SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Richardson et al. v. WestJet Airlines Ltd*., 2023 NSSM 56

Date: 20231024
Docket: 523452
Registry: Halifax

Between:

Eliza Richardson and Benjamin Friedrich

Claimant

v.

WestJet Airlines Ltd.

Defendant

Adjudicator:	Michael J. O'Hara
Heard:	August 29, 2023
Appearances:	Eliza Richardson, Claimant, appearing personally Alison MacDonald, for the Defendant

By the Court:

Introduction

[1] This is a claim for compensation for the delay of a flight booked by the Claimants with the Defendant. The Defendant denies liability and says it complied with all of its legal obligations and, in particular, the requirements of the *Air Passenger Protection Regulations*, SOR/2019-150, made under the ***Canada Transportation Action***, SC 1996, c. 10.

Facts

[2] In October 2022 the Claimants booked a round trip flight with the Defendant, WestJet Airlines Ltd. ("WestJet") for travel from Halifax to Toronto and return with the following itinerary:

Flights	Departs	Arrives	Seats
WS275 – Operated by: WestJet	Halifax, NS December 23, 2022 7:25 pm	Toronto, ON December 23, 2022 9:01 pm	19A, 19B
WS272 – Operated by: WestJet	Toronto, ON January 2, 2023 6:40 pm	Halifax, NS January 2, 2023 9:46 pm	Information not available

[3] On December 23, 2022, flight WS275 was cancelled. While no reason was given at that time, the Claimants subsequently learned that it was due to weather conditions in Toronto on December 23.

[4] On December 24, 2022, WestJet issued a new itinerary to the Claimants which they each accepted. The new itinerary was as follows:

Flights	Departs	Arrives	Seats
WS275 – Operated by: WestJet	Halifax, NS December 25, 2022 7:25 pm	Toronto, ON December 25, 2022 9:01 pm	15A, 15B
WS272 – Operated by: WestJet	Toronto, ON January 2, 2023 6:40 pm	Halifax, NS January 2, 2023 9:46 pm	Information not available

[5] On December 25, 2022, the Claimants received an email at 9:25 a.m. advising that Flight WS275 was delayed by 50 minutes, "*due to flight crew member availability*," with a new departure time of 20:25 (8:15 p.m. AST).

[6] Then, at 16:35, the Claimants were advised by email that the flight was now departing at 22:25 (10:25 p.m. AST). No reason for the delay was provided.

[7] WS275 did not depart at 22:25. Boarding commenced at approximately 23:00 and the plane took off at approximately 23:28 AST

[8] The plane arrived in Toronto at approximately 0:32 EST, December 26, some three and a half hours late.

[9] On January 8, 2023, the Claimants submitted claims to WestJet for compensation under the *Air Passenger Protection Regulations* ("APPR"), on the basis that the flight on December 25 was approximately three and a half hours late (scheduled arrival time – 9:01 p.m. EST, December 25; actual arrival time 0:36 EST, December 26).

[10] These claims were denied by the Defendant. In its email of February 3, 2023, the Defendant states:

> Upon review of your reservation, we are unable to approve your claim for compensation as the most significant reason for your flight interruption was due to weather in your destination and outside of WestJet's control.

Parties' Positions

[11] The Claimant refers to and relies on Section 19(1)(a)(i) of the APPR, which reads:

> **Compensation for delay or cancellation**
>
> 19(1) If paragraph 12(2)(d)[1] or (3)(d) applies to a carrier, it must provide the following minimum compensation:
>
> (a) In the case of a large carrier,
>
> (i) $400, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by three hours or more, but less than six hours.

[12] The Claimants say that they have met all of the requirements of section 19(1)(a)(i) including that paragraph 12(2)(d) applies as they were only advised on December 25th of the delay to the flight that day, a time which was clearly less than 14 days before the scheduled departure time on the original ticket.

[13] Given that the Defendant is a "large carrier," the minimum compensation is $400 for each Claimant. I should note here that counsel for the Defendant concedes that the Defendant is a "large carrier," which by virtue of section 1(2) of the APPR is defined to mean a carrier that has "transported a worldwide total of 2 million passengers or more during each of the two preceding calendar years."

[14] The Defendant's position on the other hand is that while the three and a half hour delay on December 25th was due to crew availability, the overall delay of over 51 hours was primarily due to weather conditions in Toronto, a matter outside the carrier's control. Evidence was provided to demonstrate that the weather in

[1] Section 12(2) is cited in full at paragraph 23, below.

Toronto on December 23 was such that safe landings in Toronto were not practicable and, additionally, the Claimants conceded this point.

