Federal Court of Appeal | Cour d'appel fédérale

Date: 20180510

Docket: A-238-16

Citation: 2018 FCA 92

CORAM: **WEBB J.A.**
RENNIE J.A.
WOODS J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

and

CANADIAN TRANSPORTATION AGENCY
and BRITISH AIRWAYS PLC

Respondents

Heard at Halifax, Nova Scotia, on April 23, 2018.

Judgment delivered at Ottawa, Ontario, on May 10, 2018.

REASONS FOR JUDGMENT BY:	WOODS J.A.
CONCURRED IN BY:	WEBB J.A.
DISSENTING REASONS BY:	RENNIE J.A.

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REASONS FOR JUDGMENT

WOODS J.A.

[1] Dr. Gábor Lukács appeals from a decision of the Canadian Transportation Agency dated March 23, 2016 (Decision No. 91-C-A-2016), which relates to the obligation of British Airways to disclose certain terms and conditions of carriage in a tariff. In this particular case, the disclosure involves compensation to air passengers who are involuntarily denied boarding an aircraft for British Airways' flights originating in the European Union and destined for Canada.

In the decision under appeal, the Agency determined that the disclosure proposed by British Airways complied with a previous order of the Agency (Decision No. 49-C-A-2016).

A. Background

[2] Under Canadian regulations, an air carrier involved in international transportation is required to file with the Agency a tariff which reflects the terms and conditions of carriage, including the carrier's policy concerning "compensation for denial of boarding as a result of overbooking." The terms and conditions are to be clearly set out, and be just and reasonable. If a carrier fails to comply with disclosed terms and conditions, the Agency may direct that the carrier take corrective measures and pay compensation (Sections 110, 111, 113.1, and 122 of the *Air Transportation Regulations*, SOR/88-58).

[3] This matter commenced on January 30, 2013 with a formal complaint by Dr. Lukács to the Agency about the disclosure in British Airways' tariff. The part of the complaint relevant to this appeal dealt with the reasonableness of Rule 87(B)(3)(B) of the tariff which deals with the amount of compensation payable for involuntarily denied boarding.

[4] In his letter of complaint, Dr. Lukács submitted that Rule 87(B)(3)(B) was unreasonable for three reasons: (1) compensation should be provided at a flat rate; (2) Rule 87(B)(3)(B) may not accurately reflect British Airways' policy to the extent that the policy is mandated by European regulations, specifically Regulation (EC) No. 261/2004; and (3) the policy unreasonably restricts passengers from seeking other remedies.

[5] On January 17, 2014, the Agency issued its decision on the complaint (Decision No. 10-C-A-2014). With respect to the reasonableness of Rule 87(B)(3)(B), the Agency determined that the compensation provided for may be unreasonable and ordered British Airways to show cause why the Agency should not mandate corrective action.

[6] Following this decision, several further decisions were issued by the Agency dealing with different aspects of the complaint. There was also an appeal to this Court (*Lukács v. Canadian Transportation Agency*, 2015 FCA 269).

[7] This appeal concerns two of the subsequent decisions of the Agency, Decision No. 49-C-A-2016 and Decision No. 91-C-A-2016.

[8] In Decision No. 49-C-A-2016, issued on February 18, 2016, the Agency considered whether the Canadian disclosure requirements have been satisfied if British Airways' tariff is silent on compensation for flights originating in the European Union. The Agency determined that the tariff must state the compensation for these flights and ordered that the tariff be amended to reflect "the regime proposed by Air Canada …".

[9] In response to this order, British Airways sought a determination from the Agency as to whether a proposed addition to its tariff would comply with Decision No. 49-C-A-2016. The proposed wording reads in part (Appeal Book, p. 10):

> RULE 87(B)(3)
>
> (C) AMOUNT OF COMPENSATION PAYABLE FOR FLIGHTS FROM THE EUROPEAN UNION TO CANADA

> (I) SUBJECT TO THE PROVISIONS OF PARAGRAPH (B)(3)(A) OF THIS RULE, CARRIER WILL TENDER LIQUIDATED DAMAGES FOR DELAY AT ARRIVAL AT POINT OF DESTINATION CAUSED BY INVOLUNTARY DENIED BOARDING CASH OR EQUIVALENT IN THE AMOUNT OF 300 EUR FOR DELAY OF 0 TO 4 HOURS AND IN THE AMOUNT OF 600 EUR FOR DELAY OVER 4 HOURS.
>
> …

[10] In Decision No. 91-C-A-2016, the Agency determined that the proposed wording was compliant with Decision No. 49-C-A-2016.

