

**Licence
Appeal
Tribunal**

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



DATE: 2015-12-22
FILE: 9717/TIA
CASE NAME: 9717 v. Travel Industry Council of Ontario

An appeal of a Decision of the Board of the Travel Industry Council of Ontario to Disallow a Claim

Appellant

-and-

Travel Industry Council of Ontario

Appellant

Respondent

REASONS FOR DECISION AND ORDER

ADJUDICATOR: Patricia McQuaid, Vice-Chair

APPEARANCES:

For the Appellant: Ralph Michael Levine, Counsel

For the Respondent: Soussanna Karas, Counsel

Heard in Toronto: December 1, 2015

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal (the “Tribunal”) arising out of a decision dated July 22, 2015 of the Board of Directors of the Travel Industry Council of Ontario (“TICO”) under the *Travel Industry Act, 2002* (the “Act”) to refuse a claim for compensation, in the amount of \$5,600, from the Travel Compensation Fund (the “Fund”) pursuant to section 57 of O. Reg. 26/05 (the “Regulation”).

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. Ms Karas, in her opening statement, stated that TICO agrees that the Appellant is a “customer” as defined by the Act. There are two reasons for the denial of her claim. First, the Board did not feel that the documentation provided was sufficient. The Appellant did not submit an invoice. Second, the Appellant did not make “payment to or through a registered travel agent”.

The entitlement to claims on the compensation fund and exclusions are set out in section 57 of O. Reg. 26/05. The Respondent’s position involves a strict interpretation of the statutory provisions, and therefore, it is helpful to set out the relevant sections 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 essential facts are not in dispute. On January 28, 2014, the Appellant called Rowena Santiago, a travel counsellor/outside service representative, with SmartChoice Travel and Tours ("SmartChoice"). The Appellant wanted to book four airline tickets to the Philippines. The tickets cost \$1,400 each for a total cost of \$5,600. At that time, TICO's records showed that SmartChoice was operating as a partnership. Gerardo Calderon and Romeo Lascano Jr. ("Mr. Lascano") were the principals. Gladys Calderon was the manager of SmartChoice.

On January 29, 2014, at the direction of Ms Santiago, the Appellant deposited \$5,600 into a bank account, in the name of Romeo Lascano. Ms Santiago told the Appellant that Mr. Lascano was one of the owners of SmartChoice, which fact was confirmed by the Appellant's husband when he checked the TICO website. He checked the website because he was concerned when Ms Santiago told his wife to deposit payment to Mr. Lascano's bank account. He was reassured by the fact that the SmartChoice website showed pictures of both Mr. Lascano and Mr. Calderon and that the TICO logo appeared on the website.

After depositing the money, the Appellant emailed Ms Santiago to get the tickets sent to her. They were not forthcoming. Several days later, the Appellant and her husband arranged to meet Ms Santiago at another travel agency, at which she also worked, near the Scarborough Town Centre. At that time, Ms Santiago printed an itinerary for them. This showed the Philippines Airlines flight numbers, the dates of travel, and listed the Appellant and her family members as passengers. The SmartChoice name appeared on the upper right hand corner of the itinerary, with its phone number, website and email address listed.

The Appellant never received the tickets themselves. As her husband stated in his testimony, by March 2014, things started "getting ugly". Ms Santiago was nowhere to be found. They learned that she had been arrested. They spoke to Gladys Calderon about their situation and she suggested that they file a claim with TICO, which they eventually did.

The Appellant also commenced a Small Claims Court action against SmartChoice and Mr. Lascano. She did not pursue that claim after she learned that Mr. Lascano was not in Canada and so could not be served with documents and that SmartChoice filed for bankruptcy. Her Small Claims Court action does appear in the trustee in bankruptcy records submitted by the Registrar at the hearing, as a claim by an unsecured creditor. TICO is also listed as an unsecured creditor, in the amount of approximately \$103,000. The Appellant did not pursue recovery of any monies through the trustee; Ms Karas advised that TICO did, though it did not receive 100 cents on the dollar.

The Appellant is not the only customer who thought she was purchasing tickets through SmartChoice and Ms Santiago, and paid for the tickets, but received nothing in return. Doug Fritz, an investigator with TICO, testified that in April 2014, TICO started receiving consumers' complaints that they paid Ms Santiago for airline tickets to the Philippines and failed to receive the travel service contracted for. Through his investigation, Mr. Fritz learned that Ms Santiago (who seemed to be known by several names) came to Toronto in 2011 from Las Vegas, which she fled because of a warrant out for her arrest there. Shortly thereafter, she began working as a travel consultant, under contract with SmartChoice.

Mr. Fritz's investigation revealed that Ms Santiago had devised a fairly elaborate and fraudulent scheme, the details of which are not particularly relevant to the issue before the Tribunal. Ms Santiago would take payment from customers and give them itineraries on SmartChoice letterhead. Customers often believed that this was a ticket, but the airline would not have been paid, so there were no tickets in fact.

Mr. Fritz confirmed in his testimony that TICO's understanding, as of April 2014, was that Romeo Lascano was one of the SmartChoice partners. He discovered that Mr. Lascano left Canada in 2011 and was living in Las Vegas. Mr. Fritz contacted Mr. Lascano, who told him that despite what was stated in the TICO records, he was no longer a partner in SmartChoice. However, Mr. Fritz also searched Mr. Lascano's bank accounts, to which SmartChoice still had access, which showed money going into his account from complainants. Mr. Lascano also allowed SmartChoice to use his credit card (while apparently no longer a partner) to buy airline tickets for which he would be reimbursed by Ms Santiago or SmartChoice.

