



POSITIVE STJ DECISION PROHIBITS “AUTOMATIC” MORAL DAMAGES FOR FLIGHT DELAY IN BRAZIL

On Robson da Silva Balbe vs. Airline (REsp No. 1.796.716 – MG), the Superior Tribunal of Justice (“STJ”, the Brazilian Supreme Court for non-constitutional matters) decided that moral damages for flight delay are not “automatic” and require evidence of “an extraordinary fact that has offended the core of the appellant’s personality”, to justify this type of compensation.

Our View

The STJ decision is positive as it prevents the possibility of moral damages being “automatically” awarded to a passenger for flight delay without any actual evidence that would justify it. Despite its non-binding effect, we hope that this ruling will serve as guidance to other Brazilian Courts when deciding similar cases.

The Case

After the cancellation of a domestic flight, the passenger commenced legal proceedings seeking moral damages against the airline, under the allegation that it had not properly provided its services. The original flight, from Juiz de Fora, Minas Gerais, to São Paulo, was delayed and subsequently cancelled. The passenger was reallocated to another flight, of the same airline, arriving at his final destination with a delay of over four hours.

The passenger claim was originally dismissed by the First and Second Instance Courts of Minas Gerais. Subsequently, three STJ Justices have also unanimously upheld the decision.

According to the STJ, it is undisputed that there was a flight delay followed by cancellation and that the airline, pursuant to Art. 14 of the Brazilian Consumer Defence Code (“CDC”), is strictly liable (i.e. irrespective of fault) for the failure in the service provision. However, the STJ decided that it is necessary to ascertain if this failure actually generated moral damages [to the passenger] to be compensated.

This is an important change in the STJ’s approach to this type of claim, as it has in the past decided that moral damages were presumed (i.e. *in re ipsa*) provided that there was a delay, without the need of the passenger actually showing any moral damages arising from it.

The Reporting STJ Justice, Nancy Andrighi, stated that there was a shift from her previous understanding of the issue because, according to her, flight delays and flight cancellations are common in most Brazilian airports and this could not automatically entitle a passenger to receive moral damages, without proving his/her psychological pain arising from it.

According to the Reporting Justice, the facts and circumstances of the particular case will assist to establish if the passenger sustained any moral damages, for example: (i) length of the delay; (ii) if the airline provided alternatives to the passenger; (iii) if it provided clear information to the passenger about the delay/cancellation; (iv) if it offered material support (i.e. food, hotel accommodation) when the delay was considerable; (v) if the passenger, because of the delay, missed, for instance, an urgent commitment.

In her decision, the Reporting Justice mentions a few examples of STJ decisions allowing moral damages: (i) in a delay of over 8 hours, when the airline did not provide material assistance or information on the delay to the passenger; or, (ii) in a delay of over 9 hours, where the passenger was unable to spend time with his father in his final hours.

However, in another case, (iii) in a delay of almost 8 hours, the STJ decided that the passenger should not be awarded moral damages because the airline offered two alternative solutions to the problem: (a) hotel accommodation paid by the airline and reallocation to a flight the following day; or, (b) making part of the travel by road.

The Reporting Justice concludes that, in the present case, the passenger did not provide any evidence – for instance that he missed an appointment at the place of destination – that could justify an award for moral damages.

For further information, please contact the authors of this briefing:



JULIO COSTA

Partner, Rio de Janeiro
T +55 (21) 3550 9011
E julio.costa@cal-law.com.br



MARIANA SOMENSI

Senior Associate, São Paulo
T +55 (11) 3179 2912
E mariana.somensi@cal-law.com.br

www.cal-law.com.br
hfw.com

© 2019 Holman Fenwick Willan LLP. All rights reserved. Ref: 001522

Costa, Albino & Lasalvia Sociedade de Advogados is a Brazilian law firm, registered with the OAB - Brazilian Bar Association, São Paulo Section, under number 25846.

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice. Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please email hfwenquiries@hfw.com