



Civil Resolution Tribunal

Date Issued: June 17, 2024

File: SC-2023-005759

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Cheung v. Air Canada*, 2024 BCCRT 559

BETWEEN:

JANICE CHUNG YAN CHEUNG

APPLICANT

AND:

AIR CANADA

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Megan Stewart

INTRODUCTION

1. This dispute is about compensation for a delayed flight.
2. Janice Chung Yan Cheung bought a ticket on Air Canda from Vancouver to Hong Kong, via Tokyo. Ms. Cheung's flight to Tokyo was delayed, meaning she would have missed her connection to Hong Kong. So, Air Canada re-booked her on a direct flight

from Vancouver to Hong Kong. The direct flight arrived 6 hours and 18 minutes after Ms. Cheung's originally scheduled arrival time. Ms. Cheung says she is entitled to \$700 in compensation for the delay under the *Air Passenger Protection Regulations* (APPR). She claims this amount in damages.

3. Air Canada says Ms. Cheung's flight to Tokyo was delayed due to an unforeseen maintenance issue on an earlier flight. Air Canada says since the maintenance issue was safety-related, it was not required to provide Ms. Cheung any monetary compensation. Air Canada says it made alternate travel arrangements for Ms. Cheung in accordance with the APPR, and owes her nothing more. So, it asks that I dismiss this dispute.
4. Ms. Cheung is self-represented. An employee represents Air Canada.

JURISDICTION AND PROCEDURE

5. These are the Civil Resolution Tribunal's (CRT) 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 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. 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 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 an oral hearing is not necessary in the interests of justice.
7. 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 court.

8. Ms. Cheung asked that Air Canada provide specific evidence to prove what it says about the unforeseen mechanical issue, and to determine if instead, the delay was a consequence of planned maintenance. I note she asked for this evidence during her opportunity to provide evidence and submissions, and before Air Canada had had its turn. Subsequently, Air Canada produced the requested documents, so I find Ms. Cheung's request was premature. I decline to order production of any additional documents.

ISSUE

9. The issue in this dispute is whether Ms. Cheung is entitled to the claimed \$700 for her flight delay under the APPR.

EVIDENCE AND ANALYSIS

10. As the applicant in this civil proceeding, Ms. Cheung must prove her claims on a balance of probabilities, meaning more likely than not. I have read all the parties' submissions and evidence, but refer only to information I find relevant to explain my decision.
11. The following background is undisputed. In December 2022, Ms. Cheung bought a ticket on Air Canada from Vancouver to Hong Kong, connecting in Tokyo. On the morning of March 5, 2023, the date of her departure, Ms. Cheung received notification that her flight to Tokyo (flight AC3) had been delayed by two hours due to a maintenance issue. Had Ms. Cheung travelled on the delayed flight AC3, she would have missed her connection in Tokyo, which departed on time. So, Air Canada re-booked her on its direct flight from Vancouver to Hong Kong departing March 5 at 11:35pm. The direct flight was slightly delayed, and left Vancouver at 12:00am on March 6.
12. Ms. Cheung initially claimed \$1,000 for the delay under APPR section 19(1)(iii), but in submissions she reduces this amount to \$700 under section 19(1)(ii), due to the

delay being between six and nine hours. She also says Air Canada did not explain why her request for compensation was denied, contrary to APPR section 19(4).

