pairs of underwear Mr. Audette bought were not reasonably essential so it did not reimburse him for those, but it does not explain why. I find WestJet's position arbitrary, given it determined a pair of running shoes and 4 pairs of socks, which I find similarly necessary to a shaver and underwear, were reasonably essential. Based on the reasoning in *Kalynn v. Air Canada*, 2022 BCCRT 809, *Brown v. WestJet Airlines Ltd.*, 2023 BCCRT 456, and *Khabazian-Isfahani v. WestJet Airlines Ltd.*, 2012 BCPC 09-28034 (an unreported decision) with which I agree, I find all the items here were essential purchases reasonably made in the context of Mr. Audette's missing luggage. The purchases were supported by receipts, and I find the items' costs were not excessive. I note the vice chair in *Brown* found the \$234.39 expense of an electric shaver excessive. However, based on the circumstances here, including the much longer delay in delivering the luggage, I have reached a different conclusion. I order WestJet to pay Mr. Audette \$311.63 for a replacement shaver and underwear.

CRT FEES, EXPENSES, AND INTEREST

26. The *Court Order Interest Act* (COIA) applies to the CRT. Mr. Audette is entitled to pre-judgment interest on the \$311.63 damages award from June 28, 2022, the date he submitted his request for incidental expenses to WestJet, to the date of this decision. This equals \$18.05.

27. 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. As Mr. Audette was partly successful, he is entitled to \$62.50 for half his paid CRT fees. Neither party claimed dispute-related expenses.

ORDERS

28. Within 14 days of the date of this order, I order WestJet to pay Mr. Audette a total of \$392.18, broken down as follows:

- a. \$311.63 in damages, as reimbursement for incidental expenses,
- b. \$18.05 in pre-judgment interest under the COIA, and
- c. \$62.50 in CRT fees.

29. Mr. Audette is entitled to post-judgment interest, as applicable.

30. I dismiss the balance of Mr. Audette's claims.

31. 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.

Megan Stewart, Tribunal Member