[11] Dr. Lukács sought leave to appeal Decision No. 91-C-A-2016. This Court granted leave on a narrow issue: "whether the inclusion of the exceptions found in Rule 87(B)(3)(a) of the proposed Tariff would result in the Tariff not being compliant with the order of the Canadian Transportation Agency found in Decision 49-C-A-2016 …".

[12] The exceptions in Rule 87(B)(3)(A) referred to above are part of the conditions to qualify for compensation. This subparagraph precedes subparagraph (B), dealing with the amount of compensation and which is the subject matter of the original complaint. The relevant part of Rule 87(B)(3) is reproduced below (Appeal Book, paragraph 37, 38).

> (3) Carrier causing such delay will compensate such passenger for carrier's failure to provide confirmed space as follows:
>
> (A) CONDITIONS FOR PAYMENT OF COMPENSATION
>
> Subject to the exceptions in this subparagraph, carrier will tender to the passenger the amount of compensation specified in subparagraph (B) when:
>
> (I) Passenger holding ticket for confirmed reserved space presents himself for carriage at the appropriate time and place, …

…

Exception 1: The passenger will not be eligible for compensation if the flight on which the passenger holds confirmed reserved space is unable to accommodate him because of:

(AA) Government requisition of space, or

(BB) Substitution of equipment of lesser capacity when required by operational or safety reasons.

Exception 2: The passenger will not be eligible for compensation if he is offered accommodations or is seated in section of the aircraft other than that specified on his ticket at no extra charge, except that passenger seated in section for which lower fare applies shall be entitled to an appropriate refund.

(B) AMOUNT OF COMPENSATION PAYABLE

…

B. Analysis

[13] Dr. Lukács submits that Decision No. 91-C-A-2016 is not reasonable because the proposed wording that the Agency found to be compliant with Decision No. 49-C-A-2016 fails to conform with the regime proposed by Air Canada, as required. In particular, British Airways proposes exclusions from compensation and the regime proposed by Air Canada had no such exclusions.

[14] This issue requires a determination as to whether the Agency, in Decision No. 91-C-A-2016, erred in interpreting one of its prior decisions. Given the nature of the appeal, the reasonableness standard of review should apply in light of the Agency's expertise in these

matters (*Council of Canadians with Disabilities v. Via Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 88, 99).

[15] The difficulty that I have with the position of Dr. Lukács in this appeal is that the exclusions from compensation are contained in a different provision than the provision challenged in the formal complaint. The complaint sought to have Rule 87(B)(3)(B) set aside. As far as I am aware, Rule 87(B)(3)(A) has never been put at issue in any of the prior related proceedings in this matter and accordingly British Airways would not have had the opportunity to make submissions concerning this provision.

[16] It is useful to consider the relevant scheme of British Airways' existing tariff. Rules 87(B)(3)(A) and (B) are subparagraphs of a provision dealing with denied boarding compensation. The subject matter of each of the subparagraphs is reflected in their titles: (A) deals with "Conditions for Payment of Compensation", and (B) deals with "Amount of Compensation Payable." As mentioned, the formal complaint only dealt with subparagraph (B).

[17] According to Dr. Lukács' submissions, the exceptions to compensation in subparagraph (A) should not apply to flights originating in the European Union and the regime proposed by Air Canada did not include them. Although there may be good arguments in support of this, this submission goes beyond the complaint that the Agency was dealing with. Accordingly, it would be reasonable for the Agency not to consider the exceptions in subparagraph (A) and to interpret related prior decisions of the Agency as being restricted to subparagraph (B).

[18] In the circumstances, it would be reasonable for the Agency to conclude that the wording proposed by British Airways is compliant with Decision 49-C-A-2016 on the basis that the decision only considers the amount of compensation, and not the conditions for payment. Although Decision No. 49-C-A-2016 was not explicitly restricted in this manner, it would be reasonable for the Agency to conclude that this restriction was implicit given the context of the dispute.

[19] I am therefore of the view that the Agency's decision in Decision No. 91-C-A-2016 is reasonable and would dismiss the appeal.

[20] As for costs, Dr. Lukács has requested that the Court award his disbursements since the appeal was in the nature of public interest litigation and was not frivolous. I would agree with this approach and award Dr. Lukács his disbursements in this Court to be paid by the respondent British Airways PLC. If the parties are unable to reach agreement on the disbursements, they should be assessed. Since the participation of the Canadian Transportation Agency in this appeal was limited, it should not be liable for these costs.

