



SUPREME COURT OF NORWAY

J U D G M E N T

given on 14 December 2020 by the Supreme Court composed of

Chief Justice Toril Marie Øie
Justice Ragnhild Noer
Justice Knut H. Kallerud
Justice Arne Ringnes
Justice Erik Thyness

HR-2020-2401-A, (case no. 19-186250SIV-HRET)

Appeal against Eidsivating Court of Appeal's judgment 11 September 2019

Svenn Nilsen (Counsel Christina Doreen Steimler)

The Norwegian Consumer Council (intervener) (Counsel Erlend Haaskjold)

v.

Finnair Oyj (Counsel Runar Hansen
Counsel Aage Krogh)

The Federation of Norwegian Aviation Industries (intervener) (Counsel Tage Brigt Andreassen Skoghøy)

- (1) Justice **Thyness:**

Issues and background

- (2) This case concerns a claim for standard compensation after a delayed flight and raises the question of whether such claims may be lost under non-statutory requirements to give notice of claims within reasonable time.
- (3) On 8 August 2016, Sverre Nilsen travelled from Bangkok via Helsinki to Oslo with the Finnish air carrier Finnair Oyj. The flight was delayed, and Nilsen arrived slightly more than three hours after the originally scheduled arrival time.
- (4) Nilsen made a claim for compensation against the air carrier on 12 November 2016. The legal basis for the claim was Regulation (EC) No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights (the Air Passenger Regulation). Standard compensation under the Regulation is EUR 600 for flights of more than 3 500 km.
- (5) Finnair rejected the claim arguing that it had to be made within a reasonable time, which they stipulated at a maximum of two months after the flight.

The proceedings

- (6) Nilsen brought a complaint against Finnair. On 24 June 2017, Ullensaker Conciliation Board ordered Finnair to pay EUR 600 in compensation with the addition of interest and costs.
- (7) Finnair brought the case to Øvre Romerike District Court through a writ of summons 4 August 2017. Following a written procedure, the District Court ruled as follows on 12 December 2017:
- “1. Finnair Oyj is to pay EUR 600 in compensation to Sverre Nilsen.
 2. Finnair Oyj is to pay costs in the Conciliation Board to Sverre Nilsen of NOK 6 294.
 3. Finnair Oyj is to pay costs in the District Court to Sverre Nilsen of NOK 2 500.”
- (8) After Finnair’s appeal, the case was decided in writing by Eidsivating Court of Appeal, which ruled as follows on 11 November 2019:
- “1. The claim against Finnair Oyj is dismissed.
 2. Costs are not awarded in any instance.”
- (9) The Court of Appeal found that statutory notice requirements may to a great extent be applied in non-regulated matters, and that the contractual relationship between the passenger and the air carrier, including the compensation scheme in the Air Passenger Regulation, was not sufficiently distinct to exempt the traveller from the general duty to give notice of claims. The Court of Appeal also found that the time limit for giving notice started to run when the journey ended, and that there was no basis for applying a shorter time limit than the two months, which is the limit set out in the Consumer Purchase Act, while a two-month time

limit would in most cases also be sufficient. The Court of Appeal found no basis for allowing a longer time limit for Nilsen.

- (10) Nilsen has appealed to the Supreme Court. The appeal challenges the application of the law.
- (11) The Norwegian Consumer Council has declared intervention in support of Nilsen, while the Federation of Norwegian Aviation Industries has declared intervention in support of Finnair.
- (12) The case has been conducted as a remote hearing in accordance with section 3 of the Temporary Act of 26 May 2020 No. 47 on adjustments to the procedural set of rules as a consequence of the Covid-19 outbreak. Finnair has withdrawn a claim for annulment due to passivity. Apart from that, the case stands as it did in the lower instances.

