



(Disputes Tribunal Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

**District Court**

**[2023] NZDT 476**

**FIRST APPLICANT**      **NT**

**SECOND APPLICANT**      **OX**

**RESPONDENT**      **B Ltd**

**The Tribunal orders:**

B Ltd is to pay the sum of \$1,822.67 to NT and OX on or before Tuesday, 23 May 2023. The balance of the claim is dismissed.

**REASONS**

1. On 8 October 2022, the Applicants, NT and OX (together referred to as “the Applicants”), booked to fly with the Respondent, B Ltd, from [city 1] to [city 2] (via [city 3]) on 21 December 2022. B Ltd was operating the [city 1] to [city 3] leg, and X Ltd was operating the [city 3] to [city 2] leg. The total cost of the flights was \$8,226.00. The Applicants planned the trip to visit NT’s mother for Christmas in [city 2].
2. Severe weather was predicted in Continent leading up to the Applicants’ departure. While the Applicants’ flight to [city 3] was en-route on 21 December 2022, a severe snowstorm in [city 3] required [city 3] Airport to mandate limits on flight arrivals. As a result, the Applicants’ flight was diverted to [city 4], [country 1]. The Applicants were booked on alternative flights on 22 and 23 December 2022 with VB (B Ltd’s star alliance partner) but, each time, the flights were cancelled due to the severe weather.
3. On 23 December 2022, after their flights to [city 2] that day were cancelled, the Applicants hired a car and drove to [city 5]. They asked B Ltd to fly them out of [city 6] to [city 2] on 24 December, but received no response. By 26 December, they asked B Ltd to fly them home to New Zealand. B Ltd initially informed them that their return flights were from Country 2, and they would need to pay for any fare difference. On or about 28 December, the Applicants flew on B Ltd from [city 6] to [city 1] and then on to [city 7] on an B Ltd flight. The Applicants were not required by B Ltd to pay any fare difference.
4. The Applicants seek compensation of \$21,571.58 from B Ltd, being a refund of their flight costs, travel expenses incurred and damages for distress, time, and harm suffered. The Applicants’ claim of \$21,571.58 is calculated as follows:
  - \$8,226.00, being the total cost paid to B Ltd for the trip on 8 October 2022
  - \$33.55, for the [country 1] electronic visa (ESTA) required
  - \$67.54 for BART train tickets on 21 December 2022
  - \$81.31 for Hotel N, [city 4] food on 23 December 2022
  - \$551.36 (less \$107.72 credit) for Hotel N, [city 4] hotel on 24 December 2022

- \$634.42 for rental car costs to [city 5] on 24 December 2022
  - \$78.22 for petrol costs on 25 December 2022
  - \$712.30 for Hotel J costs on 25 December 2022
  - \$494.00 for B health travel insurance on 25 December 2022
  - \$97.83 for Six rent a car insurance on 26 December
  - \$168.59 for Sunset petrol on 26 December
  - \$61.91 for [redacted] snacks for Christmas Day
  - \$68.31 for Dinner at [city 6] Airport on 27 December
  - \$283.65 for further costs from Hotel J on 28 December
  - \$120.31 for Flixbus to [city 6] Airport
  - \$10,000.00 damages for distress, time, and harm suffered.
5. I held a teleconference hearing with the parties on 27 March 2023. The Applicants attended the hearing. BB attended the hearing on behalf of B Ltd and was appointed as its representative.

### Onus of Proof

6. Generally, an applicant bringing a claim in the Tribunal has the onus of proving their claim on the civil standard of proof which is the balance of probabilities (that is, that it is more likely than not). Where a respondent raises a defence to a claim, that defence must also be proved to the required standard of the balance of probabilities. When assessing whether the onus of proof has been discharged by a party, the Tribunal considers and evaluates the information and evidence presented by all parties. I would like to reassure the parties that all information and evidence presented to the Tribunal has been considered, however, this order refers only to essential material and is not intended to be a full record of the hearings or of the information and evidence presented.

### Issues

7. The issues I need to determine in relation to the claim are:
- (a) Should B Ltd compensate the Applicants for the costs incurred during their trip to Country 2 that was disrupted due to a weather event?
  - (b) If so, are the Applicants entitled to a remedy and is the amount claimed proved and reasonable?

