

**Licence
Appeal
Tribunal**

**Tribunal
d'appel en
matière de permis**



DATE: 2016-10-05
FILE: 10192/TIA and 10206/TIA
CASE NAME: 10192 and 10206 v. Registrar, *Travel Industry Act, 2002*

Appeals of Decisions of the Board of the Travel Industry Council of Ontario to Disallow Claims

KL and IO

Appellants

-and-

Travel Industry Council of Ontario

Respondent

REASONS FOR DECISION AND ORDER

ADJUDICATOR: Patricia McQuaid, Vice-Chair

APPEARANCES:

For the Appellants: Each self-represented

For the Respondent: Soussanna Karas, Counsel

Heard in Toronto: August 26, 2016

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal (the “Tribunal”) arising out of two decisions, each dated April 19, 2016, of the Board of Directors of the Travel Industry Council of Ontario (“TICO”) under the *Travel Industry Act, 2002* (the “Act”) to refuse the two Appellants’ claims for compensation from the Travel Industry Compensation Fund (the “Fund”) pursuant to section 57 of O. Reg. 26/05 (the “Regulation”). The Appellant KL’s claim is in the amount of \$2,490 and the claim of the Appellant IO is in the amount of \$1,950.

The Appellants KL and IO filed separate appeals. At the request of the Respondent, and on consent of the Appellants, their appeals were heard together.

After careful consideration of the evidence and submissions, and for the reasons that follow, the Tribunal approves the claims of KL and IO.

BACKGROUND

By way of background, TICO’s principal mandate is consumer protection. Administering the Fund is part of that mandate. The Board of TICO reviews claims made to the Fund by “customers” and determines entitlement. That review is based on documents submitted to it. There is no oral hearing. A claimant does, however, complete an affidavit with TICO, as well as supporting documentation, as available.

In her affidavit, KL stated that she made four e-transfer payments to Michelle Solomon of Business & Vacation Travel Planners, Blue Mountain Travel (“Blue Mountain”) for four flights to Jamaica on August 22, 2015. KL and her three children went to the airport on August 22, only to discover that tickets had not been booked. They were unable to travel and thus missed her sister’s wedding. IO, in her affidavit, stated that in July 2015, she booked two tickets to Jamaica for travel on December 22, 2015 through Blue Mountain Travel. She paid for the tickets by cash deposits into a TD bank account. She did not receive the airline tickets, nor did she get her money back.

The basis for denying both claims was that the payments were made to a third party who was not a registered travel agent and that without a proper receipt issued by Blue Mountain Travel, the Board “was unable to determine what if any travel services were purchased and whether the services were utilized prior to the failure of” Blue Mountain Travel.

The entitlement to claims on the compensation fund and exclusions are set out in section 57 of O. Reg. 26/05. Ms. Karas, in her submissions, acknowledged that the provisions of this regulation are drafted “in a limited way”. The Board has to balance its consumer protection mandate with the requirement that it preserve the Fund, which is essentially monies held in trust, for the benefit of all eligible claimants. The relevant sections of the regulation are set below, in order to give context to the evidence that follows.

Reimbursement of customer

57. (1) A customer is entitled to be reimbursed for travel services paid for but not provided if,

- (a) the customer paid for the travel services and the payment or any part of it was made to or through a registered travel agent;
- (b) the customer has made a demand for payment from,
 - (i) the registered travel agent and the appropriate registered wholesaler,
 - (ii) any other person who has received the customer's money, and
 - (iii) any other person who may be legally obliged to reimburse or compensate the customer, including a person obliged under a contract for insurance; and
- (c) the customer has not been reimbursed by,
 - (i) those of the registered travel agent and the appropriate registered wholesaler, who under section 25 of the Act are liable to make the reimbursement, because they,
 - (A) are unable to pay by reason of bankruptcy or insolvency,
 - (B) have ceased carrying on business and are unwilling to pay, or
 - (C) have ceased carrying on business and cannot be located,
 - (ii) any other person who has received the customer's money, or
 - (iii) any other person who may be legally obliged to reimburse or compensate the customer, including a person obliged under a contract for insurance. O. Reg. 26/05, s. 57 (1); O. Reg. 161/10, s. 10.