Ms Santiago pled guilty to fraud charges in respect of some 70 individuals who paid approximately \$301,000 for airline tickets not received. She received a 21 month jail term and was deported after she served her jail term. In addition to the 70 consumers cited in the court documents, TICO received complaints from 24 consumers who paid her approximately \$81,000.

When asked whether SmartChoice was part of the scheme run by Ms Santiago, Mr. Fritz stated that, based on his investigation, SmartChoice (specifically, the Calderons) knew what was going on – some of the money from customers that should have been paid into the agency's trust accounts was being paid into their personal accounts. The Calderons have been charged with offences under the *Travel Industry Act*.

One of the allegations cited in those charges is that they, carrying on business in partnership as SmartChoice Travel and Tours, failed "to deposit \$5600.00 in a designated trust account within two banking days after receiving the funds from [the Appellant] for payment of four return airline tickets to Manila, Philippines..." As Mr. Fritz quite candidly stated, "SmartChoice is responsible for this booking".

The Tribunal also heard testimony from Lori Furlan, who is a claims coordinator with TICO. Ms Furlan described the Appellant's claim as "complicated". TICO has

approved only two of the claims made by complainants who fell prey to Ms Santiago's scheme. Ms Furlan reiterated that the Appellant's claim was denied by the Board for two reasons. There was a lack of documentation – there was an itinerary, but that was not sufficient. There was no ticket, no invoice and no receipt. In her words, "the Board was unable to determine if the travel services were actually received." She did acknowledge that the failure to invoice properly was a contravention of the Act, by SmartChoice. The second reason for the denial was that the funds were not paid into an account of the registrant, SmartChoice, but rather into the account of a "third party", Mr. Lascano.

Though not stated in the decision from the Board, Ms Furlan also testified that it was an issue that the Appellant did not pursue every recourse for reimbursement before pursuing her claim with TICO, specifically a claim through the trustee in bankruptcy. Ms Furlan cited s. 57(1)(b) of the Act as the basis for this assertion. This provision requires the customer to "make a demand for payment" from the travel agent or any other person who received the customer's money or who may be legally obliged to repay the customer. However, Ms Furlan conceded that this provision does not specifically state that such action vis-à-vis a trustee in bankruptcy is required by a claimant.

After reviewing the evidence, as set out in detail in this decision, the Tribunal finds no basis for the Board's denial of the Appellant's claim. The Tribunal finds that the evidence supports the Appellant's entitlement to reimbursement from the Fund.

The Appellant paid \$5,600 for airline tickets she did not receive. Her only "proof" of that is the itinerary issued by Ms Santiago. Ms Karas conceded that there is no suggestion that the Appellant is not credible. There was no further documentation, such as an invoice, because of the fraud perpetrated on her, and others, by Ms Santiago (who was selling through the auspices of SmartChoice), and because SmartChoice, according to TICO's own investigation, failed to comply with its obligations under the Act. In light of the results of that investigation, it is disingenuous for TICO to deny the claim for lack of proper documentation, yet cite that very transaction in its charges against SmartChoice. Mr. Fritz, in his testimony, stated that there is no dispute that the Appellant paid money for tickets which she did not receive.

The second ground for denial of the claim – that the payment was made to a third party, Mr. Lascano, who the Board stated "is not a registered travel agent" – is no more tenable than the first ground. Mr. Lascano was shown at the material time, based on TICO's own records, to be one of two named partners of SmartChoice. He was at the material time, according to Mr. Fritz's testimony, still connected financially to the business, through access to his bank account and the agency's use of his credit cards. Funds were deposited into his account by SmartChoice or by Ms Santiago to reimburse him. To describe him as a "third party" in this context is unreasonable. He might more aptly be described as one of the principals of the registered travel agent, who was also a co-conspirator.

There may well be claims among the 24 consumers referred to by Ms Furlan and Mr. Fritz who had made payments, unwittingly perhaps, to third parties ostensibly at arm's length from SmartChoice, but this Appellant is not one of the consumers who paid a third party. Indeed, the document submitted to the Board for consideration of the various claims against the Fund reveals that the Appellant was the only one (of 11 submitted at the Board's meeting on May 6, 2015) who made payment to Mr. Lascano.

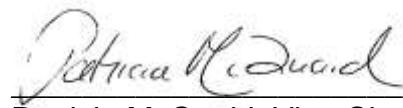
In closing submissions, Mr. Levine drew the Tribunal's attention to the fact that consumer protection is an integral part of TICO's mandate. Ms Karas acknowledged that mandate, but stated that the Board made its decision, especially with respect to the "third party issue", based on a "strict reading" of s. 57 of the Act, following its wording "to the letter". On the particular facts before the Tribunal on this appeal, and given the consumer protection mandate of TICO, such a position is incongruous. Consumer protection legislation should not be interpreted too narrowly and strictly, so as not to achieve the legislation's intended purpose. In applying s. 57(1)(a) of the Act to the facts in this case, the Tribunal finds that the Appellant "paid for the travel services and the payment or any part of it was made to or through a registered travel agent."

In this appeal, the Tribunal stands in the place of the Board of TICO. The Board does not hear evidence in claim matters; they conduct a review of documents only. The Tribunal had the advantage of hearing the Appellant's oral testimony and that of Mr. Fritz and Ms Furlan, which was of great assistance.

ORDER

By authority of subsection 71(6) of the Regulation, Tribunal directs TICO to pay the Appellant the amount of \$5,600 as reimbursement for travel services paid for but not provided.

LICENCE APPEAL TRIBUNAL



Patricia McQuaid, Vice-Chair

Released: December 22, 2015