[15] Viewed in this way, the total delay was approximately 51.5 hours (December 23, 9:01 p.m. EST to December 26, 0:32 EST), with 48 hours attributable to weather and only 3.5 hours attributable to crew availability. Weather conditions were therefore the primary reason for the delay, according to WestJet, and since weather conditions (or more accurately, "meteorological conditions") are included in the list of situations in section 10(1) of the APPR in paragraph (c) as being outside the carrier's control, it follows that there should be no compensation owing to the Claimants on the facts of this case. (I note here that crew availability is considered to be a matter that is within the carrier's control. The parties were in agreement on this point).

[16] In advancing this argument, counsel for the Defendant places much reliance on a decision of the Canadian Transportation Agency known as Decision #122-C-A-2021 and referred to as the "APPR Interpretation Decision." In that case the Agency dealt with 8 general questions of which number 6 is of particular relevance here:

> 6. When determining whether a passenger delayed by multiple flight disruptions during their itinerary is entitled to compensation for inconvenience under section 19 of the APPR, it is necessary to take into account all of the flights involved in the delay to the arrival of the passenger's flight at the destination indicated on the original ticket, and to determine the primary reason, or most significant contributing factor, of the overall delay.

[17] In its decision the Agency made the following comments about this issue (paras 120-125):

> [120] Situations can occur where a passenger is late in arriving at their final destination because they experienced flight disruptions on multiple flights on their itinerary, such as when a passenger experiences an initial flight disruption and is reprotected on another flight that is also disrupted.
>
> [121] The amount of compensation a passenger may be entitled to under section 19 of the APPR depends on "the arrival of the passenger's flight at the destination that is indicated on the original ticket". Therefore, when determining whether a passenger

delayed by multiple flight disruptions is entitled to compensation for inconvenience under section 19, it is necessary to take into account all of the flights involved in the delay to the arrival of the passenger's flight at the destination that is indicated on their original ticket. This could, depending on the circumstances, include flight disruptions to replacement flights.

[122] The Agency has already addressed above how flight disruptions with multiple reasons should be categorized. The Agency finds that a modified version of this test is appropriate to use when a passenger experiences multiple flight disruptions on multiple flights:

1) identify the reasons for each flight disruption, and attribute the corresponding delays to those reasons;

2) identify the primary reason of delay to the passenger's arrival at the destination indicated on their original ticket, or the most significant contributing factor of the delay; and

3) determine categorization based on the category of the primary reason, or most significant contributing factor of the delay.

[123] Again, each situation must be assessed on a case-by-case basis. Identification of all reasons for each flight disruption should include identifying disruptions to replacement flights. Relevant factors for identifying the primary reason, or most significant contributing factor, include what caused the longest period of delay, whether a connection was missed, and whether the different disruptions are causally-related.

[124] In determining the primary cause of the delay, the flight disruption that is used as the basis for categorization must be causally-related to the passenger arriving late at their final destination. For example, if a passenger's initial flight is delayed, but they do not miss their connecting flight because the connecting flight is also delayed, then the disruption to the initial flight is not causally-related to the passenger arriving late at their final destination. In that case, the cause of delay to the initial flight should not be the basis for determining if the flight disruption is within the carrier's control.

[125] Situations involving multiple disruptions on multiple flights can be very complex. For example, a passenger could be travelling from Vancouver, British Columbia, to Halifax, Nova Scotia, via Toronto, Ontario, on one carrier, and miss their connection in Toronto due to a one-hour delay in Vancouver caused by a snow storm. The passenger could then be rebooked on a new itinerary departing two hours later on the same carrier, from Toronto to Halifax via Montréal, Quebec. The passenger's replacement flight from Montréal to Halifax could then be delayed a further three hours due to a business decision of the carrier within its control. As the three-hour delay due to the business decision in Montréal is longer than the two-hour delay in Toronto, the categorization could be based on the three-hour delay related to the business decision,

> and the flight disruption could be considered to be within the carrier's control for the purposes of determining whether the passenger is entitled to compensation.

[18] Counsel for the Defendant also made reference to a decision of the Canadian Transportation Agency known as Decision #68-C-A-2023, an application by David Beauchamp against WestJet. For the reasons I will elaborate on below, I find this case not helpful to the position of the Defendant in this present case.

Analysis

[19] We begin with section 19(1)(a)(i) of the APPR which I will again quote:

> **Compensation for delay or cancellation**
>
> 19(1) If paragraph 12(2)(d) or (3)(d) applies to a carrier, it must provide the following minimum compensation:
>
> (a) In the case of a large carrier,
>
> (i) $400, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by three hours or more, but less than six hours.

[20] As will be seen, s. 19(1)(a) makes section 12(2)(d)[2] a necessary prerequisite for s. 19 compensation.