(2) A reimbursement under subsection (1) is limited to the amount paid to or through any registrant for the travel services that were not provided. O. Reg. 26/05, s. 57 (2).

Section 61 of the Regulation sets out the requirement to submit documentation to the Board:

61. (1) The claimant shall provide such documents and other information to the board of directors as the board requires to prove the claim. O. Reg. 26/05, s. 61 (1).

EVIDENCE

The Tribunal heard testimony from the Appellants and Lori Furlan, the Claims Coordinator at TICO. Ms. Furlan processes the claims submitted by consumers and prepares the documents for the Board's review. It is not disputed that Blue Mountain Travel was a registered travel agency and that Michelle Solomon and Kesha Daley (who is relevant to IO's claim) were employees. At the relevant time, Blue Mountain was located at 1672 Jane Street, Toronto. Its registration was terminated on July 31, 2015, and it is that failure which triggered claims against the Fund by consumers.

Ms. Furlan testified that 43 claims have been made. Of these, 22 have been approved (with a pay out from the Fund of approximately \$26,000), seven have been denied (including those of KL and IO) and the remaining have either been abandoned or a decision is still pending. The Respondent's documents, filed at the hearing, indicate that the reported incidents involving Ms. Solomon and Blue Mountain relate to air only bookings, mainly to Grenada, Jamaica and other Caribbean destinations. TICO also discovered that Ms. Solomon continued to sell

travel services after July 31, 2015 when she was no longer registered. Both Blue Mountain and Ms. Solomon are facing charges under the Act; these include charges for failing to deposit customer funds into trust accounts, contrary to the Act.

The Tribunal will deal with the evidence relating to each of the Appellants' claims separately.

KL's claim

TICO does not dispute that KL paid money for, but did not receive travel services. KL testified that she had purchased airline tickets from Blue Mountain and Ms. Solomon, previous to August 2015. In March 2015, she bought airline tickets through Ms. Solomon. She never attended at the Blue Mountain office and always paid for the tickets by instalments and by e-transfer. She never had any problems with her travel bookings. Because of her previous positive experience, KL testified that she had a high level of trust and confidence in Ms. Solomon.

For the trip to Jamaica, in August 2015, to attend her sister's wedding, she made payments as follows:

June 18, 2015 – deposit of \$100
July 14, 2015 – e-transfer of \$150
July 30, 2015 – e-transfer of \$1,000
August 13, 2015 – e-transfer of \$1,240

KL testified that her husband was originally planning to travel with the family to the wedding, but had to cancel because of work commitments. His ticket was also paid by an e-transfer. They received a refund from Blue Mountain for his ticket and therefore, this is not included in her claim.

KL made the payments to an email address given to her by Ms. Solomon: nevi_shop@hotmail.com. KL got an email receipt when she made the money transfers. She believed that this was sufficient as proof of purchase. In the past, once she had paid for the tickets in full, Ms. Solomon would send her the tickets. The fact that she did not have the tickets prior to the August 22, 2015 travel date did not cause her concern. What she was concerned about was a phone call she received from her sister on their day of departure about labour disruption at the Kingston, Jamaica airport. She called Ms. Solomon who told her that everything was "OK" and the flight was booked and still scheduled to leave Toronto.

KL went to the airport with her children, only to discover that there was no record of a reservation for them. The airline agent asked her if she had booked her flights through Blue Mountain Travel, to which she responded yes. She then learned that other travelers who had booked through Blue Mountain were experiencing similar situations – payments made, but no actual airline booking made.

After several frantic phone calls with Ms. Solomon, KL decided to go to the Blue Mountain office to speak to Ms. Solomon in person. Several people were there, all upset, because they paid Ms. Solomon money for airline tickets that were not booked. KL testified that she was aware that some people, including a neighbour who paid by credit card, did get reimbursed from the TICO Fund.