"Judith M. Woods"

J.A.

"I agree
Wyman W. Webb J.A."

RENNIE J.A. (Dissenting Reasons)

[21] My colleagues have concluded that the Canadian Transportation Agency's consideration of the complaint before it was restricted to the amount of compensation that was to be paid in the case of a passenger being denied boarding, and did not include the circumstances under which the compensation would not be paid. Regrettably, I do not agree.

[22] At issue is whether British Airways' revised tariff complied with the Agency's order. Any doubt or ambiguity about the answer to that question is to be determined, foremost, by the reasons of the Agency and what it said it was deciding. Given the history of this complaint, that necessarily includes the previous decision of the Agency on the same complaint (Decision No. 49-C-A-2016). From this starting point, there are four reasons why the appeal should be allowed.

[23] First, on a plain reading of the previous decision, British Airways did not do what that order directed it to do. At paragraph 18 of Decision 49-C-A-2016 the Agency directed British Airways to amend its tariff "… to reflect the regime proposed by Air Canada in the proceedings related to Decision No. 442-C-A-2013, including the incorporation by reference of Regulation (EC) 261/2004".

[24] Air Canada's tariff, with respect to flights departing from the European Union, as filed and approved by the Agency, reads "… Air Canada will apply the provisions of the following legislation[]: … EC regulation no. 261/2004…".

[25] (EC) Regulation 261/2004 provides an exception to the obligation to pay compensation only where there are reasonable grounds to believe that health, safety or security is at risk. There is no exception for "operational reasons". British Airways tracked the Air Canada regime insofar as it considered the amounts of compensation that were payable after certain delays, but it contains an "operational reasons" exception, which the Air Canada tariff does not.

[26] Secondly, the Agency consistently spoke of a "regime" for compensation upon denial of boarding. Had the Agency intended to limit the scope of its order to the amount that would be paid only, it would have used the word "amount" and not spoken consistently and uniformly of a "regime".

[27] I turn to the third reason. In its earlier decision in the same matter the Agency expressly stated what it considered to be in issue in the proceedings. At paragraph 13 the Agency wrote:

> In the circumstances of this case, British Airways elected to apply a compensation regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013. The denied boarding compensation regime appearing in Air Canada's tariff clearly establishes the carrier's policy, which includes not just the specific compensation that was proposed, but also incorporates by reference Regulation (EC) 261/2004. *Therefore, British Airways' election of the compensation regime proposed by Air Canada includes not just the specific amounts of compensation proposed for outbound flights, but the context in which these amounts are set out*, which includes a tariff provision that incorporates by reference Regulation (EC) 261/2004.
>
> [Emphasis added]

[28] In the Agency's view, more than the amount to be paid on denial of boarding was in issue.

[29] Finally, it is unreasonable to consider that a "regime for denial of compensation" can be fulfilled by an obligation to pay certain amounts of compensation, but reserving, at the same time, a broad and unrestricted right not to pay compensation where boarding is denied "for operational reasons". And there can be no doubt that the exception is broad:

> EXCEPTION 1: The passenger will not be eligible for compensation if the flight on which the passenger holds confirmed space is unable to accommodate him because of:
>
> (aa) government requisition of space, or
>
> (bb) substitution of equipment of lesser capacity when required by operational or safety reasons.

[30] Counsel was hard-pressed to identify circumstances where boarding would be denied for anything other than safety or operational reasons. I do not believe that the Agency's order should be interpreted in such a manner as to frustrate its stated purpose, which was to address the compensation payable when boarding is denied, which reasonably includes any exceptions to that obligation.

[31] I would therefore allow the appeal, set aside the decision of the Agency and return the matter to it for re-determination in accordance with these reasons.

"Donald J. Rennie"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-238-16
APPEAL FROM A DECISION OF THE CANADIAN TRANSPORTATION AGENCY DATED MARCH 23, 2016, NO. 91-C-A-2016	
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v. CANADIAN TRANSPORTATION AGENCY and BRITISH AIRWAYS PLC
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	APRIL 23, 2018
REASONS FOR JUDGMENT BY:	WOODS J.A.
CONCURRED IN BY:	WEBB J.A.
DISSENTING REASONS BY:	RENNIE J.A.
DATED:	MAY 10, 2018

APPEARANCES:

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