### **Should B Ltd compensate the Applicants for the costs incurred during their trip to Country 2 that was disrupted due to a weather event?**

8. The law of contract applies. A contract is a legally binding agreement between two or more parties that the law will enforce. Once a contract is formed, the parties are bound by the terms they have agreed to, and those terms are enforceable by one party against the other.
9. The Civil Aviation Act 1990 ("the CAA") deals with international carriage by air and provides that the [the convention] 1999 (set out in Schedule 6 of the CCLA) has the force of law in New Zealand (s91C of the CAA). New Zealand and Country 2 are both signatories to the [the Convention]. Article 19 of the [the Convention] deals with delay and 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".*
10. A legally enforceable contract was formed between the Applicants and B Ltd when the Applicants purchased return tickets from New Zealand to [city 2] directly with B Ltd. Further, the [the convention] applies to that contract which related to international flights between New Zealand and Country 2. The effect of Article 19 is that the evidentiary onus of proof shifts from the Applicants to B Ltd, so that B Ltd is required to prove that it took all measures that could

reasonably be required to avoid the damage sustained by the Applicants or that it was impossible for it (or its agent (VB)) to take such measures.

11. I set out my understanding of the Applicants' flight problems. Even if I have not correctly set out all the flight problems (because they were difficult to glean from the various documents and communications presented by the parties), there is no dispute from B Ltd that the Applicants had a very unfortunate experience trying to get to [city 2]. This is because the Applicants' flight from [city 1] to [city 3] was diverted to [city 4] during the journey when a severe snowstorm limited international arrivals at [city 3] Airport. The Applicants were rebooked on a 22 December flight with VB to [city 2] via [city 8]. The Applicants wanted to change that to travel via [city 9] due to worsening weather forecasts, but they were unable to get through to B Ltd. When they got to the airport for their flight to [city 8], it was cancelled due to severe weather. VB placed the Applicants on stand-by for a 22 December evening flight to Toronto. The Applicants did not get on that flight, but their bags did or were mislaid, and the Applicants did not get their bags back until the next day. They were then rebooked on a flight to [city 2] via [city 9] and [city 8] with VB on 23 December which was delayed and then cancelled at 1am on 24 December due to the weather while the Applicants were at the airport. The Applicants then drove to [city 5] and asked B Ltd to fly them out of [city 6] to [city 2] on 24 December, but received no response. By 26 December, they asked B Ltd to fly them home to New Zealand. B Ltd initially informed them that their return flights were from Country 2, and they would need to pay for any fare difference, but B Ltd flew them home on or about 28 December, without further cost.
12. The Applicants say that they had a terrible experience with B Ltd, and B Ltd never got them to their destination and communicated poorly. They say that it has been very upsetting, expensive, pointless, time-consuming and frustrating for them. They feel that they were essentially left stranded with no support in a country they did not want to be in and did not book to go to, and left to pay the costs, on top of missing out on Christmas with relatives in [city 2] and using up all their holiday leave. They say that they never got to their destination, but with better planning and responsiveness from B Ltd, many of the events that occurred, or potentially the whole situation, could have been avoided.
13. Having carefully considered the available evidence and information, and having heard from the parties, I find that B Ltd has proved, on the balance of probabilities, that B Ltd (and its agent, VB) took all measures that could reasonably be required to avoid the damage suffered by the Applicants and/or that it was impossible for B Ltd and VB to take sure measures. This means that, under Article 19 of the [the convention], B Ltd is not liable for damage suffered by the Applicants due to the delay caused by the severe weather. I make these findings for the following reasons:
  - (a) I am satisfied that the delays the Applicants suffered were caused by severe and unprecedented weather over Continent around Christmas 2022, which is already a very busy time of year for air travel. I am satisfied that the weather was extreme at the time of the disruption and delays experienced by the Applicants. In particular, I note that B Ltd sent an email to the Applicants following their diversion to [city 4] on 21 December that advised that the diversion was due to "...heavy snow in the [city 3] area, affecting the ability of your aircraft to safely land.". Further, the local news report dated 22 December 2022, (presented to the Tribunal by B Ltd) reports that "*A generational 'bomb cyclone' winter storm was tightening its grip across the nation. According to the National Weather Service more than 90 million people are under winter weather alerts and more than 87 million are under wind chill alerts. The alerts stretch across 37 states...[city 4] International Airport has had 16 cancellations...three were going to [city 8].*".
  - (b) Severe weather is a known cause of disruption and delays with flights, particularly with the extreme weather experienced in Continent over the winter months. Weather is outside the control of an airline, and it is clear that Article 19 of the [the convention] aims to ensure that airlines will not be liable for events outside its control (like weather events) provided the airline has taken all measures that could reasonably be required to avoid its customers suffering damage, or it was impossible for it to take such measures. I have taken into account that

Article 19 of the [the convention] places an obligation on an airline to take all measures that could “reasonably” be required to avoid damage. The word ‘reasonably’ is flexible, depending on the circumstances, and means good and acceptable, but does not mean excellent or perfect.

