



Civil Resolution Tribunal

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Enviro Friendly Maintenance Services Ltd. v. Bains et al.*,
2018 BCCRT 453

B E T W E E N :

Enviro Friendly Maintenance Services Ltd.

APPLICANT

A N D :

Daljit Bains and Bakshinder Bains

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about cleaning equipment and whether the respondents, Daljit and Bakshinder Bains, received it at a particular building and then after their termination failed to return it to the applicant, Enviro Friendly Maintenance Services Ltd. At the material time, the respondents were the applicant's employees.
2. The applicant says the prior cleaner provided the respondents with a "cleaning equipment starter kit". The applicant says it terminated the respondents for negligence in failing to keep the building secure, and that the respondents have since failed to return the cleaning equipment, which it values at \$2,100. The respondents say they never received the cleaning equipment, because they declined the job and therefore they never worked at the building in question. The respondents say that another person R, the cousin of Bakshinder Bains, cleaned the building in question. The applicant is represented by Yogendra Sharma, its principal. The respondents are represented by Daljit Bains.

JURISDICTION AND PROCEDURE

3. These are the tribunal's formal written reasons. 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 as I find I can fairly resolve the issues based on the documentary evidence before me.
5. 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.

6. Under the Act and 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.

ISSUE

7. The issue in this dispute is whether the respondents received the claimed cleaning equipment, and if so, what is the appropriate remedy.

EVIDENCE AND ANALYSIS

8. In a civil claim such as this, the applicants bear the burden of proof, on a balance of probabilities, although there is a reverse onus on a 'bailee for reward', as discussed below. I have only addressed the evidence and arguments to the extent necessary to explain my decision.
9. The following narrative is set out in Mr. Sharma's affidavit in evidence. The applicant has been in business since early 2017. Mr. Sharma hired MS and her husband JS as the applicant's first cleaners at the building in question. The applicant bought the cleaning starter kit, and gave it to MS. MS left the country and gave the keys and cleaning equipment to JS. The applicant hired the respondent Daljit Bains as a "substitute employee". Mr. Sharma asked JS to give the keys and cleaning equipment to the respondents. I find none of this is disputed and I accepted this evidence.
10. The applicant also produced an affidavit from JS, sworn June 8, 2018, about a year after the events in question. In JS' affidavit, he says Mr. Sharma introduced Mr. Bains to him in August 2017. JS swears, "I kept the remaining portion of the equipment for the starter kit at my home storage" and that Mr. Sharma later asked him to bring that remaining equipment and keys to the building. JS swears that he did so, where Mr. Bains moved all of the equipment into his van in Mr. Sharma's presence. JS further

swears that he showed Mr. Bains the janitorial room in the building and where the rest of the equipment was stored on the site.

11. The crux of this dispute is that in his Dispute Response Mr. Bains says they did not take the job. Mr. Bains said he considered it but felt the job was big but the fee too small. He says he did not agree to work. Mr. Bains says he suggested to Mr. Sharma that Ms. Bain's cousin, R, take the job. The respondents say that when Mr. Sharma later asked for the keys to the building, Mr. Bains retrieved them from R, who is the person who worked at the building.
12. In their submissions for this decision, the respondents reiterate that neither of them ever worked at the building in question. They note they have to sign-in and out from every building and that there are security cameras. The respondents say the applicant would have a record of Ms. Bains signing in and out of another location at the time the applicant says the respondents worked at the building at issue in this dispute. However, notably, the respondents do not deny that they received the equipment, as set out in JS' affidavit in evidence.
13. In its reply submission, the respondent says that if the respondents re-assigned the cleaning job at issue to R, it was without his knowledge and consent. In essence, Mr. Sharma denies that Mr. Bains refused the job and says he was never told R would do it instead. Mr. Sharma denies ever hiring R.
14. I accept that the respondents never worked at the building in question. However, I also accept that they received the equipment as the applicant expected the respondents to work there. This conclusion is supported by both Mr. Sharma's and JS' affidavits. As noted above, the respondents do not expressly deny receiving the equipment, as their submission is simply focused on the fact that R did the cleaning job instead of them. I find Mr. Sharma's evidence that it never hired R is consistent with Mr. Bain's submission that R was never paid by the applicant.
15. First, I find the applicant's claim against Bakshinder Bains must be dismissed, because the applicant has not proved she had anything to do with the cleaning equipment. In

particular, JS' affidavit does not mention Bakshinder Bains and instead says that it was Daljit Bains who loaded the cleaning equipment into his van.