The parties' contentions

- (13) The appellant – *Svenn Nilsen* – contends:
- (14) The Court of Appeal is wrong in assuming that there is a non-statutory notice requirement in Norwegian law that applies to travellers seeking compensation for delays. The Court does not sufficiently distinguish between statutory remedies for non-performance due to lack of conformity and delays, respectively. The legislation is less clear for delays than for the lack of conformity. Moreover, in the case at hand one must emphasise the fact that it concerns a standard compensation without individual measurement.
- (15) Despite the air carriers' duty to provide information, many passengers are unaware of their rights. It would therefore be contrary to the purpose of the regulation, which is to ensure a high level of protection for the passengers, to set a time limit for claims.
- (16) Case law from the Transport Appeals Board has little value as a source of law, and case law benefiting Finnair is of a more recent date.
- (17) On an international level, only Sweden operates with a notice requirement. Besides, an air passenger's claim for standard compensation is only lost under the rules on limitation.
- (18) The most important consideration behind rules on notice requirements is loyalty. Also the consideration of foreseeability, securing of evidence and avoidance of speculation may justify a notice requirement. Neither of these considerations is relevant to a claim for standard compensation under the Air Passenger Regulation.
- (19) Except for the Home Sales Act, which does not cover typical consumer sales, none of the legislation referred to by the Court of Appeal sets out any notice requirement for claims relating to compensation for delays. Nor has a non-statutory notice requirement been recognised in case law or legal theory.
- (20) In the alternative, there is no basis for laying down an absolute time limit for complaints, as the Court of Appeal seems to have done. The standard time limit, if any, is "within a reasonable time". A notice served slightly more than three months after the event must be sufficient under the circumstances.

- (21) Svernn Nilsen has requested the Supreme Court to rule as follows:
- “1. Svernn Nilsen is to be compensated by EUR 600, with the addition of default interest from 12 December 2016 and until payment is made.
 2. Svernn Nilsen is awarded costs in all instances.”
- (22) The intervener – *The Norwegian Consumer Council* – endorses Svernn Nilsen’s submissions and emphasises:
- (23) The importance of protecting of the other party’s expectations is less compelling here than in many other types of contractual relationships. The two other important considerations behind notice requirements – securing of evidence and avoiding speculation – are not relevant to claims for standard compensation for flight delays.
- (24) The Norwegian Consumer Council has requested the Supreme Court to rule as follows:
- “The Norwegian Consumer Council is awarded costs in the Supreme Court.”
- (25) The respondent – *Finnair Oyj* – contends:
- (26) Nilsen’s claim is lost as his complaint was made too late.
- (27) The Air Passenger Regulation prescribes no time limit for claims and legal action. The European Court of Justice’s recognition of the national legislatures’ right to set procedural deadlines must be interpreted to mean that it is possible to apply notice requirements applicable under national law for complaints in this type of cases.
- (28) Notice requirements in connection with purchases stem from the duty of loyalty in contractual relationships, and should to a great extent be applied beyond matters specifically regulated by statute.
- (29) No parallel can be naturally drawn from the rules applicable to delay in legislation relating to the purchase of movable assets. It would be more natural to look to the notice requirements set out in the Package Travel Acts or the Crafts Services Act.
- (30) The development within the EU after 2004 shows that clear rules have been added to EU consumer rights legislation on other forms of passenger transport with respect to when complaints must be made, and what is required of both the consumer and the carrier. A proposed six-month time limit for submitting a claim for standard compensation under the Air Passenger Regulation is being discussed in the EU.
- (31) The Swedish Supreme Court has concluded that passengers demanding compensation under the Air Passenger Regulation must make a complaint within a reasonable time after arrival at the final destination. As a result of this ruling, the Transport Appeals Board has unanimously decided that air passengers must make a complaint within a reasonable time, normally within two months.
- (32) Dispute resolution bodies are now heavily burdened with air passenger cases of limited importance to the consumers. This could largely be avoided if the Supreme Court found that air passengers must file their complaints within a reasonable time. Further, air carriers would

not have to store information regarding flights from years back in time.

- (33) It is proper that the time limit for complaints starts to run when the consumer should reasonably have discovered the basis for her claim, which would normally be when the delay or the cancellation occurred. The requirement should be that a complaint be made within a reasonable time after this. In line with what applies for buyers under the Home Sales Act, the time limit should, as a starting point, not be much longer than two months.
- (34) Finnair Oyj has requested the Supreme Court to rule as follows:
- “1. The appeal is dismissed.
 2. Finnair Oyj is awarded costs in the Conciliation Board, the District Court, the Court of Appeal and in the Supreme Court.”
- (35) The intervener – *the Federation of Norwegian Aviation Industries* – supports Finnair’s contentions, and emphasises in particular:
- (36) Notice requirements follow from the general duty of loyalty between contractual parties, and is not only justified by the possibility for the provider of the goods or services to remedy and take other mitigating measures. Moreover, key to the assessment is the ability to secure evidence and the protection of the other party’s expectations, which are also relevant considerations in connection with delays.
- (37) The courts are dealing with several cases where up to one year and seven months have passed before a complaint is sent. Such use of time is not worthy of protection. Air carriers need to be able to run their business operations based on certainty that complaints will not be made later than during the first months after the delay.
- (38) The Federation of Norwegian Aviation Industries has asked the Supreme Court to rule as follows:
- “1. The appeal is dismissed.
 2. The Federation of Norwegian Aviation Industries is awarded costs in the Supreme Court.”

