

**BETWEEN**

**DU**  
APPLICANT

**AND**

**DUD**  
SECOND APPLICANT

**AND**

**VF**  
RESPONDENT

**AND**

**VFV LIMITED**  
SECOND RESPONDENT

**AND**

**VFVU**  
THIRD RESPONDENT

Date of Order:

12 September 2016

Referee:

Referee Tunncliffe

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**ORDER OF THE DISPUTES TRIBUNAL**

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**The Tribunal hereby orders that VFV Limited is to pay \$1,209.10 to DU and DUD on or before 24 September 2016.**

### **Facts**

[1] DU and DUD booked return flights from A to B with VFV Limited (VFV). The flight to B went according to plan. However after passengers had boarded the plane for the return flight on 22 May 2016, they were all asked to disembark. Passengers waited at the airport for 5 hours before VFV cancelled the flight.

[2] DU and DUD rebooked with ABC and returned to A on 23 May 2016, flying via C.

[3] VFV has refunded the fare paid for the B to A flight, \$343.00.

[4] DU and DUD seek compensation of \$1,999.99, being \$435 for the alternative flight (the difference between the refund of \$343 and the ABC flight of \$778), \$125 for accommodation, \$67.60 for taxis to and from B airport, \$16 for internet costs, \$10.50 for food, \$15 for an extra board night at the cattery, \$540 to pay a contractor to cover DU's work on 23 May plus the remainder of \$790.89 for unnecessary stress to DUD, who suffers from Parkinsons.

### **Issues**

[5] The issues for the Tribunal to determine are:

- a. . Whether the delay was due to unforeseeable circumstances;
- b. Whether VFV took all necessary measure to avoid the damage or whether it was not possible for the carrier to take those measures;
- c. Whether VFV's liability is limited to that set out in its Terms & Conditions;
- d. If VFV is liable, what is the reasonable damage caused by the delay;
- e. Whether VF and VFVU are personally liable.

*Was the delay was due to unforeseeable circumstances?*

[6] A carrier is liable for damage caused by delay in the carriage of passengers (S.91Z(1) Civil Aviation Act 1990) unless the carrier proves that the delay was made necessary by force majeure (S.91Z(2)(b) CAA).

[7] The definition of force majeure in law is “unforeseeable circumstances that prevent someone fulfilling a contract” (Concise Oxford English Dictionary 11th ed) and “an event that can be neither anticipated nor controlled” (Blacks Law Dictionary, 8th Ed).

[8] A mechanical breakdown is a foreseeable event. VFV said the part that had failed had only recently been replaced with a new one and VFV could not reasonably know that the new part was defective. VFV has not produced any evidence to prove the actual cause of the mechanical failure, or that it was due to a part that had recently been replaced with a new one. However, even if it had done so, the failure was not unforeseeable because repairs do not always go entirely as expected.

*Did VFV take all necessary measure to avoid the damage or whether it was not possible for the carrier to take those measures?*

[9] A carrier is not liable if the carrier proves that (a) the carrier, or the carrier’s servants or agents, had taken all necessary measures to avoid the damage; or (b) it was not possible for the carrier, or the carrier’s servants or agents, to have taken those measures (S. 91ZA CAA).

[10] VFV took 5 hours to advise passengers that the flight was cancelled, by which time there were no other flights leaving B. It could be argued that VFV was doing its best to make sure the fault could not be fixed before disrupting passengers by cancelling. However, the effect of that decision was that it was too late for passengers to make arrangements with other airlines and accommodation and other costs associated with the delay were inevitable.

[11] VFV had only one plane. VFV did not have an arrangement in place to deliver its passengers to their destinations should its sole aeroplane be out of commission for a number of days, as occurred in this case.

[12] To take advantage of the exoneration from liability under S.91ZA, the onus of proof lies with VFV. By delaying its decision to cancel for 5 hours VFV has not done all it could to avoid the cost of transport and accommodation costs for out-of-town passengers, or costs associated with staying an extra night. Operating with one aeroplane without an alternative arrangement in case of mechanical breakdown in place created a risk. The question is, who

should bear the cost of that risk - VFV or the passenger? This risk ought reasonably to lie with the party making the decision. I find this to be a business risk resting with VFV and not one that ought to reasonably be borne by a passenger.

*Is VFV's liability limited to that set out in its Terms & Conditions?*

[13] VFV referred the Tribunal to its Terms and Conditions. VFV has not presented a copy of them, but there is no disagreement between the parties that there is a clause which reads "Where VFV is unable to commence or continue any flight, or carry any contracted passenger or freight, it will re-book the passenger on the next VFV service on which seats are available. If alternative booking is not possible or suitable, the passenger may rebook with VFV or receive a refund." VF who attended the hearing by teleconference for VFV said that the Terms and Conditions had been approved by the CAA during the process of granting VFV its operating licence.

[14] However the CAA states that the liability of the carrier in respect of damage caused by delay is limited to the lesser of the amount of damage proved to have been sustained as a result of the delay or an amount representing 10 times the sum paid for the carriage (S.91ZC(1) CAA). The carrier may by special contract increase the amount of the carrier's liability (S.91ZC(2) CAA) but there is no provision to decrease it. S.91ZD specifically precludes lowering the limit and any term purporting to do so has no effect.

[15] I find the term purporting to limit VFV's liability to a refund of the fare paid is of no effect.

*What are the reasonable damages that flow from the delay?*

[16] I find the damage caused by the delay to be \$435 for the alternative flight (the difference between the refund of \$343 and the ABC flight of \$778), \$125 for accommodation, \$67.60 for taxis to and from B airport, \$16 for internet costs, \$10.50 for food, \$15 for an extra board night at the cattery, \$540 to pay a contractor to cover DU's work on 23 May.

[17] There was no reasonable, cost effective alternative but to book with another airline because VFV could give no indication of when its plane would be ready to fly (in fact it was several days). Given that DU is self-employed and had work commitments to meet and that DUD has Parkinson's and did not have sufficient medication with him to cover a delay, the decision to rebook on another airline was reasonable.

[18] Had DU and DUD chosen to wait for VFV's plane to be available accommodation and food costs would have increased as would the business cost to DU.

[19] DU's evidence that she had a commitment to activate a website for a customer on 23 May is accepted. DU has produced an invoice in which she paid \$540 to DEF to do this work. It seems unlikely to me that DU would have paid for this to be done, not knowing whether she could recover it from VFV, if it had not been necessary.

[20] With the exception of the claim for food, all of the costs amounting to a total of \$1,209.10 have been proved by way of receipts and invoices. The claim for food is modest and reasonable.

[21] I have not allowed DU and DUD's claim for damages for stress. It is foreseeable that delays in air travel may occur from time to time for a variety of reasons, and the stress involved is to be expected.

*Are VF and VFVU personally liable?*

[22] The contract was with VFV. *VF and VFVU* are Directors of the company and they are not contractually liable for the failures of VFV.