16. I turn then to the claim against Daljit Bains. It is undisputed that the respondents were the applicant's employees, albeit for a short time, rather than independent contractors. That they were employees is supported by the fact that the employer determined their job site, provided the cleaning materials, and the respondents did not bear any financial risk in working for the applicant, in that they were paid hourly rather than a flat rate for a job (see *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 as cited in *Kirby v. Amalgamated Income Limited Partnership*, 2009 BCSC 1044). I note that this dispute does not fall within the jurisdiction of the Employment Standards Branch under the *Employment Standards Act* (ESA) because it is not a claim for wages by an employee nor are wages at issue at all in this dispute. I do not consider the applicant's claim for the return of the cleaning equipment to be the applicant employer's claim the respondents pay its "business costs" within the meaning of section 21 of the ESA, and thus the applicant's claim is not prohibited under the ESA.
17. As set out in *Kirby*, section 21 of the ESA does not bar recovery of debts incurred by an employer because of employee negligence (or gross incompetence). In *Kirby*, the court ultimately concluded that for an employer to recover damages from an employee something more than simple negligence is required.
18. Turning to what is required as proof, the court in *Kirby* stated at paragraphs 378 to 380:

Turning to the terms of the contract, the owner must establish that the employee failed to do something specifically promised or obviously implied in his or her employment contract. A claim for damages cannot be grounded in the argument that the employee did not perform as well as the employer expected. ...

... The central question must be whether the error or omission was sufficient enough to attach liability, that is, was it negligent to the extent that it caused damage to the employer. ...

Finally, the recovery of damages is only possible if the loss is directly connected to the breach, that is, it is actual and demonstrable. Damages for which the employer is partially responsible are not recoverable.

19. In *Kirby*, the court held that the employee must repay funds he received in breach of his fiduciary duty to his employer not to use his position to make a profit, even where the employer did not suffer a loss in the process.
20. I find that an implied term of the employment contract is that the employee would reasonably look after the employer's property and return it after the conclusion of the employment contract. Like in *Kirby* where there was no theft, I do not find that the respondent Daljit Bains stole from the applicant employer. Rather, on balance I find Daljit Bains gave the cleaning equipment to R, so that R could clean the building in question. In the circumstances, I find the respondent Daljit Bains is nonetheless responsible to pay damages for the cleaning equipment, as his failure to return the equipment that he received amounts to a breach of contract and was more than simple negligence. I say this because I find Mr. Bains received the cleaning equipment and passed it to R, without authorization. Thus, Mr. Bains is responsible for the cleaning equipment not being returned to the applicant employer. This is not a situation where an employee negligently wasted an employer's product or failed to do the job as well as expected. Here, Mr. Bains' conduct caused the employer loss. Based on the evidence and submissions before me, I find it more likely than not that Mr. Bains never told the applicant employer that he was handing over the job to R, and therefore the building keys and the cleaning equipment too. In other words, I find Mr. Bains' decision to hand over the job and cleaning equipment to R without the employer's knowledge or consent was more than simple negligence because he failed to reasonably protect the employer's property. There is no evidence before me that the applicant employer is partially responsible.
21. The law of bailment also applies. A **bailment** is a temporary transfer of property under which the personal property of a person is handed over to another person, a 'bailee'. Mr. Bains was a bailee for reward, because when Mr. Bains received the cleaning

equipment, it was with the expectation that he would earn income using it. As such, Mr. Bains was required to take greater care of the property than if he had received the equipment without any benefit to him. I find that Mr. Bains was responsible to safeguard the equipment and failed to do so. Mr. Bains has not explained what happened to it, and the burden is on him to do so (see *Severinson v. Holloway*, 2018 BCCRT 42). I find Daljit Bains is responsible to pay the applicant's damages, as assessed below.

22. I turn then to the applicant's claim for damages. The applicant claims he paid \$2,100 for the "cleaning starter kit". This amount is supported by the down payment receipt for \$1,207.50 inclusive of tax, and the lease agreement showing 12 monthly payments of \$103.80 for \$1,245.60. I allow the \$2,100 claimed, which is less than \$2,453.10 that the applicant's receipts total. I do not allow pre-judgment interest as based on the evidence before me, the applicant has not yet replaced the cleaning equipment.
23. The applicant advised it does not claim reimbursement of tribunal fees or any dispute-related expenses, and so I make no order in that respect.

ORDERS

24. Within 14 days, I order the respondent Daljit Bains to pay the applicant \$2,100 in damages. I dismiss the applicant's claims against the respondent Bakshinder Bains.
25. The applicant is entitled to post-judgment interest, as applicable.
26. 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.
27. 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 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.

Shelley Lopez, Vice Chair