



# Civil Resolution Tribunal

Date Issued: May 25, 2018

File: SC-2017-005272

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Reed v. McLellan*, 2018 BCCRT 208

**BETWEEN:**

Dan Reed

**APPLICANT**

**AND:**

Jason McLellan

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Julie K. Gibson

### **INTRODUCTION AND JURISDICTION**

1. This final decision of the Civil Resolution Tribunal (tribunal) has been made without the participation of the respondent, due to the respondent's non-compliance with the tribunal's directions as required, discussed below.

2. The applicant Dan Reed says he agreed to buy a motorcycle from the respondent Jason McLellan for \$1,400. The applicant says he paid \$1,067.50, with the balance to be paid upon receiving the motorcycle. The respondent did not give him the motorcycle or refund the \$1,067.50.
3. The parties are each self-represented.
4. Section 36 of the *Civil Resolution Tribunal Act* (Act) applies if a party to a dispute fails to comply with the Act or its regulations. After giving notice to the non-compliant party, the case manager (facilitator) may refer the dispute to the tribunal for resolution and the tribunal 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.
5. These are the formal written reasons of the tribunal. The tribunal has jurisdiction over small claims brought under section 3.1 of the Act. 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, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
6. Under tribunal rule 126, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.
7. For the reasons that follow, I have allowed the applicant's claim.

## **ISSUES**

8. The first issue in this dispute is whether I should proceed to hear the applicant's claim, without the respondent's further participation given its non-compliance.
9. The second issue is to whether I should order the respondent to pay the claimed \$1,067.50 to refund what the applicant paid toward the motorcycle.

## **EVIDENCE & ANALYSIS**

### **Non-compliance**

10. My April 12, 2018 summary decision to hear the dispute without the respondent's participation, given the respondent's non-compliance, was previously communicated to the parties by email, through the tribunal facilitator (case manager). The details supporting that decision are set out below.
11. Sections 32 and 34 of the Act say that the tribunal may, at any time during the case management or tribunal hearing phase of a dispute, require a person to provide evidence and that a case manager may direct the parties to provide information regarding the issues in dispute, the positions of the parties and the resolution being sought. Tribunal rule 6 requires all parties to make themselves available to participate in the dispute resolution process and to follow the directions of tribunal members and facilitators.
12. The respondent is the non-compliant party in this dispute. He failed to participate by ceasing communication with the case manager when facilitation ended, despite multiple attempts to contact him and requests for reply. As well, the respondent failed to provide submissions or his tribunal decision plan when requested. I find that his non-compliance is a failure to comply with the Act.
13. In particular, the applicant's Dispute Notice was issued on October 2, 2017. The respondent submitted his Dispute Response on November 1, 2017.
14. The following facts demonstrate the respondent's non-compliance:

- a. The respondent did not provide an email address where he could be contacted. He provided a mailing address and a phone number.
- b. *January 25, 2018*: The case manager spoke with both parties, ended facilitation and referred this dispute to the tribunal hearing phase. The applicant paid the tribunal hearing phase fee, and completed his tribunal decision plan and submission the same day.
- c. *February 6, 2018*: The case manager sent the respondent a registered letter including the tribunal decision plan. The letter set out a deadline of February 14, 2018 for submitting evidence and submissions. The letter warned that if a submission was not provided, a tribunal member may make a binding decision using only the information that had been provided. The letter was returned to the tribunal unclaimed on February 26, 2018. The respondent did not reply or submit any evidence.
- d. *February 21, 2018*: The case manager reached the respondent by phone. The respondent indicated there was a mail pick-up notice but he was out of town and would pick up the mail February 23, 2018.
- e. *February 26 and 27, 2018*: The case manager attempted to reach the respondent by phone and was unable to do so. There was nowhere to leave a voice mail message.
- f. *March 1, 2018*: The case manager sent a second registered letter to the respondent. The letter said that if the respondent did not reply, the dispute would be referred to a tribunal member for final decision, without the respondent's further participation and without further warning to the respondent. The letter directed that evidence and response to the tribunal decision plan be provided not later than March 13, 2018. Notice of pickup was left on March 3, 2018.
- g. *March 9, 2018*: The case manager spoke with the respondent by phone. The respondent said he was aware of the registered mail, and would contact

Canada Post to let them know not to return the mail. He said he would pick it up March 16, 2018.