My opinion

Legal framework

- (39) Nilsen’s claim for standard compensation is based on Article 7 of Regulation (EC) No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights (the Air Passenger Regulation). The Regulation also applies as Norwegian law, see section 1 of Regulations on air passengers’ rights in the event of denied boarding and of cancellation or long delay of flights of 17 February 2005 No. 141, provided with a legal basis in the Aviation Act.
- (40) It follows from the Preamble to the Air Passenger Regulation that the right to standard compensation is implemented to ensure a high level of protection for passengers, see item 1.

One of the objectives was to reduce the practice of denying passengers boarding by requiring air carriers to compensate those denied boarding, see item 9.

- (41) Furthermore, it is stated in Article 5 (1) (c), cf. Article 5 (3) that an operating air carrier shall compensate the passengers in accordance with Article 7 unless it can prove that the cancellation is “caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken”. According to item 14 of the Preamble, such circumstances may include meteorological conditions incompatible with the operation of the flight concerned, and strikes. The standardised compensation rates are set out in Article 7, and are EUR 250 for flights of 1 500 kilometres and less, EUR 400 for flights between 1 500 and 3 500 kilometres and EUR 600 for flights of more than 3 500 kilometres.
- (42) The European Court of Justice established in its judgment 19 November 2009 in Joined Cases C-402/07 and C-432/07 *Sturgeon* that arrival at the destination three hours or more after the originally scheduled arrival time is equal to cancellation of the flight. However, Article 7 (2) (c) of the Air Passenger Regulation provides that the air carrier may reduce the compensation by 50 % if the delay of flights of more than 3 500 kilometres is less than four hours. Such reduction has not been invoked in the case at hand.
- (43) Article 14 of the Air Passenger Regulation provides that the air carrier has an obligation to inform the passengers of their rights, and provide a “written notice setting out the rules on compensation and assistance” for passengers affected by a delay of at least two hours.

Is there a time limit for complaints?

- (44) Finnair has not disputed that the conditions for standard compensation in the Air Passenger Regulation are met. Finnair contends, however, that the claim is lost because Nilsen did not make a complaint until three months and four days after having arrived at the destination.
- (45) For the record, I mention that the Court of Appeal has assumed that Finnair has complied with its duty to provide information under the Air Passenger Regulation, and that the appeal to the Supreme Court does not challenge the findings of fact. It is therefore not relevant in this case to assess possible consequences of the failure to comply with the minimum requirements for information to the passengers.
- (46) The air passenger regulation has no provisions regarding notice requirements. However, the European Court of Justice states in its judgment 22 November 2012 in Case C-139/11 *Moré* paragraph 33, that time limits for bringing actions are determined in accordance with the rules of each Member State. It is not entirely clear whether this is limited to rules on limitation, or if it also includes notice requirements and other objections based on delay in exercising rights. In light of my conclusion, it is not necessary for me to consider this. I mention, however, that the Swedish Supreme Court stated in its ruling in NJA 2018 page 127 paragraph 14 that the Air Passenger Regulation does not preclude application of notice requirements pursuant to national law.
- (47) The Sale of Goods Act 1907 contained general rules concerning notice requirements in connection with both delays and lack of conformity. It has been generally accepted in legal theory that the rules in the Sale of Goods Act can mostly be applied by analogy, see for example Augdahl, *Den norske obligasjonsretts almindelige del*, [General principles of Norwegian law of contract] 5th edition, 1978 page 285.

