

The complaint

Mr C is unhappy with how Nationwide Building Society handled a claim he made to it in respect of a service he purchased using his credit card.

What happened

The background facts are well known to both parties so I will not repeat them in detail here – instead I will summarise these and focus on giving reasons for my decision.

Mr C purchased flights using his Nationwide credit card. However, he says the flight was delayed by more than 3 hours and the airline has not compensated him for this appropriately in accordance with his statutory rights.

Mr C made a claim to Nationwide to recover compensation. It looked at things under Section 75 of the Consumer Credit Act 1974 ('Section 75') but declined his claim. In summary, it said that the service Mr C paid for has been provided and in order to request compensation for delays he needed to raise a claim with the airline.

Our investigator did not uphold the complaint. He considered Nationwide had not acted unfairly in declining the claim as there was a lack of information showing that Mr C had followed the airline claim process.

Mr C said he did make a claim to the airline but didn't hear back from it. He provided this service with further information about it.

The matter has now come to me to make a final decision.

I issued a provisional decision on this case which said:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

While I have considered the evidence from the parties I am only commenting on what I consider central to this complaint. This is not intended as a discourtesy but reflects my role in resolving disputes informally.

It is important to note here that Nationwide is not the supplier of flights. So its role is limited to what would reasonably be expected of it as a provider of financial services. In that respect I consider Section 75 and chargeback to be particularly relevant here so I will focus on these in deciding if Nationwide acted fairly or not.

Section 75

This allows Mr C in certain circumstances to make a 'like claim' against Nationwide for a breach of contract or misrepresentation by the airline in respect of the flights.

In order to engage a valid Section 75 claim certain criteria has to be met in respect of the cost of the service and the relationship of the parties. I don't appear to have an invoice for the flight booking so I can't be completely satisfied that Mr C does have a valid agreement with the airline in respect of the alleged breach he is claiming. However, it seems likely he does based on other information I have seen. Furthermore, he might provide this invoice showing this in response to my provisional finding and it doesn't change the outcome here in any event. So I have gone on to consider the situation assuming his claim is valid in respect of this criteria.

In order to determine if Nationwide acted fairly I have gone on to consider if, from the evidence available, it appears that the airline breached its contract with Mr C (I don't consider misrepresentation applies to this claim, nor has either party focused on it).

Ultimately, I don't think Nationwide acted unreasonably in declining the claim here because the basis of Mr C's claim is via his statutory rights in law (which I will also refer to as 'the Regulations') not a breach of contract. Nationwide previously made this point as well.

My starting point for such a conclusion is that I am not persuaded the airline is contractually liable to Mr C for delayed flights. The contract terms I have seen which appear to relate to Mr C's booking clearly state the following:

'Except for your rights under these Terms or Applicable Law, the flight times shown on our Website or elsewhere are not guaranteed'

I note this clause clearly distinguishes the terms of the contract and applicable law – implying these are distinct and separate. Here I conclude that it is the applicable law which gives Mr C the statutory right to claim compensation, but this is separate to the provisions in the contract. Furthermore, after considering the terms of the contract I do not see anything which guarantees flight times. Therefore, I conclude that the relevant contractual provision here is that flight times are not guaranteed. Therefore, a delayed flight is not a breach of contract.

I accept that the applicable law is mentioned in the contract as follows.

The provisions governing cancellations, delays and denied boarding are set out in the Convention and (where applicable) APR 2019 or Regulation EU261. Nothing in these Terms affects your rights under such Applicable Law. Please see our dedicated web page for more details about your rights and support information for disrupted services. Please also see section 19 in relation to APR 2019 and Regulation EU261 claims procedures.

However, I am not persuaded that mentioning this in the contract here (and in light of the other provisions of the contract as discussed) has the effect of implying the rights Mr C has under the Regulations into the contract he has with the airline. I consider there is a clear distinction between the contractual terms Mr C has agreed with the airline and an acknowledgement of his right to claim compensation under the applicable law. My finding is that the reference to the Regulations here is clearly for information/advice only. Effectively this lets Mr C know his statutory rights but there is no contractual promise to pay him compensation in the event of delays. I note the reference is to Mr C having rights 'under' the Regulations– showing these are arising as a result of the law rather than the terms of his contract with the airline.

Furthermore, while I acknowledge that some law can specifically imply terms into consumer contracts, in this case there is nothing in the Regulations I am aware of which directly implies rights regarding delayed boarding into the contract Mr C has with the airline. In fact Article 12

of the Regulations relating to further compensation specifically indicates that any rights to compensation under these is intended to be separate from any right to compensation a consumer is otherwise entitled to (for example, a claim for damages caused by a breach of contract).