- h. *March 13, 2018*: Canada Post left a notice for the respondent that the item would be returned if not picked up within 10 days.
  - i. *March 16, 2018*: The respondent told the case manager that he could pick up the package and respond with the tribunal decision plan the next week.
  - j. *March 19, 2018*: The second registered letter was returned undelivered.
  - k. *March 19, 20 and 21, 2018*: The case manager attempted to contact the respondent at his provided phone number. The respondent did not answer and there was nowhere to leave a voice mail message.
  - l. The respondent did not provide evidence or submissions or complete his portion of the tribunal decision plan.
15. The facilitator referred the respondent's non-compliance to me for a decision as to whether I should hear the dispute in the absence of participation from the respondent.
16. As noted, the respondent filed a Dispute Response and participated in facilitation, but provided no explanation about why he suddenly stopped communicating with the tribunal as required. I find the case manager made a reasonable number of attempts to contact the respondent. Parties are told at the beginning of a tribunal proceeding that they must actively participate in the dispute resolution process, including submitting evidence and submissions by the deadline. I find it is more likely than not that the respondent was aware of the facilitator's contact attempts but chose not to respond.
17. The tribunal's rules are silent on how it should address non-compliance issues. I find that in exercising its discretion, the tribunal must consider the following factors:

- 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.
18. This dispute does not affect persons other than the parties.
  19. The non-compliance here occurred at the beginning of tribunal decision phase. The respondent effectively abandoned the process after providing a response but prior to submitting evidence or submissions.
  20. Given the case manager's repeated attempts at contact and the respondent's failure to respond despite warnings of the consequences, I find the nature and extent of the non-compliance is significant.
  21. I see no prejudice to the applicant in hearing the dispute without the respondent's participation. The prejudice to the respondent in proceeding to hear the dispute is outweighed by the circumstances of its non-compliance. If I refused to proceed to hear the dispute, the applicant would be without a remedy. That would be unfair.
  22. Finally, 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 resources to this dispute, such as by making further attempts to seek the respondent's participation.
  23. In weighing all of the factors, I find the applicant's claims should be heard. In deciding to hear the dispute I have put significant weight on these factors:

- a. the extent of the non-compliance is significant;
- b. the applicant is not prejudiced if such an order is made; and
- c. the need to conserve the tribunal's resources.

### **Merits of the Claim and Damages**

- 24. Having decided to hear the dispute without the respondent's participation, I turn to the merits of the dispute. Where a respondent files a Dispute Response but then fails to comply with tribunal directions to provide submission and evidence, as is the case here, an adverse inference may be drawn against that respondent. This means that if the respondent refuses to participate, then it is reasonable to assume that the applicant's position is correct on the issue at hand. This concept is similar to where liability is assumed when a respondent has failed to respond to a dispute and is in default.
- 25. The applicant says the respondent agreed to sell him a motorcycle for \$1,400. The applicant provided evidence that he paid at least \$1,067.50, the amount the applicant claimed in this dispute. He says he was never provided the motorcycle or a refund.
- 26. In his Dispute Response, the respondent agreed that he received \$1,000 from the applicant. The respondent said the receipt stated that a final payment must be made before the motorcycle could be picked up "...on or before Sept 15, 2017 or he forfeits (sic) the monies already given and he forfeits (sic) the bike as well."
- 27. The respondent says that the applicant called him on October 1, 2017, and said he would not make the final payment and asked for his money back.
- 28. The applicant filed receipts showing an agreement to buy the motorcycle for \$1,400. The receipts show the applicant paid \$1,107.50 toward the purchase of the motorcycle, with a final balance of \$292.50 owing as of August 24, 2017. However, in this dispute the applicant claims only \$1,067.50. I find it would be

inappropriate to order an amount greater than what was claimed, particularly given the respondent only had notice of the \$1,067.50 amount.

29. None the receipts contain language about forfeiting the money and the motorcycle if the sale is not completed by September 15, 2017. The respondent did not file any evidence. I find the respondent's assertion in the Dispute Response that the applicant would forfeit both the money and the motorcycle to be unfounded.
30. The applicant also filed a series of text messages which are consistent with a respondent forming an intention to refund the money in the latter half of September, 2017.
31. Given the evidence, I find that there was an agreement for the sale of the motorbike for \$1,400. I find that the applicant paid most of the purchase price. I find that, when the deal fell apart, the respondent did not provide the motorbike or a refund. I find that a refund in the full amount claimed is appropriate.
32. I find the applicant is entitled to the claimed \$1,067.50 refund and \$125 in tribunal fees.
33. The applicant is also entitled to \$7.24 in pre-judgment interest under the *Court Order Interest Act* (COIA) on the \$1,067.50, from September 15, 2017.

## **ORDERS**

34. Within 30 days of this decision, I order the respondent to pay the applicant a total of \$1,199.74, comprised of:
  - a. \$1,067.50,
  - b. \$7.24 in pre-judgment interest under the COIA, and
  - c. \$125 in tribunal fees.
35. The applicant is also entitled to post-judgment interest under the COIA.



36. Under section 48 of the Act, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.
37. Under section 58.1 of the Act, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

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Julie K. Gibson, Tribunal Member