



Civil Resolution Tribunal

Date Issued: July 26, 2018

File: SC-2017-004774

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Super Save Disposal Inc. v. Xue*, 2018 BCCRT 380

B E T W E E N :

Super Save Disposal Inc.

APPLICANTS

A N D :

Dong (Audrey) Xue

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kate Campbell

INTRODUCTION

1. This is a dispute about a contract for waste disposal services. The applicant, Super Save Disposal Inc. (Super Save), says the respondent Dong (Audrey) Xue¹ breached the contract between the parties by attempting to cancel the services before the agreed term ended. The applicant seeks liquidated damages of \$1,188, plus a \$135 for “removal fee” and \$66.15 in GST.
2. The respondent says the contract is not binding, for a variety of reasons. The parties are both self-represented.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the tribunal. The tribunal has jurisdiction over small claims brought under section 3.1 of the *Civil Resolution Tribunal Act* (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.
4. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions because I find that there are no significant issues of credibility or other reasons that might require an oral hearing. Neither party requested an oral hearing.
5. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in

¹ The Dispute Notice, which is based on the applicant’s dispute application, lists Audrey Xue and Dong Xue as separate defendants. Subsequent correspondence provided to the tribunal confirms that Audrey Xue and Dong Xue are the same person. I have amended the style of cause accordingly.

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.

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.

ISSUES

7. The issue in this dispute is whether the respondent breached the contract between the parties, and if so, what remedy is appropriate.

EVIDENCE AND ANALYSIS

8. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. I have only addressed the evidence and arguments to the extent necessary to explain my decision.
9. The evidence before me shows that on May 26, 2016, the respondent and the applicant, represented by salesperson Stefan Virtanen, signed a service agreement which included the following terms:
 - The applicant would provide weekly waste collection services to the respondent, including a 2 yard waste container.
 - The respondent would pay \$49.50 per month for these services.
 - The term of the agreement was 2 years (clause 2).
 - The effective date of the agreement was May 30, 2016.
 - The respondent could not terminate the agreement except by providing written notice to the applicant via registered mail within 90 to 120 days before the end of the 2 year term (clauses 2 and 14).

- If the respondent terminated the Agreement prior to the end of the term, the applicant could accept the repudiation of the Agreement and terminate the Agreement (clause 11).
- Upon termination of the contract, the respondent agreed to pay as liquidated damages the amount of the remaining monthly charges plus the sales tax (clause 11).

10. I find that this written agreement constitutes a binding contract between the applicant and the respondent.

Lack of English

11. The respondent says the contract is not enforceable because she and her husband did not fully understand it when she signed it due to their limited English. I do not agree. The written agreement shows that the respondent was able to renegotiate the term of the contract to 2 years, down from the standard 5 year term included in the pre-printed form. The respondent initialled the specific language noting this negotiated change. This evidence supports the conclusion that she understood and agreed to the contract, and had the opportunity to review its wording.

12. Also, the respondent and her husband signed a June 8, 2016 letter to the applicant requesting to cancel the applicant's services. The English in that letter is very clear and somewhat detailed. The respondent cannot reasonably rely on the cancellation letter they wrote in English, and at the same time assert that they did not understand the contract. Moreover, the June 8 letter says they wanted to cancel because they realized their community already had garbage collection services. The letter does not mention that the respondent did not understand the contract.

13. Finally, the text messages provided by the respondent show that she was able to communicate clearly in English with the applicant's salesperson. She was able to

engage in a detailed written negotiation over replacement of the 2 yard waste bin, including the cost and delivery of replacement bins.

14. Based on that evidence, and for the reasons set out above, I do not accept the respondent's argument that the contract is unenforceable due to her lack of English. In particular, I find her text messages to the applicant show a clear ability to communicate in written English. I prefer that evidence to the statement from the respondent's neighbour, who says it was evident to him that the respondent and her husband did not understand much of what Stefan Virtanen said during the meeting when the respondent signed the contract. Since the neighbour was not present during the meeting, I place no weight on his opinion about what the respondent understood at the time.

Alleged Breach by Applicant

15. The respondent also says the applicant breached the contract first, by failing to pick up garbage on May 30, June 1, June 2, and June 6, 2016. The contract says it came into effect May 30, 2016, and that garbage would be collected weekly. The records provided by the applicant show that the garbage was collected on June 2, June 9, and June 16, 2016.
16. I am persuaded by the service records provided by the applicant, which are detailed and include the specific time of each collection. I note that the contract does not specify a particular day of the week for collection, and the collection occurred once per week after the contract came into effect on May 30, 2016. There is nothing in the contract that required the applicant to collect the respondent's garbage on May 30 or June 1. For these reasons, I find that the applicant did not breach the contract. Even if I found that such a breach, it was not so fundamental as to breach the entire agreement and render it void.

