Civil Resolution Tribunal

Date Issued: February 14, 2024

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Visscher v. Air Canada*, 2024 BCCRT 146

B E T W E E N :

HUIBERT VISSCHER, SANDRA SOFIA BROENINK, and SOFIE ROSE VISSCHER

APPLICANTS

A N D :

AIR CANADA

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Christopher C. Rivers

INTRODUCTION

1. This dispute is about compensation for a canceled flight.

2. Huibert Visscher, Sandra Sofia Broenink, and Sofie Rose Visscher booked tickets to fly from Aruba to Vancouver, with stops in Charlotte and Toronto. Air Canada

operated the final leg from Toronto to Vancouver. Due to a snowstorm in Toronto, Air Canada rebooked the applicants on a new flight from Aruba to Vancouver, with stops in Chicago and Seattle. The applicants say despite apparently rebooking them, Air Canada did not issue tickets for the revised itinerary, leaving them stranded in Aruba until they could book a new flight. I find they are arguing Air Canada was negligent in arranging the revised itinerary.

3. The applicants claim $3,000 in compensation under the *Air Passenger Protection Regulation* (APPR) and $2,816.24 in damages for hotel costs, transportation, and meals.

4. The small claims monetary limit at the Civil Resolution Tribunal (CRT) is $5,000. Nothing prevents a party from providing evidence about debt or damages over $5,000, however the CRT can only order a maximum of $5,000 in damages. The applicants acknowledge they are limited to $5,000 in damages, so I find they have agreed to abandon any portion of an award for damages that exceeds $5,000.

5. Air Canada says it is not liable. It makes a number of arguments, including that it has met its obligations under the APPR and its contract with the applicants, that the applicants did not properly mitigate their damages, that the applicants failed to take necessary steps to confirm the new itinerary, and that the applicants did not suffer damages as they allege. It asks me to dismiss the applicants’ claim.

6. The applicants are represented by Mr. Huibert Visscher. The respondent is represented by an employee.

7. For the reasons that follow, I allow the applicants’ claim in part.

JURISDICTION AND PROCEDURE

8. These are CRT’s formal written reasons. The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). CRTA section 2 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.

9. CRTA section 39 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.

10. CRTA section 42 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.

11. Where permitted by CRTA section 118, 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

12. The issues in this dispute are:

    a. Did Air Canada fulfill its obligations under the APPR? If not, are the applicants entitled to compensation under the APPR?

    b. Was Air Canada negligent? If so, what are the applicants' damages?

EVIDENCE AND ANALYSIS

13. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities. This means "more likely than not". I have read all the parties' submissions and evidence but refer only to the evidence and argument that I find relevant to provide context for my decision. Despite having the opportunity to provide documentary evidence, Air Canada did not do so.

Background

14. I find the parties entered a contract when the applicants, through an agent, agreed to pay Air Canada and Air Canada agreed to fly them from Toronto to Vancouver as the final leg of a series of flights beginning in Aruba on March 3, 2023.

15. On that date, the applicants were scheduled to fly with American Airlines from Oranjestad, Aruba to Charlotte and then to Toronto. Air Canada would then fly the applicants from Toronto to Vancouver. Due to a snowstorm in Canada, Air Canada cancelled the applicants' flight.

16. On March 3, 2023, Air Canada emailed Mr. Visscher to say the applicants' previous flight AC 103 (Toronto to Vancouver) has been changed to UA 1650 (Aruba to Chicago) + UA 1046 (Chicago to Seattle) + AC 8801 (Seattle to Vancouver). The first two flights in the revised itinerary were operated by United Airlines.

17. The email showed three flights marked in orange as "Previous" – AA 875 (Aruba to Charlotte), AA 1745 (Charlotte to Toronto), and AC 103. The table also showed three flights marked in blue as "New" – UA 1650, UA 1046, and AC 8801.

18. Throughout their submissions, Air Canada argues it was only responsible for the final leg of the trip, from Toronto to Vancouver. It notes, accurately, that the applicants had different itinerary numbers for the American Airlines and Air Canada legs of their flights.

19. However, Air Canada sent the applicants an email advising of the change to *all* their flights. The email specifically addressed the original flights that would have been operated by American Airlines from Aruba to Charlotte to Chicago. Despite this change being a fundamental and central issue to the dispute, Air Canada does not provide any explanation for what happened. It does not say if or how it cancelled the applicants' original flights on American Airlines or how it chose to rebook the applicants on United Airlines.

20. In respect of the email changing the itinerary, Air Canada only says two things. First, Air Canada says it’s legal obligation was limited to rebooking the applicants on an alternate flight from Toronto to Vancouver. As the revised itinerary shows, it did not do that.

21. Second, Air Canada says it only had a responsibility to rebook the applicants for tickets with Air Canada’s “stock number.” However, it does not explain why that is its obligation or how the applicants’ flights with American Airlines then came to be cancelled without its involvement.