[21] Here, it would be useful to bear in mind that the Regulations organize the carrier obligations under three categories, as follows:

- Delay, cancellation, or denial of boarding due to situations outside the carrier's control. These are dealt with in section 10;

[2] 19(1)(a) also refers to 12(3)(d) but that relates to a cancellation which has no relevance to the December 25th flight which involved a delay.

- Delay, cancellation, or denial of boarding that is within the carrier's control but is required for safety purposes. These are dealt with in section 11; and

- Delay, cancellation, or denial of boarding that is within the carrier's control and is not required for safety purposes. These are dealt with in section 12.

[22] Section 12 is the section that applies here. Section 12 applies because the flight in question – flight WS275 on December 25 - was delayed due to crew availability, a matter that is considered to be within the carrier's control and, as well, the delay on December 25th was not required for safety purposes.

[23] As stated, s. 12(2)(d) must apply in order for the compensation requirement in s. 19(1) to be triggered. It reads:

> 12 (2) In the case of a delay, the carrier must
>
> (a) provide passengers with the information set out in section 13;
>
> (b) if a passenger is informed of the delay less than 12 hours before the departure time that is indicated on their original ticket, provide them with the standard of treatment set out in section 14;
>
> (c) if the delay is a delay of three hours or more, provide alternate travel arrangements or a refund, in the manner set out in section 17, to a passenger who desires such arrangements; and
>
> (d) If a passenger is informed 14 days or less before the departure time on their original ticket that the arrival of their flight at the destination that is indicated on that original ticket will be delayed, provide the minimum compensation for inconvenience in the manner set out in section 19.

[24] Paragraph 12(2)(d)[3] applies and is satisfied here because:

[3] The other carrier obligations in s. 12(2)(a), (b), and (c) would also have applied here, but whether they were complied with is unclear as the Claimants did not present evidence regarding those obligations or seek any sort of remedy regarding those.

- the Claimants were advised the arrival of the flight in Toronto (the destination indicated on the original ticket) would be delayed;

- that advice was given on December 25 which was less than 14 days before the departure time on the original ticket.

[25] Since paragraph 12(2)(d) is satisfied, we then refer back to section 19(1). The flight of December 25th was delayed by over three hours and since the Defendant is a large carrier, compensation of $400 is owing by the Defendant to each of the Claimants. That is, $800 in total.

[26] This analysis is not complicated and appears to be entirely consistent with the applicable legislative provisions. That should end the story.

[27] The Defendant's position would have us consider the cancelled December 23rd flight and the December 25th actual flight and then determine what the primary cause for the 51.5 hour overall delay was. It is said that this approach is consistent with the Interpretation Decision.

[28] With respect, I cannot see how the wording of the applicable legislative provisions in the APPR can bear such an interpretation. Nor do I see how the Interpretation Decision supports such an approach.

[29] The cited comments in the Interpretation Decision do not appear to address the situation here. As I read that decision, it is directed towards multiple flight itineraries where there can be missed connections due to flight disruptions and similar related issues. There could be a three-leg trip involving two or more carriers, perhaps, for example, Yellowknife to Edmonton by Canadian North, Edmonton to Calgary by Air Canada, and Calgary to Toronto by Air Canada. In such cases, it surely could become a complex question of which carrier shoulders the responsibility for a delay. However, none of the rationale behind that type of analysis applies in the instant case. Rather, the present case is fairly simple and involves a single flight from Halifax to Toronto with one carrier.

[30] It will be noted that with the approach I take, the word "flight" in both section 19 and section 12 of the APPR is taken to be a reference to flight WS275 scheduled for December 25, and not to the cancelled flight WS275 scheduled for December 23[4]. In other words, the term "flight" is to be understood as a scheduled aircraft journey or trip from a specified departure point to a specified destination on a specified date and time. Dictionary definitions of "flight" accord with this sense of the word. The ITP Nelson Canadian Dictionary of the English Language has this definition: "*a scheduled airline run or trip*." To similar effect is the applicable definition contained in the Collins English Dictionary and Thesaurus: "*aircraft flying on a scheduled journey*".

[31] The argument advanced by the Defendant ignores portions of the Interpretation Decision, not cited by the Defendant, particularly those delays that fall under s. 10(2). I refer to the following passages from the Interpretation Decision:

> [150] A knock-on effect occurs when an earlier flight delay or cancellation is the direct cause of a subsequent flight disruption. Knock-on effects can result from various scenarios, and can occur as a result of delays or cancellations to return or onward flights for which incoming aircraft or crew is to be used.
>
> [151] Pursuant to subsection 10(2) of the APPR, if a flight disruption is directly attributable to an earlier delay or cancellation outside the carrier's control, it is also considered to be due to situations outside the carrier's control provided the carrier took all reasonable measures to mitigate the impact of the earlier delay or cancellation. Subsection 11(2) is to the same effect; however, it relates to situations within the carrier's control but required for safety purposes.
>
> [152] Therefore, for subsections 10(2) and 11(2) of the APPR to apply, the subsequent disruption must be "directly attributable" to an earlier delay or cancellation, and the carrier must have taken "all reasonable measures" to mitigate the impact of the earlier delay or cancellation. These provisions place the burden on the carrier to establish that all reasonable measures were taken to prevent or minimize the impact of the knock-on effect. There is no presumption that the carrier has taken all reasonable measures to mitigate the knock-on effect.