13. The APPR applies to flights to and from Canada, including connecting flights, so I find it applies to Ms. Cheung's flights. I also find Air Canada's International Tariff forms part of the contract the parties formed when Ms. Cheung bought her ticket, and applies to her flights. I find the tariff, an excerpt of which is in evidence, largely mirrors Air Canada's obligations in the APPR related to flight delays, though I note one relevant difference below.
14. Ms. Cheung includes Air Canada's alleged breach of APPR section 19(4) in her request for monetary compensation. However, in a recent decision *Isaacs v. Air Canada*, 2024 BCCRT 542, a tribunal member found there are no provisions in the APPR or its parent legislation, the federal *Canada Transportation Act*, which entitle a passenger to compensation for an airline's failure to comply with this section. The tribunal member noted sections 32 and 33 and the Schedule to the APPR list various administrative monetary penalties payable for a contravention of the APPR. The tribunal member also noted the Schedule indicates a maximum \$25,000 penalty for a contravention of APPR section 19(4). The CRT has no jurisdiction to administer penalties under the *Canada Transportation Act*, so the tribunal member declined to make findings about whether Air Canada breached section 19(4). While other CRT decisions are not binding on me, I agree with the reasoning in *Isaacs*, and I apply it here. I make no findings about whether Air Canada breached APPR section 19(4) as Ms. Cheung alleges.
15. The APPR sets out a carrier's obligations when flights are delayed, though these are different for small carriers and large carriers. Air Canada is undisputedly a large carrier. The obligations and available compensation also depend on whether the delay was within or outside of the carrier's control.

Was the delay within or outside of Air Canada's control?

16. Ms. Cheung says the delay was within Air Canada's control. Air Canada says the delay was within its control, but required for safety reasons.
17. Air Canada says it assigned the aircraft originally intended to operate the March 5 AC3 flight (Fin 852) on March 2. It says on Fin 852's arrival in Vancouver on March 4, three cabin window seals were found to be leaking moisture. Maintenance reports in evidence confirm the leaks. This maintenance issue had to be addressed for safety reasons. So, a replacement aircraft (Fin 845) was pulled from its scheduled plan (the fin swap) to operate a return flight to Seoul on March 4 and 5, and then operate flight AC3 on March 5. Air Canada's business records show Fin 845 was the first available aircraft for the fin swap. They also show both the outbound flight to Seoul and the inbound flight to Vancouver were delayed by 100 minutes due to the fin swap. Air Canada says this had knock-on effects for flight AC3.
18. Ms. Cheung says it is reasonable to assume the leaky seals could have been discovered as part of Fin 852's pre-flight inspections before March 4, and possibly even before Fin 852 was assigned to the March 5 AC3 flight. I find she is suggesting the leaks existed before Fin 852's March 4 inbound flight. She also appears to suggest an operational decision was made to delay a planned maintenance inspection of the window seals, and that this decision was within Air Canada's control. She says had the leaks been discovered earlier and had Air Canada initiated an earlier fin swap, a different aircraft might have been available to mitigate the delays to the Seoul flights and the subsequent AC3 flight.
19. I disagree the leaks could have been discovered before March 4. The maintenance reports show Fin 852 was immediately grounded on discovery of the leaks, and steps were taken to repair or replace the seals. I find this shows the leaks were clearly a safety issue that prevented Fin 852 from flying until they were fixed. Had the leaks been pre-existing or discoverable through pre-flight inspections before March 4, I find Fin 852 would likely have been grounded at that point, and not continued to fly. As for the suggestion that Air Canada made an operational decision to delay a planned

maintenance inspection of the window seals, I find this is purely speculative. Given the important safety function of window seals, I find the leaks were likely an unexpected malfunction that were addressed immediately upon discovery.

20. Air Canada relies on a guide from the Canadian Transportation Agency that sets out different types of flight disruptions within and outside of a carrier's control. It describes an unexpected mechanical malfunction as a disruption that is within a carrier's control but required for safety purposes. Ms. Cheung does not challenge this description, and I accept it is accurate. I find Fin 852's disruption was required for safety purposes.
21. APPR section 11 applies when a delay is within a carrier's control but required for safety purposes. Section 11(2) says a delay that is directly attributable to an earlier delay within the carrier's control but required for safety purposes is also considered to be within the carrier's control but required for safety purposes, if the carrier took all reasonable measures to mitigate the delay's impact. This is the "knock-on effect".
22. Here, I find the delay caused by Fin 852's leaky window seals on March 4 caused a knock-on effect for AC3 on March 5 for the reasons explained above.