The issue for TICO, is that KL's payment was to the nevi_shop@hotmail account, which Ms. Furlan discovered through their investigation, was Ms. Solomon's boyfriend's account, a third party account. Ms Furlan testified that TICO needs to be satisfied that the funds were paid to a registrant. TICO was unable to trace that the funds paid into this account had then been deposited into Blue Mountain's account, the registered travel agent. In denying the claim, the Board took the position that because the money was paid to Ms. Solomon's boyfriend's account, it was not a payment to or through a registered travel agent, as required by the regulation. Furthermore, the Board concluded that without a receipt, the Board was, "unable to determine what, if any, travel services were purchased and whether the services were utilized prior to the failure of the registrant". Ms. Furlan did testify that if the documentation had otherwise been in order, the fact that one of KL's payments was made on August 13, after Blue Mountain's failure on July 31, would not have precluded payment of that portion of the claim.

IO's claim

IO had never booked travel services with Blue Mountain before doing so in July 2015; however, family members had used Ms. Solomon to book airline tickets. She was recommended to her. She spoke to Ms. Solomon by phone, to book airfare to Jamaica in December 2015, for herself. The fare was \$930. Ms. Solomon gave her an account in which to deposit her payment. IO then went to a TD bank and made the payment. She did get a receipt for that payment but has been unable to find, nor could the bank locate a copy for her. Ms. Solomon told her that she would "write up" the ticket which IO would then pick up at the Blue Mountain office. Shortly thereafter and before picking up the ticket, IO called Ms. Solomon again and told her that she wanted to book a ticket for her granddaughter as well. Ms. Solomon told her that Kesha Daley would give IO the account number into which she was to deposit payment. The second airfare was \$1,020. She made that deposit on July 25, 2015 and was able to locate the receipt for that payment. She called Ms. Solomon, on several occasions, to tell her that she would be attending at her office to pick up the tickets. There was never an answer.

IO eventually went to the Blue Mountain office on September 14, 2015. This was the first time she met Ms Solomon. Ms Solomon gave her an itinerary. The itinerary was for travel to Montego Bay, Jamaica on December 22, 2015, for her and her granddaughter, and this had the Blue Mountain stamp. When she was leaving the office, she met a woman who told her that she too had booked airline tickets through Ms. Solomon, but did not get tickets from her, and suggested that IO call the airline to see if in fact, there was a booking for her. IO called Air Canada immediately and was told that no reservation had been made. IO then

went back into the Blue Mountain office to speak to Ms. Solomon and insisted that she be reimbursed. Ms. Solomon told her that she had no cash in the office but would send her the money. There is a handwritten note on the itinerary to the effect that IO requested a refund on September 14, 2015. IO testified that Ms. Solomon did not offer to write her a cheque, nor would she have accepted a cheque from her at that point. No refund was forthcoming.

TICO acknowledges that Kesha Daley was an employee of Blue Mountain, but again, was unable to trace either payment made by IO to a Blue Mountain account. Furthermore, there is no receipt whatsoever for the \$930, which IO says she paid for her ticket. IO advised TICO that she had contacted the bank to try to recover a receipt, but they could not “go back that far”. With respect to the second payment of \$1,020, this was paid into Ms. Daley’s personal account and therefore not “to or through a registered agent”. TICO’s position is that the itinerary is not a ticket, and does not indicate a payment.

ANALYSIS

Ms. Karas stated in her submissions that the relevant sections of the regulation are drafted in such a way that only those claims that fit within its requirements are eligible for reimbursement. The Board makes its decision based on the documents provided to it. The Tribunal notes that the Board does not have the benefit of the oral evidence, which can give important context to the documents submitted by a claimant and sometimes explain why documents were not submitted.

The Tribunal has acknowledged in prior decisions that the TICO Board has a balancing act to perform; it requires supportive documentation to ensure that only eligible claimants are paid, thereby preserving the Fund in an appropriate manner; yet it also has a consumer protection mandate. Ms. Karas stated that the Board has developed policies regarding how it will process claims: funds paid by a consumer must be traceable to the travel agency to show that the claim was made “to or through a registered travel agency”. Ms. Karas stated that the policy may not be “perfect”, but it enables the Board to maintain a consistent and reliable approach to the payment of claims, with a predictability regarding required documents. While the Tribunal appreciates the rationale for such a policy, it is not, however, bound by TICO policy.

In these appeals, the Tribunal stands in the place of the Board of TICO.