I accept the airline has a claims process which it refers to in its terms (and details on its website) where customers are able to make a claim to it for compensation in light of the rights conferred by the Regulations. However, I don't think the existence of a claims process is sufficient to imply these statutory rights into the contract here. Furthermore, there are no contractual guarantees I can see that claims will be upheld in any event. In fact the process outlined indicates that if Mr C is unhappy with the outcome of his claim for compensation he may be able to appeal it to a relevant aviation ADR body to decide.

In summary, I consider that if the airline failed to pay Mr C compensation he was owed as a result of the delays then this would be a potential breach of its obligations under the Regulations and not a breach of contract.

Because I am not persuaded Mr C has a contractual claim against the airline for breach of contract in respect of delays – it follows that he doesn't have a 'like claim' against Nationwide for the same and Nationwide did not act unfairly in not upholding his Section 75 claim.

I don't believe I am mistaken in coming to my conclusions as set out above, but even if I accepted (which I do not) that the Regulations were in fact incorporated as terms in the contract Mr C had with the airline (rather than separate statutory rights) I also note:

- Mr C does not appear to have provided sufficient information at the time of his claim to Nationwide to show that he followed the process to make a claim to the airline for compensation and that it declined to pay him; and*
- that the failure of the airline to pay him was in relation to compensation he was entitled to in light of the exempting criteria set out in the Regulations such as those relating to 'extraordinary circumstances'. I note that Nationwide has indicated that 'extraordinary circumstances' would likely apply and prevent Mr C being due compensation here in any event because on the date of his flight there were issues with air traffic control due to poor weather conditions outside of the control of the airline which caused the delays (I have checked this and it appears to be the case here).*

So, the distinction between statutory rights and contractual terms aside, I don't think Mr C had provided persuasive evidence that the airline had breached its contract in not paying compensation to him in any event.

In conclusion, for the reasons outlined above (a lack of persuasive evidence that the airline had breached its contract with Mr C) I don't think Nationwide acted unfairly in the way it handled his Section 75 claim.

In the interest of completeness I have thought about if Nationwide could have got back Mr C's money through the chargeback scheme.

It isn't clear if Nationwide attempted a chargeback but I don't think it acted unfairly in not raising one in any event because I don't think there was a reasonable prospect of a claim succeeding. While it isn't entirely clear to me if the card is a Visa or Mastercard I don't think this makes a difference here. This is because I am not aware of a suitable chargeback

reason code for this situation. Even if it could be argued there was an appropriate reason code - in light of the contract Mr C agreed with the airline (as referred to above) where it does not guarantee departure times, and the fact the service was provided in the end I don't think a chargeback claim had a reasonable prospect of succeeding in any event.

I know Mr C will likely be disappointed by this decision. But I remind him that my decision is about Nationwide and how it handled the claim made to it. If Mr C considers he has a legal claim against the airline for compensation he might be able to refer it to a suitable ADR body or take it to court. He should consider seeking appropriate advice before proceeding if he is thinking of taking this route.

My provisional decision

I don't uphold this complaint.

I asked the parties for any further comments. Nationwide had nothing further to add.

Mr C said in summary:

- The flight was sold as guaranteed to depart at 16:10 and it was not clearly shown that it might be sometime after this; and
- other flights managed to depart that day as scheduled so there were no extraordinary circumstances impacting the airline here.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I have considered Mr C's further submission carefully. However, it does not change my decision here. I still consider my provisional findings are fair and reasonable for the reasons given (as copied above).

Mr C has made a couple of key points in response which I will deal with here to explain why they don't change my decision.

Firstly, while I take his point about the flight time on his booking confirmation I note that the terms and conditions of the airline do say that flight times are not guaranteed. So I can't fairly say this is a breach of contract. Nor do I consider these terms are hidden or so out of the ordinary that a reasonable person would expect to see them displayed in a different way.

Secondly, I note Mr C's point about extraordinary circumstances. Despite what he has said and shown I don't think there is compelling evidence that a claim for flight delays under the relevant Regulations would have succeeded here as there is some information indicating that a weather event caused air traffic control restrictions on the day of the flight. However, even if I put that aside I still note the findings in my provisional decision summarised as follows:

- Mr C does not appear to have provided sufficient information at the time of his claim to Nationwide to show that he followed the process to make a claim to the airline for compensation and that it declined to pay him.
- While the airline has said it would consider a claim made to it under the rights Mr C

has in law, a subsequent failure to uphold a claim under the Regulations would not be a breach of contract in any event (for the reasons I have already given in my provisional decision).

Under Section 75 Nationwide can only be responsible for a breach of contract or misrepresentation and I am not satisfied there is persuasive evidence of either here.

There are other forums for escalating claims about flight delays under the relevant Regulations. Mr C might wish to consider these (with appropriate advice). However, in this case I don't consider that Nationwide should be responsible for refunding Mr C for the reasons I have given here and incorporating my provisional findings (as set out above).

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 2 February 2024.

Mark Lancod
Ombudsman