



# Civil Resolution Tribunal

Date Issued: November 14, 2019

File: VI-2019-005241

Type: Motor Vehicle Injury

Civil Resolution Tribunal

Indexed as: *Merko v. Wagemans et al*, 2019 BCCRT 1287

BETWEEN:

KAITLYNN MERKO

**APPLICANT**

AND:

DANIEL WAGEMANS and INSURANCE CORPORATION OF BRITISH  
COLUMBIA

**RESPONDENTS**

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## REASONS FOR DECISION

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Tribunal Member:

Andrea Ritchie, Vice Chair

## INTRODUCTION

1. This is a summary decision dismissing this dispute, because the applicant has been non-compliant with the Civil Resolution Tribunal's (tribunal) directions.

2. The applicant, Kaitlynn Merko, and the respondent, Daniel Wagemans, were involved in a motor vehicle accident on April 4, 2019. The respondent, Insurance Corporation of British Columbia (ICBC), insures both Ms. Merko and Mr. Wagemans.
3. The applicant is self represented. The respondents are both represented by an ICBC adjuster.

## **JURISDICTION AND PROCEDURE**

4. These are the tribunal's formal written reasons. The tribunal has jurisdiction over motor vehicle injury disputes, or "accident claims", brought under section 133 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness.
5. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.
6. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

## **ISSUE**

7. The issue before me is whether I should decide this dispute without the applicant's further participation, or dismiss or refuse to resolve it, due to the applicant's non-compliance.

## **BACKGROUND, EVIDENCE AND ANALYSIS**

8. Section 36 of the CRTA applies if, during the case management phase, a party to a dispute fails to comply with the CRTA, its regulations, or the tribunal's rules. This includes a failure to comply with specific time limits or a tribunal order made during the case management phase. After giving notice to the non-compliant party, the case manager may refer the dispute to the tribunal for resolution, and a tribunal member may:
  - a. Hear the dispute in accordance with any applicable rules,
  - b. Make an order dismissing a claim in the dispute made by the non-compliant party, or
  - c. Refuse to resolve a claim made by the non-compliant party or refuse to resolve the dispute.
9. The key difference between a dismissal order and a refusal to resolve under section 36 of the CRTA is that, subject to a cancellation request, disputes that are dismissed may not be re-filed with the tribunal, another tribunal or a court at a later date. Claims or disputes that the tribunal refuses to resolve may be re-filed with leave of the tribunal, subject to any applicable limitation period.
10. The applicant is the non-compliant party in this dispute and has failed to participate in the case management phase, as required by sections 25 and 32 of the CRTA and tribunal rules 1.3 and 1.4.
11. The case manager has referred the applicant's non-compliance to me for a decision about whether to hear this dispute without the applicant's further participation, or to refuse to resolve or dismiss it.
12. As shown on the Dispute Notice, the applicant claims against the respondents for \$1,000 for physiotherapy and massage therapy treatment and \$12,000 for the cost of repairing her vehicle that was "charged to her insurance". In his response, Mr. Wagemans says that the accident was the applicant's fault and that he is not

responsible for the damages claimed. In its response, ICBC says it is an improper party to the dispute because Mr. Wagemans is the proper respondent, but that ICBC is entitled to respond on Mr. Wagemans' behalf.

13. The case manager provided details of the applicant's non-compliance in failing to participate in the case management phase as required.
14. In particular, the applicant failed to attend the facilitation teleconference. By email on October 9, 2019, a facilitation teleconference was scheduled for October 24, 2019 at 3:00 pm. On October 10, 2019, the applicant failed to attend a private call with the case manager. On October 17, 2019 the case manager phoned and spoke with the applicant and advised her of her options going forward: to contact the case manager to withdraw her claim or to proceed to facilitation with the respondents. The case manager advised the applicant if they did not hear from her about withdrawing the claim, the scheduled facilitation call would proceed on October 24, 2019. At 12:24 pm on October 24, 2019, the case manager emailed the applicant to remind her of the call at 3:00 pm. When the applicant failed to attend the call on time, the case manager emailed and phoned her to remind her to call in immediately. The applicant did not call in.
15. Later on October 24, 2019, the case manager emailed a warning to the applicant that she was required to follow each instruction given to her by the case manager and to advise the case manager by 4:00 pm on October 25, 2019 if she intended to proceed with her claim. The case manager also left the applicant a voice message.
16. The case manager's October 25, 2019 email set out a final warning. It said that if the applicant did not advise the case manager by 9:00 am on October 28, 2019 whether she intended to proceed with her claim, the dispute could be referred to a tribunal member for a decision about whether to dismiss or refuse to resolve the claim, or whether the dispute should be decided without the applicant's further participation.