The evidence outlined above provides important context to the Appellants’ claims. The Tribunal found both Appellants to be credible. They gave their evidence in a firm and straightforward manner. Both were among a large group of consumers who used the services of Blue Mountain and Ms. Solomon to book travel services, but did not receive those services. Ms. Karas stated in her submissions that TICO has acknowledged that Ms. Solomon was involved in fraud on consumers. TICO is prosecuting both Ms. Solomon and Blue Mountain, one of the goals of which she stated was to get restitution for those persons, like

KL and IO, whose claims were denied by the Board. Implicitly, there is some recognition that KL and IO paid money to Ms. Solomon and Blue Mountain and did not receive the travel services purchased.

Regarding KL's claim, the documentary evidence shows payments totaling \$2,490 were made for four tickets to Jamaica. The fact that when KL requested of Ms. Solomon, that the payment for her husband's ticket be refunded, it was, would only bolster her confidence and trust in Ms. Solomon and Blue Mountain Travel. Based on KL's evidence about going to the airport, with her children, to get on a flight to Jamaica, it would be unreasonable, and untenable, to conclude, as the Board did, that "it cannot be determined what if any travel services were purchased and whether the services were utilized before the failure".

The only issue remaining is the fact that the payments were made, unwittingly by KL, to Ms. Solomon's boyfriend's account. Ms. Solomon directed KL to make her payments to that account. KL had no reason to question Ms. Solomon given her previous positive dealings with her. It is noteworthy that the charges against Blue Mountain include the failure to deposit customer funds into its trust account, very probably making it difficult to trace the payments as being, "to or through a registered travel agent". To suggest that KL's payment was not to Ms. Solomon, who was, at the material time, the employee and public face of Blue Mountain, is to narrowly and unreasonably construe the legislative intent of consumer protection in favour of preservation of the Fund.

The Tribunal finds that KL's evidence is corroborative of the documents provided by her in support of her claim against the Fund. KL is to be reimbursed in the amount of \$2,490 from the Fund.

Regarding IO's claim, she did receive an itinerary from Ms. Solomon on September 14, 2015 as evidence of travel booked. It was, clearly, a bare bones document. But it did detail the flight dates and destination. IO quite quickly recognized that this was not sufficient and after calling Air Canada, which confirmed that flights had not been booked, demanded a refund. The itinerary has a handwritten note on it that a refund in the amount of \$1,950 was demanded on September 14, 2015. IO provided a document to support the fact that payment of \$1,020 was made. Ms. Solomon directed IO to speak to Ms. Daley, who would tell her the account number into which the payment was to be deposited. IO would have had no way of knowing that this was not a Blue Mountain account. For the reasons noted above with respect to KL's claim, the Tribunal finds that IO should be reimbursed in the amount of \$1,020 from the Fund.

What is more problematic is reimbursement for \$930 in respect of the first ticket IO purchased. There is no documentation provided as evidence of that payment, though the Tribunal accepts IO's testimony that she attempted to get a receipt, several months after the transaction, from the bank, without success. Section 61 of the regulation does require the claimant to provide such documents and other information to the Board that it requires to prove the claim. TICO has not raised

an issue that this payment was not made to or through a registered agent, but rather that there is no documentation to support that a payment was in fact made. And without the benefit of oral testimony that the Tribunal heard, that position is understandable. But the Tribunal, in considering the evidence in its totality, concludes that it was made. IO testified to making this payment in the same manner as the second payment. It was her airfare that was being purchased. The itinerary which she did receive reflects two passengers travelling, herself and her granddaughter. As noted above, the Tribunal stands in the place of the Board on these appeals. The Tribunal found IO to be credible and accepted her evidence and concluded that the evidence supports IO's claim for \$930, as well.

ORDER

By authority of subsection 71(6) of the Regulation, Tribunal directs TICO to pay the Appellant KL the amount of \$2,490 and to the Appellant IO, the amount of \$1,950, as reimbursement for money paid to or through Blue Mountain Travel for travel services that were not provided.

LICENCE APPEAL TRIBUNAL


Patricia McQuaid, Vice-Chair

Released: October 5, 2016