Air Canada's mitigation of the delays

23. Ms. Cheung questions whether Air Canada took all reasonable measures to mitigate the impact of the delay.
24. The evidence shows the fin swap happened within 1 hour and 39 minutes of Fin 852 arriving in Vancouver on March 4, which I find was reasonable. Further, Air Canada submitted evidence of the relevant aircraft schedule for March 5 and 6 that shows it did not have availability to pull another aircraft from its scheduled plan to ensure flight AC3 departed on time on March 5. In her reply submissions, Ms. Cheung says two of Air Canada's 31 Boeing 787-9 aircraft were not shown on the schedule, which suggests they could have been used for flight AC3. As it was raised in her reply submissions, Air Canada did not have a chance to respond to this allegation. In any event, I find there are two problems with Ms. Cheung's argument. First, she provided no evidence Air Canada's Boeing 787-9 fleet includes 31 aircraft, and not the 29

shown on the schedule. Second, even if Air Canada's fleet does have 31 aircraft, this does not mean the missing two were available for flight AC3. I find it reasonably likely that if aircraft were not on the schedule Air Canada provided, they were not available to fly.

25. Based on the above, I find Air Canada took all reasonable measures to mitigate the impact of the earlier delay required for safety purposes.

Did Air Canada comply with its obligation to make alternate arrangements?

26. Under APPR 17(1)(a), where there is a knock-on effect attributable to a delay required for safety purposes, a large carrier must make alternate travel arrangements on the next available flight it operates, or on a carrier it has a commercial agreement with. The route must be reasonable, and the flight must depart within nine hours of the passenger's original departure. The APPR does not provide for monetary compensation in these circumstances.

27. Ms. Cheung says Air Canada could have re-booked her on a later connection out of Tokyo on a carrier Air Canada has a commercial agreement with, rather than on the direct Vancouver to Hong Kong flight. It is undisputed Air Canada did not operate this later connecting flight. Ms. Cheung says if Air Canada had re-booked her on the later connection, her arrival into Hong Kong would only have been delayed by 78 minutes, instead of by 6 hours and 18 minutes. Ms. Cheung says Air Canada bears the burden of proving the later connecting flight lacked seat availability, which it has not done. Air Canada disputes there was availability on the later connecting flight, and says Ms. Cheung has not proven otherwise.

28. In *Welsh v. Flair Airlines Ltd.*, 2023 BCCRT 107, the respondent airline alleged a delay was due an earlier weather delay outside of its control. The tribunal member found evidence of the earlier delay was likely information the airline controlled or possessed, and the applicant did not. He found fairness required the airline to prove the earlier weather delay was outside of its control and so it was justified in denying the applicant compensation under the APPR.

29. I find the situation in *Welsh* is different to the situation here. I find whether there was seat availability on another carrier was not information Air Canada clearly controlled or possessed, since the nature of their commercial agreement is not in evidence. Rather, I find this was information Ms. Cheung could have accessed had she made the relevant inquiries. Since she is the party alleging there was seat availability on the later flight, I find she bears the onus of proving it. She has not done so.
30. I note the direct Vancouver to Hong Kong flight Air Canada booked Ms. Cheung on was scheduled to depart more than nine hours after her originally scheduled flight, which is longer than permitted under APPR section 17(1)(a). However, again the APPR does not provide for compensation for failure to comply with this section. In addition, the tariff does not incorporate the nine-hour departure window for alternate travel arrangements, so I find Air Canada has not breached its contract with Ms. Cheung.
31. Given all of the above, I dismiss Ms. Cheung's claim for compensation.
32. 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. Ms. Cheung was unsuccessful, so I dismiss her claim for CRT fees. Air Canada did not pay any fees, and neither party claimed dispute-related expenses.

ORDER

33. I dismiss Ms. Cheung's claim and this dispute.

Megan Stewart, Tribunal Member