[4] As the cancellation of WS275 on December 23 was due to adverse weather conditions in Toronto, it would fall under s. 10 and s. 19 would not be triggered. There are, of course, other obligations imposed by s. 10(3) on the carrier in such circumstances, but compensation for inconvenience is not one of them.

[32] Potentially section 10(2)[5] may have applied in this case. It reads:

> **Earlier Flight Disruption**
> 10(2) A delay, cancellation or denial of boarding that is directly attributable to an earlier delay or cancellation that is due to situations outside the carrier's control, is considered to also be due to situations outside that carrier's control if that carrier took all reasonable measures to mitigate the impact of the earlier flight delay or cancellation.

[33] In the previous paragraph I said "potentially" because no evidence was presented to show that the delay on December 25th was directly attributable to the cancellation on December 23. As well, the Defendant offered no evidence to show that the it took all "reasonable measures to mitigate the impact of the earlier flight cancellation".

[34] If there was such evidence, section 10(2) may well have provided the Defendant with a complete answer to deny s.19 compensation. But there was no such evidence.

[35] (The position of the Defendant could be seen as rendering s.10(2) meaningless since the Defendant's position would achieve the same result, but with broader application).

[36] In the result, I would reject the Defendant's position and find in favour of the Claimants.

[37] The conclusion I arrive at is consistent with and supported by the principles of statutory interpretation. One of the leading Canadian cases, if not the leading case, on statutory interpretation (which is recognized as also applying to regulations), is *Rizzo and Rizzo Shoes Ltd.,* 1998, 1 SCR 27. This was a unanimous decision of the

[5] S. 11(2) applies to situations where a delay or cancellation was within the carrier's control but is required for safety reasons. This has no application to the facts in this present case.

Supreme Court of Canada and the comments of Iacubucci, J. are instructive. In paragraph 21 he states:

> 21. Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, 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.
> >
> > [Underlining added]

[38] At paragraph 22 Justice Iacobucci, refers to section 10 of the Ontario *Interpretation Act*. Here, in this case, since it is federal legislation, the federal ***Interpretation Act***, RSC 1985, c. C I-21 would apply. The comparable provision is section 12 of that *Act* which reads:

> **Enactments Deemed Remedial**
> 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensure the attainment of its objects.

[39] The principal objects of the AFFI can be discerned through the regulation-making power in the ***Canada Transportation Act***, SC 1996, c 10, found in section 86.11 and which I will set out in full in a schedule to this decision.

[40] The conclusion I reach here is consistent with the objects of these regulations – protection of passengers and ensuring compliance by carriers with various obligations to passengers when there are delays, cancellations, and denials of boarding.

[41] In paragraph 27 of **Rizzo,** Iacobucci, J. states:

> 27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra,* an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra,* at p. 88).
>
> [Underlining added]

[42] In my view, the position advanced by the Defendant could lead to absurd results.

[43] For example, in the present case, some proportion of the passengers on WS275, scheduled for departure on December 25, 2022, would have booked that very flight for departure on December 25 as part of their original ticket or itinerary. In other words, such passengers, unlike the Claimants here, were not travelling on flight WS275 on December 25th as a replacement flight.

[44] According to the position of the Defendant, all of those described passengers would be entitled to the $400 under s. 19(1)(a)(i) yet, according to the Defendant's argument, the Claimants here would not be. Respectfully, that would be an absurd result.

[45] As noted above, the Defendant has also referred to the *Beauchamp* case. That case, while facially similar, is significantly different and distinguishable in two respects Firstly, the cancellation of the first flight, unlike the case here, was not proven to be due to factors outside the carrier's control. Secondly, the replacement flight was not three or more hours late. The *Beauchamp* case does not assist the Defendant's argument.

[46] For all of the above reasons, I find in favour of the Claimants.

[47] They will also be awarded the costs for the filing fee

Conclusion

[48] It is hereby ordered that the Defendant pay to the Claimants as follows:

Debt	$ 800.00
Costs	99.70
Total	**$ 899.70**

Michael J. O'Hara, Small Claims Court Adjudicator