



IN THE SMALL CLAIMS TRIBUNAL

Adjudicator: Dr. Claudio Żammit

Sitting of Thursday 19th September 2019

Claim Number: 1/18 CZ

John Burke Cooney

vs.

Lot Polish Airlines S.A.

The Tribunal,

Having seen the Notice of Claim filed in virtue of Regulation (EC) 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure, filed on 21st February 2018 in virtue of which claimant premised that defendant company delayed delivery of his baggage causing damages of one thousand four hundred and twenty-four Euro (€1,424). He also premised that under

the Montreal Convention of 1999 an air carrier is responsible for these costs and their liability cannot be decreased for any reason.

The Tribunal also noted that defendant company was duly served with the acts of the case on 17th July 2018 and no reply was filed.

The Tribunal:

Having seen the documents filed with the Notice of Claim, namely claimant's formal complaint with defendant company dated 11th January 2018, the property irregularity report, a declaration by an employee of Hotel Telegraaf, correspondence sent by claimant, the air-ticket and boarding pass issued by defendant company, receipts for the purchase of clothes on 10th January 2018, the written reply send by defendant company, claimant's residence card, and all other documents;

Having considered that defendant company did not reply to claimant's claim;

Having also considered that the lack of reply by defendant company does not in itself mean that claimant's claim is automatically proven;

Having therefore considered all evidence brought forward by claimant;

Having also considered that the Tribunal can adjudicate this case on the basis of the evidence produced and that therefore no oral hearing needs to be fixed;

Considers that:

In this action, claimant is suing defendant company for damages incurred due to the fact that his baggage was delayed and not duly transported by defendant company.

Claimant alleges that this is in breach of the Montreal Convention of 1999. In this respect, Article 19 of the same Convention provides that:

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned 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 or them to take such measures.

Article 22 of the same Convention furthermore states that:

1. In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4 150 Special Drawing Rights.
2. In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1 000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.
3. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.
4. In the case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the destruction, loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.
5. The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.
6. The limits prescribed in Article 21 and in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six

months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

Article 29 of the same Convention furthermore states:

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Looking at Article 19, in this case, defendant company did not prove 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 or them to take such measures. Given that there is no such evidence, therefore, defendant company cannot be exonerated from paying damages.

The question that remains to be answered, however, is whether there is any limitation of liability for damages, and if yes, what this limitation is.

Article 22 (5) provides that limitation of liability shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment. Claimant did not prove that there was the intent, on the part of defendant company, to cause any damage; therefore the limitation of liability as found in Article 22 (2) of the Convention applies.

After having established that the limitation in Article 22(2) applies to this case, the Tribunal must consider therefore, whether claimant merits to be paid the maximum amount payable under the limitation of liability, or whether a lesser amount should be awarded to claimant.

The Tribunal notes that claimant's baggage was delayed and that it arrived at the hotel where he was staying the day after. Although claimant spent a considerable amount of hours (more than twenty-four hours) without his baggage, he did not stay without it for days. From an examination of the receipt exhibited (purchase of clothes from Suitsupply in Tallinn), claimant did not have the need to buy all the clothes indicated therein, and the Tribunal does not consider that claimant was reasonable when he bought both trousers and a jacket and other clothing (higher-end clothing) and at the same time bought another suit (€699). It thus results to the Tribunal that claimant was not strictly trying to arrange, in a reasonable way, for the temporary delay of his baggage, but bought unnecessary clothing at the outset, notwithstanding the fact that he had an indication that his baggage would be arriving at most the day after.

The Tribunal therefore finds that claimant's claim is only partially valid, and considers that the sum of 400 Euro is reasonable, in Tallinn, to provide for the situation that claimant was in. The fact that liability is limited to 1,000 Special Drawing Rights in Article 22 of the Convention does not mean that the Tribunal cannot decrease the liability of the Carrier, like claimant is implying. The limit of liability on the contrary is limiting the maximum exposure of the carrier, but not excluding the liquidation of lesser amounts by way of damages.

In addition, Art. 562 of the Code of Organisation and Civil Procedure¹ states that the burden of proving a fact falls, in all cases, on the party alleging it, saving where the law provides otherwise; and art. 559 of the same Code imposes on the alleging party the obligation of producing the best evidence. Claimant did not prove that he needed all the clothing he bought, and therefore the Tribunal cannot do other than to partially uphold his claim. This is also in line with another basic principle, in that claimant cannot of his own will increase his alleged damages, when he had every obligation to diminish them, not to inflate them.

¹ Chapter 12 of the Laws of Malta

Thus, for the aforementioned reasons, the Tribunal partially upholds claimant's claim and thus orders defendant company to pay to claimant the sum of four hundred Euro (€400), with interest as claimed.

Claimant shall bear one-third (1/3) of the expenses of these proceedings, whereas defendant company shall bear the remaining two-thirds (2/3) of the expenses.

Dr. Claudio Żammit

Adjudicator

Mary Josette Musu'

Deputy Registrar