- (c) I am satisfied that B Ltd has proved, on the balance of probabilities that it (and its agent, VB) took all reasonably available measures to get the Applicants to [city 2] and avoid the damage they suffered and, in some respects, it was impossible for them to take such measures in the circumstances. In this regard, I have taken into account the difficult circumstances, with both the severe weather and the Christmas travel and holiday period, and the resulting disruption and lack of flights, and I note that various attempts were made to rebook the Applicants to [city 2] via VB between 21 and 23 December. I am satisfied that this shows that reasonable attempts were made to get the Applicants to [city 2] at a very busy time of year despite the extreme operational complications and disruptions.
- (d) While B Ltd or VB did not immediately rebook the Applicants on a flight when the flight to [city 2] was cancelled early on 24 December due to the weather, I am satisfied that a delay over Christmas Day and Boxing Day was not unreasonable in the unusual circumstances of the extreme weather, the serious backlogs, and the holiday period. In this regard, I note that B Ltd’s [instant messaging] reply to the Applicants on 26 December noted that “...*thanks for reaching out, we’re sorry it’s been so difficult to reach us. We’re working through incredibly high volumes both at our contact centre and via our social channels, we understand the delay is frustrating...*”.
- (e) I have taken into account the Applicants comments that they did not hear from B Ltd between about 22 December and 26 December, however, I note that the Applicants were dealing with B Ltd’s Star Alliance partner, VB, during that time. I also note that the Applicants chose to communicate with B Ltd via [instant messaging] because they could not get through by phone, but which BB says is not a live-chat and therefore made communication slower.
- (f) I am satisfied that it is more likely than not that B Ltd would have been able to get the Applicants to [city 2] had the Applicants been prepared to wait out the weather and disruption, but the Applicants instead elected to return home to New Zealand. B Ltd accepted that, and was therefore no longer able to get the Applicants to their destination in Country 2 and was therefore unable to perform its side of the contract. While it is understandable that the Applicants decided to return to New Zealand, given the circumstances they found themselves in, this does not mean that B Ltd would not have fulfilled its side of the contract and got them to Country 2 had they waited for the weather to clear. Therefore, while I appreciate that the Applicants were on leave from work and the main purpose of their trip was to get to family in [city 2] for Christmas, it was their decision to return to New Zealand.
- (g) I have noted the Applicants’ view that the extreme weather was well forecasted, so B Ltd should have done something about it to avert the situation that happened to them. However, I consider it unreasonable to expect any airline to vary flights in advance on the basis of predicted bad weather, particularly four days before Christmas.
- (h) It is very unfortunate that the severe weather cancelled all the various flights the Applicants were re-booked on to get to [city 2], and that this badly inconvenienced the Applicants in terms of attending the airport and trying to contact by B Ltd and VB via phone and [instant messaging], and the extra costs incurred. However, I am satisfied that B Ltd is not responsible for such costs in the circumstances, as the risk of severe weather disruptions is on the customer.
- (i) I note that it is usual for customers to hold travel insurance to provide protection against severe weather disruptions, but the Applicants did not book travel insurance for their trip. While the lack of travel insurance has no bearing on my findings, it does explain why the Applicants have not been able to recover any of their losses through insurance as would be usual.

- (j) Given that the CAA brings the [the convention] into New Zealand law which specifically sets out the liability for delay of international air carriage, Parliament has set up this regime to deal with liability for delay in international carriage by air. This means that the implied guarantees set out in the Consumer Guarantees Act 1993 do not apply to loss or damage that occurs during such carriage services (s40 of the Consumer Guarantees Act). It is therefore unnecessary for me to consider the Consumer Guarantees Act despite raising this with the parties at the hearing, in addition to the [the convention].

