

'Watch out for Further Announcements' – Cancellation. The British Experience

In the last of our articles dealing with flight problems, and rights accrued under 261/2004, we highlight two examples of the chaos, real and potential, created by a flight cancellation.

In December 2006 we witnessed the chaos apparently caused by fog at Heathrow Airport. The news was dominated by reports of flight cancellations, throwing the travel plans of many thousands into jeopardy. One airline, cancelled all its domestic flights, whilst it appeared that other airlines were providing a limited service.

The news reports showed many hundreds of passengers being housed in tents outside the terminals, and being provided with blankets against the cold.

Like many organisations, we were asked to provide comment on this issue on Radio 5 Live. As we discovered, we had only 2 - 3 minutes to explain the vast area of rights that could be 'enjoyed' by a travel consumer! Our representative, Frank Brehany, made a comment that he considered the whole affair to be 'curious'. Curious that one airline should cancel all their domestic flights, yet a BBC news article showed aircraft operating behind the reporter. What was going on? The interviewer quickly explained that other airlines had also cancelled flights, but did not offer a reason for cancellation other than fog. Given the technological prowess of these machines, it was still nonetheless curious that such drastic action was employed.

So in the situation that these passengers found themselves, what rights should they have been given?

Firstly, Article 14 (1) provides that on arrival at the check in desk, passengers should have seen a notice setting out their rights under the Directive.

Under Article 14 (2), where a flight has been cancelled or where there has been denied boarding, a full notice detailing their rights, should have been provided to the passenger.

The next stage is provided in what is generically termed the Right to Care. Under Article 9 a passenger :

“shall be offered free of charge, meals and refreshments in a reasonable relation to their waiting time, hotel accommodation where a stay of one or more nights becomes necessary, or where a stay additional to that intended by the passenger becomes necessary, transport between the airport and place of accommodation (hotel or other). In addition, passengers shall be offered free of charge two telephone calls, telex or fax messages or e mails”.

It is also the duty of such airlines when providing this assistance to pay heed to the needs of vulnerable persons.

In addition, passengers affected by a cancellation should also be provided rights under Article 8.

This states that where reference is made to this article, passengers shall be offered the choice between;

“Reimbursement within seven days, by the means provided for in Article 7(3) - (this refers to payment in cash, electronic bank transfer, bank orders or bank cheques - note if the passenger agrees, payment can be made by travel voucher sand/or other services), of the full cost of the ticket at the price which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger’s original travel plan, together with, when relevant; a return flight to the first point of departure at the earliest opportunity”

“Re-routing, under comparable transport conditions, to their final destination at the earliest opportunity”

“Re-Routing, under comparable transport conditions, to their final destination at a later date at the passengers convenience, subject to availability of seats”

“[where the airline offers a flight from another airport], the operating carrier shall bear the cost of transferring the passenger from that alternative airport either to that for which the booking was made, or to another close-by destination agree with the passenger”

Before we consider whether you should receive compensation, it is important to recognise when it will not be payable. Under Article 5(1) (c) compensation will not be payable if;

you are informed of the cancellation at least 2 weeks before the scheduled time of departure;

You are informed of the cancellation between 2 weeks and 7 days before your scheduled time of departure and you are offered re-routing where you depart no more than 2 hours before your scheduled time of departure and arriving at your final destination less than 4 hours after their scheduled time of arrival;

you are informed of the cancellation less than 7 days before your scheduled time of departure and are offered re-routing and you depart no more than 1 hour before the scheduled time of departure and you reach your final destination less than 2 hours after the scheduled time of arrival.

However the question of compensation is somewhat vexed, as it is conditioned by the defence of 'extraordinary circumstances'.

If compensation was payable, then under Article 5 (3), it **will not** be payable where an airline invoked the defence under the preamble 15. The defence states:

"Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations".

Preamble 14 provides examples of what constitutes an extraordinary circumstances, these being,

“cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that effect the operation of the operating air carrier”.

The fact that its definition is open to a wide interpretation would mean therefore that the Heathrow fog incident would be classed as an 'extraordinary circumstance'. Is that really the case?

If you search the BBC website you discover that there have been a number of 'fog incidents' reported over several years. If we now examine the reason why so many flights were cancelled, we discover through the same website that there is a straightforward reason. Simply, there were too many aircraft operating at a time of year when perhaps extreme or poor weather should be expected.

The question must surely be asked, who is taking the risk, the airline or the passenger, and is it a reasonable risk to take? Would it be more reasonable to spread the schedule across a wider geographical area?

Remember, Preamble 15 states, "*even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations*". Is it reasonable to 'overbook' runway space in a winter season? Is it reasonable not to anticipate that extreme weather will affect such a busy schedule? Is it reasonable for airport authorities to allow such schedules, given the real possibility that passengers will suffer severe restrictions in the event of fog?

The recent Industrial Action threatened against an airline again caused chaos, flights were cancelled and we therefore assume that the defence of extraordinary circumstances was deployed. Again we refer to the preamble in 14 & 15 above. However, we also noted from the BBC website, that 2 strikes had also been planned in February 2007. Thankfully they were avoided, however, it raises the question, if the strikes were 'planned', what advance notice did the airline have and what steps did they take to plan the re-scheduling of the passengers? Perhaps the answer to that question lies with the Trade Union? Passengers so affected by this dispute could write to the Union and establish what level of advance notice they gave the airline; it would then be a question as to what 'reasonable measures' the airline then took to avoid the cancellation, and whether they could avoid paying the appropriate compensation?

Let us now assume that you are entitled to compensation under 261/2004. Compensation would be paid as follows:

€250 for all flights of 1500 kms or less;

€400 for all intra-community flights of more than 1500kms, and all other flights between 1500 & 3500kms;

€600 for all other flights;

Where there is re-routing offered and the arrival time does not exceed (2 hours 1500kms)(3 hours intra-community flights 1500kms or 1500 to 3500kms for all other flights)(4 hours in respect of all other flights), then the carrier may reduce the stated compensation by 50%;

Distances will be measured by the great circle route method.

An interesting case was decided in the Oxford County Court (Harbord v Thomas Cook Airlines). A flight was affected by a technical fault and an alternative flight was offered the next day. However, it was established that the aircraft with the fault was not the one the passenger was due to fly on, it was another aircraft in the fleet which had a knock on effect in the airlines operations. It was also held that allocating a flight to the next day amounted to a cancellation.

The Air Transport Users Council suggests that a further right exists under the Montreal Convention. Under Articles 19 & 22.1, where an 'airline is liable for damage occasioned by delay'. The argument follows that cancellation has the same effect as a delay because the Convention refers to a 'delay in the transportation by air'.

The issue of rights that flow from a flight cancellation is complex and detailed. Is it any wonder the average travel consumer is confused?

What has become clear, is that most travel complaints we receive, suggest that rights are not routinely offered. We predict that it only a matter of time before long suffering passengers challenge this laissez-faire approach to their rights in a group action!

HolidayTravelWatch
9 February 2007

www.holidaytravelwatch.com