17. The case manager also advised that they phoned the applicant on October 25 and 28, 2019, leaving her voice messages each time containing the same warning as the emails. The applicant did not respond by October 28 as required. The case manager also phoned the applicant on October 30, 2019 but was unable to access the applicant's voice mail.
18. In summary, the applicant did not respond to any of the case manager's warning emails or voice messages.
19. Tribunal rule 1.4(3) explains the factors the tribunal must consider in assessing how to proceed when a party is non-compliant:
  - a. Whether an issue raised by the claim or dispute is of importance to persons other than the parties to the dispute,
  - b. The stage in the facilitation process at which the non-compliance occurs,
  - c. The nature and extent of the non-compliance,
  - d. The relative prejudice to the parties of the tribunal's order addressing the non-compliance, and
  - e. The effect of the non-compliance on the tribunal's resources and mandate.
20. I find that in the circumstances of this case, it is appropriate to dismiss the applicant's dispute. Based on the evidence described above, I find that the applicant had proper notice of the teleconference and knew the consequences if she failed to attend or correspond with the case manager, which was the potential dismissal of her dispute. I am also satisfied this dispute only affects the named parties, and I see no prejudice to the respondents in making an order dismissing the applicant's dispute.
21. On the other hand, if I refuse to resolve the claim, there would be no finality to this dispute as it would be open to the applicant to make a further request for tribunal resolution, subject to any limitation period. I find that in refusing to resolve, there

would be no finality and no consequence to the applicant for failing to participate, which would be unfair to the respondents.

22. Further, at the time of the applicant's non-compliance, the dispute was early in the tribunal's case management phase. The parties had not begun the tribunal decision process, in which the parties prepare their submissions and evidence which are then provided to a tribunal member to make a binding decision. The applicant effectively abandoned the process after receiving the respondents' responses.
23. The tribunal's resources are valuable and its mandate to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly is severely impaired if one party does not want to participate. I find that it would be wasteful for the tribunal to continue applying its resources on a dispute where, through silence, the applicant shows she does not want the tribunal's assistance in resolving her claim.
24. Although not binding on me, I agree with and apply the tribunal Chair's reasoning in *Grand-Clement v. The Owners, Strata Plan KAS 2467*, 2017 BCCRT 45 that it is problematic to force an unwilling applicant to pursue a dispute with the tribunal. I agree that to do so would go against the tribunal's mandate and impair the fairness of the process by creating an imbalance of the tribunal's fact finding and decision-making functions.
25. In weighing all the factors, I find the applicant's claims, and the dispute, should be dismissed.
26. In deciding to dismiss the claims rather than refuse to resolve them, I have put significant weight on the following factors:
  - a. The extent of the non-compliance is significant,
  - b. The respondents are not prejudiced if such an order is made, and
  - c. The need to conserve the tribunal's resources.

## DECISION AND ORDERS

27. I order that the applicant's claims, and this dispute, are dismissed.
28. Under its rules, the tribunal can make orders about payment of fees or reasonable dispute-related expenses in the case of a withdrawal or dismissal. Given the applicant's non-compliance, I find she is not entitled to a refund of her fees. However, I find the respondents are each entitled to reimbursement of their \$25 response filing fee. The respondents' representative, an ICBC adjuster, paid for both respondents' filing fees.
29. Within 30 days of the date of this decision, I order the applicant to pay ICBC a total of \$50, as reimbursement for paid tribunal fees.
30. ICBC is also entitled to post-judgment interest on this amount, as applicable under the *Court Order Interest Act*.

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Andrea Ritchie, Vice Chair