



# Civil Resolution Tribunal

Date Issued: December 31, 2018

File: SC-2018-001708

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Deck v. Stead*, 2018 BCCRT 924

**B E T W E E N :**

James Deck

**APPLICANT**

**A N D :**

Apryl Stead

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Julie K. Gibson

## **INTRODUCTION**

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

2. The applicant James Deck hired the respondent as a wedding photographer. He says she failed to complete the service in a satisfactory way. The applicant seeks a refund of \$2,000.
3. The respondent says she fulfilled the wedding package as best she could. She says the bride and groom failed to give her the lists needed to take some photos.
4. The parties are each self-represented.

## **JURISDICTION AND PROCEDURE**

5. 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. It also applies if a party fails to comply with tribunal rules in relation to the case management phase of the dispute, including specified time limits, or an order of the tribunal made during the case management phase. 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.
6. 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.

7. Under tribunal rule 126, in resolving this dispute the tribunal may make one or more of the following orders:
  - a. order a party to do or stop doing something;
  - b. order a party to pay money;
  - c. order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

8. The first issue is whether I should proceed to decide the applicant's claim, without the respondent's further participation, given her non-compliance.
9. The second issue is to what extent I should order the respondent to pay the applicant the claimed \$2,000.00.

## **EVIDENCE AND ANALYSIS**

### ***Non-compliance***

10. My July 9, 2018 summary decision to hear the dispute without the respondent's participation, given her non-compliance, was previously communicated to the parties by email, through the tribunal facilitator. The details supporting that decision are set out below.
11. The respondent is the non-compliant party in this dispute. She has failed to participate in the case management phase, as required by sections 25 and 32 of the Act and tribunal rules 94 to 96, despite multiple attempts by the facilitator to contact her with a request for a reply.
12. The Dispute Notice was issued on March 7, 2018. The Dispute Response was submitted on May 18, 2018.
13. The facilitator made the following attempts at contact:

- a. **June 13, 2018** – The facilitator emailed the parties to set up a conference call time and requested a reply by June 15, 2018. The respondent did not reply.
  - b. **June 20, 2018** – The facilitator emailed the respondent with a deadline of June 22, 2018. The email warned that, if the respondent failed to reply, the dispute would be referred to a tribunal member who would decide the dispute without the respondent’s further participation. The respondent did not reply. The facilitator then called the respondent at the number she had provided. The number was not in service.
  - c. **July 3, 2018** – The facilitator tried calling the respondent again. The number was not in service.
14. The facilitator referred the respondent’s non-compliance with the tribunal’s rules to me for a decision as to whether I should hear the dispute without her further participation.

**Should the tribunal hear the applicant’s dispute?**

15. I find the respondent has not provided an explanation about why she failed to communicate with the tribunal as required. I find the facilitator made a reasonable number of attempts to contact her. Parties are told at the beginning of a tribunal proceeding that they must actively participate in the dispute resolution process. I find it is more likely than not that the respondent was aware of the attempts to contact her and chose not to respond.
16. 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.
17. First, this claim does not affect persons other than the parties involved in this dispute.
18. Second, the non-compliance here occurred at the outset of the facilitation process. No substantive discussions between the parties occurred. The respondent has effectively abandoned the process after providing a response. Third, given the facilitator'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.
19. Fourth, I see no prejudice to the applicant in hearing the dispute without the respondent's participation. The prejudice to the respondent of proceeding to hear the dispute is outweighed by the circumstances of her non-compliance. If I refused to proceed to hear the dispute, the applicant would be left without a remedy. That would be unfair.
20. Finally, the tribunal's resources are valuable. Its mandate to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly is impaired if one party fails 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.
21. In weighing the factors, I find the applicant's claims should be heard. In deciding to hear the applicant's dispute I have put significant weight on the following 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 *Dispute* and Damages**

22. I have decided to hear the dispute without the respondent's participation. I turn to the merits of the dispute.
23. Where a respondent filed a response but has since failed to comply with the tribunal's directions, an adverse inference may be drawn against her. This means that if the respondent refuses to participate, it is generally 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 provide any response to the dispute and is in default.
24. Having said that, I reviewed the Dispute Response, because it was filed prior to the respondent's non-compliance.
25. In the Dispute Response, the respondent says she fulfilled the verbal agreement for wedding photography as best she could. She says the bride and groom failed to provide lists of family members to enable her to get some group photographs. She referred to having evidence that would prove this point, but then failed to file any evidence. Given her non-compliance, I draw an adverse inference against the respondent and prefer the applicant's evidence about what happened.
26. In September 2016, the applicant entered a verbal agreement for the respondent to provide photography services at his August 2017 wedding. Based on text messages filed in evidence by the applicant, I find that that he paid \$4,250 to the respondent for a wedding package. The package was to include two photographers providing "full day coverage", one 10 x 10 album, and all photographs on a USB drive.
27. The applicant requested that the respondent take photographs of the bride and groom's children.
28. The applicant says, and I accept, that the respondent produced very few photographs of wedding guests or the children.

29. The respondent also failed to provide the photographs on a USB drive. She failed to provide a 10x10 photo album, as the parties had agreed.
30. When the applicant asked for a partial refund for the photographs, the respondent refused, but said she would provide photo canvasses within a week. Instead, she provided photo canvasses a month later, and of the wrong photograph.
31. In her Dispute Response, the respondent agreed that the canvases were printed incorrectly. She says she re-ordered them immediately to fix the mistake. There was no evidence filed showing that the respondent re-ordered the canvasses. Given the adverse inference I have drawn against her, I find the respondent failed to provide the canvasses.
32. I find the respondent failed to provide the wedding photography services as agreed between the parties. As a result, I find that the respondent must refund the applicant \$2,000.
33. As the applicant was successful, in accordance with the Act and the tribunal's rules, I find the applicant is entitled to reimbursement of \$125 in tribunal fees.
34. Because the exact date that the respondent paid the applicant is not before me in evidence, I have calculated post-judgement interest on the \$2,000 from August 1, 2017, which I accept as the approximate date of full payment, to the date of this decision.

## **ORDERS**

35. Within 10 days of the date of this order, I order the respondent to pay the applicant a total of \$2,157.39, broken down as follows:
  - a. \$2,000 as a partial refund for the wedding photography services,
  - b. \$32.39 in pre-judgment interest under the *Court Order Interest Act*,
  - c. \$125 in tribunal fees.

36. The applicant is entitled to post-judgment interest, as applicable.
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.

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Julie K. Gibson, Tribunal Member