**Are the Applicants entitled to a remedy and, if so, is the amount claimed proved and reasonable?**

14. If an airline is liable to pay compensation for delay under Article 19 of the [the convention], the maximum liability is generally limited to 5,346 Special Drawing Rights (“SDR”) per passenger (Article 22(1)). Further, given the wording “liable for damage occasioned by the delay” set out in Article 19, any compensation is required to be compensatory in nature and must be caused by the delay and, therefore, not too remote. Before the Tribunal awards damages to a successful applicant, it must be satisfied that the amount claimed is proved and reasonable.
15. The Applicants seek compensation of \$21,571.58 from B Ltd. However, as I have found that B Ltd is not liable for the Applicants’ costs, the Applicants are not entitled to a remedy under the [the convention]. However, despite my finding that B Ltd is not liable to the Applicants under the [the convention], BB confirmed at the hearing that B Ltd is prepared to make some good-will payments to the Applicants regardless of the Tribunal’s findings, as follows:
- \$870.00, being \$435.00 refund per passenger for the value of the domestic flights between [city 3] and [city 2] which the Applicants did not take.
  - \$20.00, being \$10.00 refund per passenger for the fare changes on the return to New Zealand for the difference in fare from [city 6].
  - The cost of the hotel in [city 4] on 22 December if not already paid (amount unquantified).
  - The cost of the [city 1] to [city 7] flight (amount unquantified).
16. Based on the available information, I am satisfied that it is more likely than not that B Ltd has not paid the cost of the Applicants’ hotel (Hotel N) in [city 4] on 22 December 2022.
17. I have taken into account that B Ltd provided some accommodation (Hotel N) and meals to the Applicants in [city 4] for 21 December. I note from the correspondence on [instant messaging] that B Ltd informed the Applicants on 28 December that “*We can assist with the two night accommodation and food from 20 December to 22 December, after which it will be VB’ responsibility to look after you as they have cancelled their services. ...If you send the receipts we’re happy to take a look at these for you*”.
18. I have also taken into account that the Applicants have not claimed for accommodation on 22 December and in OX’s [email] message to the office of Aviation Consumer Protection to lodge his complaint against B Ltd, he states that “*We were given hotel accommodation and meals for the first day [in [city 4]]...and we were given a second day of paid accommodation at the hotel (Hotel N by airport in [city 4]) [when the flight on 22 December was cancelled]*”. However, the Applicants stated at the hearing that B Ltd had only paid for the first night of accommodation, and BB was unsure. I estimate that the cost of that one night of accommodation is \$551.36, based on Mr OX’s credit card record for the Hotel N on 24 December 2022 (being USD339.03 converted to NZ\$551.36).
19. I am therefore satisfied that it is fair and reasonable that B Ltd pay the Applicants for accommodation on 22 December and a reasonable amount for food on 22 December 2022. The Applicants have not claimed for any food on 22 December 2022, but they have claimed \$81.31 for food on 23 December 2022 at the Hotel N, and I consider the sum of \$81.31 to be a fair estimate of food cost on 22 December 2022 also. For the avoidance of doubt, even if I am wrong and B Ltd has already provided a voucher to the Applicants for food on 22 December 2022, I am

satisfied that the further sum of \$81.31 is reasonable given the many costs incurred by the Applicants in this unfortunate situation.

20. Further, in the absence of evidence regarding the cost of the [city 1] to [city 7] flight on the return journey to New Zealand that B Ltd is prepared to pay, I am satisfied that a reasonable estimate of this cost is \$150.00 per person (incl GST), which is a total of \$300.00.

21. The balance of the claim is dismissed because of my findings under the [the convention]. With regard to the Applicants' claim for [redacted] health insurance (\$494.00), I am satisfied that had the Applicants had travel insurance, it is more likely than not that it would have covered their time in the [Country 1], or the policy could have been upgraded at a lesser cost than claimed. For completeness, I note that even if B Ltd was responsible under the [the convention], it would not be responsible for any of the costs incurred by the Applicants in driving to [city 5], rather than waiting in [city 4] for a rebooking to Country 2. This is because the Applicants chose to incur those costs (including the rental car costs, fuel, and higher hotel costs) and, in this way, did not mitigate their losses, so such costs must be to their account. Further, B Ltd would not be liable for damages of \$10,000.00 claimed for distress, time, and harm suffered because these are more than compensatory costs and are not permitted costs for which the Tribunal can award damages.

22. I therefore award total damages of \$1,822.67 to the Applicants, calculated as follows:

- \$870.00, being \$435.00 refund per passenger for the value of the domestic flights between [city 3] and [city 2] which the Applicants did not take
- \$20.00, being \$10.00 refund per passenger for the fare changes on the return to New Zealand for the difference in fare from [city 6]
- \$551.36, being the cost of the hotel in [city 4] on 22 December
- \$81.31 for food on 23 December 2022
- \$300.00, being the estimated cost of the [city 1] to [city 7] flight.

23. For these reasons, I award damages of \$1,822.67 to the Applicants, which B Ltd is to pay by the date set out in the order. The balance of the claim is dismissed.

**Referee: D. Brennan DTR**  
**Date: 2 May 2023**



## Information for Parties

### Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available at the time.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 20 working days of the decision having been made. If you are applying outside of the 20 working day timeframe, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

## **Grounds for Appeal**

There are very limited grounds for appealing a decision of the Tribunal. Specifically, the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact. Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 20 working days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 working days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, then serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

## **Enforcement of Tribunal Decisions**

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

## **Help and Further Information**

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>