22. When a party fails to provide relevant evidence without sufficient explanation, an adjudicator is entitled to draw an adverse inference. An adverse inference is where an adjudicator assumes a party has failed to provide relevant evidence because the missing evidence would not support their case. If Air Canada was only responsible for the last leg of the itinerary, I would expect it to explain how and why the applicants’ entire itinerary for departing Aruba were changed. If it was only responsible for the flight from Toronto to Vancouver, I would expect it to explain why it apparently rebooked the applicants from Aruba to Vancouver, via Chicago and Seattle. Finally, I would also expect Air Canada to provide evidence about what steps it undertook in rebooking the applicants and what role, if any, American Airlines had.

23. Since it does none of that, I make an adverse inference that Air Canada was responsible for the entire itinerary, even if the initial legs of the itinerary were operated by other airlines. In other words, I find Air Canada is responsible for the applicants’ entire flight, from Aruba to Vancouver.

24. Air Canada’s email set out the revised itinerary’s details. Instead of leaving Aruba at 4:05pm on March 3, the applicants would depart at 2:40pm on March 4. Instead of arriving in Vancouver at 10:08am on March 4, they would arrive at 6:58am on March 5.

25. Finally, Air Canada’s email had a link for Mr. Visscher to follow to confirm the new flights and instructions to click it. He says he followed the email’s instructions. The

applicants provided a screenshot of a website they say loaded after they followed the link. The screenshot shows the new flights from Aruba to Seattle, noting the layover in Chicago.

26. Since the revised itinerary began the following day, the applicants left the airport and arranged for a hotel.

27. On March 4, the applicants returned to the airport, but United Airlines was unable to check them in for their revised itinerary.

28. The applicants say they attempted to contact Air Canada but were unsuccessful. They contacted their travel agent by email. An email chain between the applicants and their travel agent shows the travel agent saying she contacted the airlines, but none of them were able to resolve the issue.

29. Air Canada did not provide any further assistance to the applicants. The applicants ultimately flew home with a different airline, leaving Aruba on March 6, and arriving in Vancouver on March 7 at 12:37am. This means the applicant's arrival in Vancouver was delayed by 62 hours and 29 minutes from their original itinerary and by 41 hours and 39 minutes from their revised, but unsuccessful, itinerary.

APPR – Original Itinerary

30. What then, if anything, is Air Canada's obligation to the applicants?

31. The parties' rights and obligations for these flights are governed by Air Canada's tariff and the APPR.

32. Neither party provided a copy of Air Canada's tariff, so I have not applied any of its specific terms. Instead, I am able to determine only the most basic terms of the parties' contract. On the basis of my earlier adverse inference, I find Air Canada was obliged to transport the applicants from Aruba to Vancouver.

33. Under the APPR, Air Canada, as a carrier, has different obligations whether issues that arise are considered to be within or outside of their control.

34. APPR section 10(1) addresses circumstances where there is cancellation, delay, or denial of boarding as a result of circumstances outside a carrier's control. Air Canada argues the original flight's cancellation was due to the weather in Toronto, which is covered by section 10(1)(c) – meteorological conditions. The applicants do not deny the original cancellation was due to weather, so I find it was.

35. Under APPR section 10(3)(c), where the issue is outside of the carrier's control, the carrier must provide alternate travel arrangements or a refund pursuant to APPR section 18.

36. APPR section 18 requires a carrier to provide passengers, free of charge, a confirmed reservation on the next available flight from the airport to the destination departing within 48 hours. The APPR does not place any obligations on the carrier to provide accommodations for issues outside of the carrier's control. In this case, I find Air Canada met its obligation by providing a revised itinerary to Mr. Visscher.

37. I note Air Canada argues that the applicants provided no evidence they accepted the new itinerary. I infer it is alleging the applicants failed to confirm the new flights, which is why Air Canada did not issue tickets.

38. To the contrary, Mr. Visscher explicitly stated he followed the instructions set out in the email, which included confirming the flight, and I find the provided screenshot is evidence he did so. As noted above, Air Canada provided no evidence in this dispute. So, I find it has not proved this allegation.

39. Since the original flight's cancellation was outside of Air Canada's control, the applicants are not entitled to compensation for that cancellation under the APPR.

APPR – Revised Itinerary

40. I turn now to the revised itinerary, which routed the applicants through Chicago and Seattle. As noted above, the applicants were unable to board in Aruba for the first leg of their revised itinerary.

41. The applicants say Air Canada failed to issue new tickets despite confirming the reservation. In support, the applicants provided an email from their travel agent. In it, the travel agent writes they were informed by a United Airlines representative that Air Canada did not reissue the ticket. This is double hearsay. While the CRT may accept hearsay evidence in some circumstances, I find I cannot accept the double hearsay evidence about whether or not Air Canada reissued the ticket.

42. However, the applicants directly raised the issue of whether or not Air Canada issued tickets in their submissions. Other than its argument that Mr. Visscher did not confirm the flights, which I have already rejected, Air Canada did not provide any explanation for why the applicants were otherwise denied boarding.