- (48) However, recent legislation presents a more nuanced picture. The Sale of Goods Act 1988, which is primarily applicable between commercial parties, contains a general provision on notice requirements in the event of lack of conformity in section 32. With regard to delays, the buyer only has a duty to notify the seller in order to demand specific performance and a duty to set a reasonable additional period before cancelling the contract. The Consumer Purchase Act sets out a general notice requirement in connection with lack of conformity (defective items) in section 27, while with regard to delays, it is under section 22 up to the seller to enquire whether the buyer wishes to demand specific performance. If the buyer fails to respond within a reasonable time, she may not cancel the contract; thus, the right to compensation for a delay is not subject to a complaint being made.
- (49) Finnair has invoked section 26 of the Package Travel Act, which requires timely notice of any lack of conformity of the travel services. Lack of conformity in this context includes delays (“improper performance”), see section 8 (d) of the Act. I see no reason to accord much weight to this in our context. Lack of conformity in respect of package travel services may often be dealt with as and when they occur, and the organiser has a duty to remedy according to section 27. It would be unreasonable to allow claims related to conditions that could have been remedied then and there if the organiser had been notified. The arguments for requiring timely notice in order to make claims consequently carry more weight in the in the context of package travel complaints than in the context of air service delays.
- (50) Finnair has also invoked section 12 of the Craftsman Services Act, stating that is a condition for demanding cancellation or compensation for delays that a complaint is made within a reasonable time after the service has been terminated. However, also here, the context is different from air travel. For instance, a craftsman whose services are delayed might not expect that the delay will generate a claim from the customer. In addition, the relative strength of a craftsman and her customers will normally be more balanced than that between an air carrier and its passengers. For these reasons, I cannot see that the rules on craftsman services are transferable to the case at hand.
- (51) EU law in the area of transportation does not give a clear picture. Article 27 of Regulation (EU) No. 181/2011 concerning the rights of passengers in bus and coach transport, sets a time limit for submitting a complaint of three months, and Article 24 of Regulation (EU) No. 1177/2010 (the Sea Passenger Regulation) sets a time limit of two months. On the other hand, Regulation (EC) No. 1371/2007 (the Rail Passengers Regulation) and Regulation (EF) No. 261/2004 (the Air Passenger Regulation) contain neither time limits for complaints nor other notice requirements.
- (52) As demonstrated, the picture is complex, which may be explained by differences in opinion as to the general reach of the considerations justifying notice requirements, and in particular that the impact of the considerations varies depending of the relative strength of the parties and the form of non-performance one is dealing with. It follows that outside the areas regulated by statute one must clarify the duty to complain in light of the interests involved in each type of case.
- (53) When it comes to the relative strength between the parties, I reiterate that a key objective of the Air Passenger Regulation is consumer protection. This generally suggests that reserve should be exercised in requiring notices in the context at hand.

- (54) A notice requirement is normally justified by three considerations: *The protection of the other party's expectations* stems from the need for timely clarification of all consequences of a contract. *The ability to secure evidence* relates to the fact that the longer time passes, the harder it may be for the allegedly breaching party to secure evidence to its advantage. *The avoidance of speculation* is primarily relevant in connection with cancellation, where it, depending on the circumstances, may be in the interest of one of the parties to hold off its decision to see whether cancelling the contract will be more advantageous than holding on to the contract and, possibly, claiming compensation or a discount.
- (55) In my opinion, the need to protect the other party's expectations does not carry very much weight when it comes to the air carriers' obligation to pay standard compensation. Normally, the air carriers will be aware of the delays that trigger liability and of the identity of the passengers affected. This allows them to calculate the claims and make appropriate provisions. If claims are lost due to passengers claiming compensation to which they are entitled, it may be deemed a random saving for the air carriers.
- (56) The ability to secure evidence also has a limited weight in our context. It is true, as pointed out by Finnair, that the vast number of flights makes it demanding to clarify the course of events in each case when time has passed. Therefore, in the absence of a time limit for making claims, the air carriers may lose the possibility to assert extraordinary circumstances that have actually caused delay. However, the potential problem has been documented other than by means of general statements to the effect that travels with change of planes may complicate the process of clarifying the facts, and that recourse claims may be lost due to possible deadlines in the underlying contractual relationships.
- (57) Generally, there is reason to assume that at least some passengers are quick to make claims, which allows the air carrier to secure and store documentation for use in subsequent cases. But also more generally, there are few considerations that weigh heavily against putting the burden of storing sufficient documentation to handle complaints as they arrive on the air carriers.
- (58) Finally, I mention that the notice requirements derive from the *mutual* duty of loyalty in contractual relationships. The impression is that many air carriers currently limit the information they provide to passengers to the minimum required by law. At the same time, it is fair to assume that most air passengers who are familiar with the system and who consider it worthwhile to make a claim, will do so shortly after their travel has ended. It is therefore likely that the late complaints are largely due to the passengers' unawareness of the standard compensation system. This reduces the number of complaints made and is thus to the advantage of the air carriers. It is then not unreasonable that the air carriers must live with the disadvantages of handling late claims.
- (59) Based on an overall assessment of the relevant considerations, my conclusion is that there is no sufficient reason on a non-statutory basis for establishing a requirement to give notice of claims for standard compensation under the Air Passenger Regulation in a timely manner.
- (60) In the mentioned judgment in NJA 2018, the Swedish Supreme Court concludes on page 127 that the passengers have a duty to complain within a reasonable time (*skälig tid*) in order to receive standard compensation under the Air Passenger Regulation. It is set out that a reasonable time in this context is in no event less than two months. In paragraph 31, there is a reference to a principle of Swedish contract law regarding the duty to give notice of claims for