Statutory Cancellation

17. The applicant says she is not required to pay liquidated damages because it was a direct sales contract, as defined in the *Business Practices and Consumer Protection Act* (BPCPA), and she cancelled it within 10 days.
18. I do not agree, for the following reasons.
19. Section 21 of the BPCPA says a consumer may cancel a direct sales contract by giving notice of the cancellation to the supplier not later than 10 days after the consumer receives a copy of the contract.
20. I find that the May 26 contract was a direct sales contract, which is defined in the BPCPA as a contract between a supplier and a consumer for the supply of goods or services that it is entered into in person at a place other than the supplier's permanent place of business.
21. However, I find the respondent did not cancel the contract within 10 days. She responded signed the contract in the presence of Mr. Virtanen on May 26, 2016, and received a copy on that date. The respondent did not cancel the contract within 10 days of May 26. Rather, the evidence before me shows that the respondent gave notice of cancellation on or after June 8, 2016. Her cancellation letter is dated June 8, and she texted Mr. Virtanen on June 8 stating that she had "just mail out the registered mail". On June 6, she was texting Mr. Virtanen about delivering smaller bins on June 7. She mentioned the possibility of cancelling to Mr. Virtanen before June 8, but did not do so.
22. For these reasons, I find that the respondent cancelled the contract more than 10 days after receiving it.
23. Also, as submitted by the applicant, section 5 of the *Consumer Contracts Regulation* states that sections 19 to 22 of the BPCPA (including the cancellation provision in section 21) do not apply if the direct seller attends at the place where

the contract is signed following a request that was made at least 24 hours in advance by the consumer, or a relative or friend of the consumer.

24. The respondent admits that she and her husband contacted the applicant to discuss garbage collection services. The evidence shows that Mr. Virtanen visited their home on May 26 in response to that inquiry, and the contract was signed. The evidence indicates that this meeting occurred at least 24 hours after the respondent contacted the applicant. Thus, under section 5 of the *Consumer Contracts Regulation*, the respondent had no statutory right to cancel the contract.

Unconscionability

25. The respondent also submits that the contract is inequitable and unconscionable, as the cancellation terms in clause 11 are written in fine print and are so harsh and adverse to the respondent as to be inequitable. The courts and previous tribunal members have considered identical language in other contracts involving Super Save, and have found them enforceable: see *Tristar Cap & Garment Ltd. v. Super Save Disposal Inc.* 2014 BCSC 690 (CanLII); *Super Save Disposal Inc. v. Paul's Metal Service Inc.*, 2018 BCCRT 191.
26. In *Super Save Disposal Inc. v. Gill's Dream Enterprise Ltd.*, 2018 BCCRT 298, the tribunal member wrote as follows in paragraph 23:

In *Super Save Disposal Inc. v. Paul's Metal Service Inc.*, 2018 BCCRT 191, the tribunal agreed with his Worship B. G. Baynham in *Super Save Disposal Inc. v. Lee* 2015 BCPC 0157, and in particular with the court's comments regarding the onerous nature of the terms of disposal service contracts, and the need for consumer protection. While I am not bound by the tribunal's decision, I concur with it, and the tribunal's similar decision in *Super Save Disposal Inc. v. K.M.I. Holdings Ltd* 2018 BCCRT 285.

27. I agree with the above reasoning, and adopt it. While the contract's terms are onerous, they are enforceable. I find that the applicant is entitled to liquidated

damages, under the terms of the May 26 contract, and based on the reasoning in *Super Save Disposal Inc. v. Gill's Dream Enterprise Ltd.*

28. Liquidated damages are a contractual pre-estimate of the damages suffered by a party in the event of a breach of contract. Clause 11 states that if the service agreement is improperly terminated by the respondent, the applicant is entitled to liquidated damages, in the amount of the remaining monthly payments owing under the agreement, plus taxes.
29. As set out in the Dispute Notice, 24 months at \$49.50 per month equals \$1,188. 5% GST on \$1,188 equals \$59.40, for a total of \$1,247.40.
30. The applicant also claims a \$135 "removal fee", but has not provided particulars of that claim, evidence to support the amount, or a contractual entitlement to such a fee. I therefore do not order it.

Fees and Expenses

31. Both parties have claimed reimbursement for legal fees. As set out in the tribunal's rules, the tribunal generally does not order reimbursement of legal fees. This follows from the general rule in section 20(1) of the Act that parties are to represent themselves in tribunal proceedings. I see no reason to depart from this general rule in this case, and therefore I do not order reimbursement of legal fees.
32. The tribunal's rules provide that the successful party is generally entitled to recovery of their fees and dispute-related expenses. The applicant was successful, so I order that the respondent reimburse the \$125 they paid in tribunal fees.
33. The applicant also claims \$225.78 in "service fees". As the applicant did not provide receipts or particulars to support these expenses, I find, on a judgment basis, that they are entitled to reimbursement of \$50 for service expenses.
34. The respondent claimed \$10.50 for registered mail expenses, but as she was not successful in the dispute I find she is not entitled to reimbursement.

ORDERS

35. I order that within 30 days of this decision, the respondent pay the applicant a total of \$1,444.53, broken down as follows:
- a. \$1,247.40 for liquidated damages plus GST,
 - b. \$22.13 as prejudgment interest under the *Court Order Interest Act* (COIA),
and
 - c. \$175 for tribunal fees and dispute-related expenses.
36. The applicant is also entitled to post-judgment interest under the COIA.
37. 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.
38. 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.

Kate Campbell, Tribunal Member