43. Similar to above, I must consider Air Canada's failure to provide relevant evidence. If Air Canada had issued the tickets, I would expect it to say so and to provide evidence proving it. Since it does not, I make an adverse inference that Air Canada did not properly issue the tickets to the applicants. This led directly to the applicants being unable to board pursuant to the revised itinerary.

44. APPR section 3 addresses denial of boarding. While not binding on me, a CRT member has previously considered this provision in *Mackoff v. Air Canada*, 2022 BCCRT 1121.

45. In *Mackoff*, the CRT considered section 3 in the context of the APPR as a whole. It found section 3 is intended to specifically apply to overbooking. This is consistent with other CRT decisions, as well as non-binding decisions from the Canadian Transportation Agency.[1] I agree with the reasoning and adopt it here. There is no allegation the revised flight was overbooked. So, I find the applicants were not denied boarding, as defined in the APPR.

46. To the extent the applicants claim delay under the APPR, I disagree. I find the APPR contemplates delay of flights, which then have the practical result of delay to passengers. In these circumstances, there is no evidence the flights in the revised

[1] See, eg: CTA Decision No. 18-C-A-2023, CTA Decision No. 136-C-A-2021

itinerary were delayed. The issue was that the applicants were unable to board the flight.

47. So, I find no provisions of the APPR entitle the applicants to compensation under the revised itinerary.

Negligence

48. However, I find the applicants' submissions include an argument that Air Canada was negligent in arranging their revised itinerary. I agree. My reasons follow.

49. As stated in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, the test for negligence requires the applicants to prove 4 things: 1) Air Canada owed them a duty of care, 2) Air Canada breached the standard of care, 3) the applicants sustained a loss, and 4) the loss was caused by Air Canada's breach.

50. Here, given it was providing a service for pay to the applicants, I find Air Canada owed the applicants a duty of care. I find Air Canada's failure to issue tickets was a breach of its duty of care. As a result of being unable to fly back to Vancouver, the applicants sustained a loss by paying for accommodation, food, and transportation while stranded in Aruba.

51. While neither party raised the *Montreal Convention*, I must consider whether it limits the applicants' claim. The *Montreal Convention* is an international treaty with the force of law in Canada under the federal *Carriage by Air Act.*[2] 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.

52. 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, known as the tariff. As noted above, there is no copy of the tariff in evidence.

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[2] See: *Thibodeau v. Air Canada,* 2014 SCC 67

53. Article 19 of the *Montreal Convention* says an airline is not liable for damages caused by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage, or that it was impossible for it to take such measures.

54. Given my findings above, I do Air Canada has not proven that it and its agents took all reasonable measures to avoid the applicants' damages. Specifically, I find Air Canada's agents caused the applicants' extra expenses by failing to issue tickets as set out in Air Canada revised itinerary. So, I find Air Canada is not exempt from liability under Article 19.

55. The applicants claim they spent $2,070 United States dollars on hotel, meals, car rental, and gas after Air Canada cancelled their initial itinerary. They provided receipts totaling $2,010.02 US dollars, and a further receipt for an ATM withdrawal of $100 US dollars they say they spent on taxis and other things. The applicants say the exchange rate at the time was 1.3605 Canadian dollars per United States dollar.

56. Air Canada does not dispute the exchange rate. Air Canada flatly denies the applicants suffered any "loss, damage, or expense as alleged or at all" but did not provide any rationale for that position.

57. Since Air Canada's breach arose when it failed to properly issue tickets for the revised itinerary, it is only liable to damages as a result of that error. This means the applicants are not entitled to damages for costs they incurred prior to the commencement of their itinerary.

58. So, I find the applicants are entitled to damages for expenses incurred after March 4, 2023 at 2:40pm, when their revised itinerary was set to begin. The total of the applicants' receipts for hotel, food, and transportation during the relevant period is $1,374.61 US dollars. I do not allow the applicants' claim for $100 US dollars in cash, as they did not provide any receipts to show how that money was spent.

59. Given the undisputed exchange rate, the applicants are entitled to $1,870.16 Canadian dollars in damages for negligence.

60. While Air Canada argues Rule 80(A)(1) of its Tariff says schedules are not guaranteed and do not form part of the Contract of Carriage, it did not provide a copy of the Tariff. Since I am unable to review the Tariff, in whole, I do not place any weight on Air Canada's provision of a single term given the lack of surrounding context.

Conclusion

61. The *Court Order Interest Act* applies to the CRT. The applicants are entitled to pre-judgement interest on their damages from March 6, 2023, the day they left Aruba, to the date of this decision. This equals $85.33.

62. Under CRTA section 49 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 see no reason in this case not to follow that general rule. In this case, the applicants were partially successful, so I find they are entitled to $87.50, being half of the $175 they paid in tribunal fees. Neither party claimed any dispute related expenses.

ORDERS

63. Within 14 days of the date of this order, I order Air Canada to pay the applicants a total of $2,042.99, broken down as follows:

    a. $1,870.16 in damages for negligence,

    b. $85.33 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $87.50 in CRT fees.

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

65. I dismiss the applicants' remaining claims.

66. 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.

Christopher C. Rivers, Tribunal Member