compensation for delays in a timely manner. Thus, Swedish law does not conform with Norwegian law on this point.

- (61) Although some weight may be accorded to uniform rules of law in the Nordics, I will not, under these circumstances, place decisive emphasis on the Swedish Supreme Court having arrived at a different result under Swedish law. Incidentally, I note that in the context of EU law, the uniformity of the law within the EU and EEA as a whole is of primary importance, and that – with the exception of Sweden – it has not been demonstrated that other countries operate with time limits for claims of the nature dealt with in the case at hand.
- (62) As a final remark, I mention the air carriers' possibility of communicating more actively with their passengers. They might for instance send an electronic message to passengers that are likely to be entitled to standard compensation, simply informing them of their rights and providing a link to a website at which claims may be submitted. This would probably have the effect that most complaints were made within a short period of time.

Conclusion and costs

- (63) I have concluded that no particular notice requirement applies in respect of claims for standard compensation under the Air Passenger Regulation, and that Svern Nilsen has properly pursued his claim within the general time limit for claims of three years, see section 2 of the Limitation of Claims Act). Svern Nilsen is thus supported in his claim for standard compensation of EUR 600.
- (64) Svern Nilsen has won the case and is entitled to full compensation for his costs under the main rule in section 20-2 of the Dispute Act.
- (65) The total costs of the proceedings in the Conciliation Board, the District Court and the Court of Appeal is NOK 77 613, of which NOK 13 000 is VAT. Legal fees of NOK 553 750 are claimed for the proceedings in the Supreme Court, of which NOK 110 750 is VAT. The claim is specified to 177 hours of work in addition to the appeal fee of NOK 31 050. Compensation for costs is limited under the Dispute Act to necessary costs, and the number of billed hours seems high. Yet, with some doubt, I find that there is no sufficient reason to reduce the legal fees claim. Against this background, Svern Nilsen is awarded costs of NOK 662 413.
- (66) The intervener, the Norwegian Consumer Council has claimed costs of NOK 293 850. The claim is accepted.
- (67) I vote for this

J U D G M E N T :

1. Finnair Oyj will pay EUR 600 in compensation to Svern Nilsen, with the addition of default interest from 12 December 2016 and until payment is made, within two weeks of the service of the judgment.
2. Finnair Oyj and Federation of Norwegian Aviation Industries will jointly and severally pay costs in the Conciliation Board, the District Court, the Court of Appeal and the Supreme Court to Svern Nilsen of NOK 662 413 within two weeks of the service of

the judgment.

3. Finnair Oyj and Federation of Norwegian Aviation Industries will jointly and severally pay costs in the Conciliation Board, the District Court, the Court of Appeal and the Supreme Court to the Norwegian Consumer Council of NOK 293 850 within two weeks of the service of the judgment.

- (68) Justice **Ringnes:** I agree with Justice Thyness in all material respects and with his conclusion.
- (69) Justice **Noer:** Likewise.
- (70) Justice **Kallerud:** Likewise.
- (71) Chief Justice **Øie:** Likewise.
- (72) Following the voting, the Supreme Court gave this

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2. Finnair Oyj and Federation of Norwegian Aviation Industries will jointly and severally pay costs in the Conciliation Board, the District Court, the Court of Appeal and the Supreme Court to Sverre Nilsen of NOK 662 413 within two weeks of the service of the judgment.
3. Finnair Oyj and Federation of Norwegian Aviation Industries will jointly and severally pay costs in the Conciliation Board, the District Court, the Court of Appeal and the Supreme Court to the Norwegian Consumer Council of NOK 293 850 within two weeks of the service of the judgment.