



Civil Resolution Tribunal

Date Issued: January 10, 2019

File: SC-2018-003441

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Berna v. Brazeau*, 2019 BCCRT 46

Default Decision – Non-Compliance

B E T W E E N :

Stephen Berna

APPLICANT

A N D :

Shannon Brazeau

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Megan Volk

INTRODUCTION

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

2. The applicant, Stephen Berna, originally named a 2nd respondent, Grayson Jefferson, who is the respondent's husband. However, the applicant did not serve a Dispute Notice on that respondent as required, so he is not included as a party to this dispute. I have therefore amended the style of cause above to show Ms. Brazeau as the sole respondent and have referred to her below as the respondent.
3. The applicant says that the respondent represented her husband, as a plumber, who the applicant paid \$1,060.50 for plumbing work that was never done. The applicant says the bank declined the respondent's refund cheque due to insufficient funds.
4. In her Dispute Response submitted on July 28, 2018, the respondent said that she did not provide the refund cheque. According to the respondent, the cheque was forged and the police have been notified.
5. Both parties represented themselves.
6. For the reasons that follow, I have denied the applicant's claim.

JURISDICTION AND PROCEDURE

7. Section 36 of the *Civil Resolution Tribunal Act* applies if a party to a dispute does not follow the Act or its regulations. It also applies if a party does not follow 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.
8. 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: hear the dispute, make an order dismissing a claim in the dispute made by the non-compliant party, refuse to resolve a claim made by the non-compliant party, or refuse to resolve the dispute.
9. These are the tribunal's formal written reasons. The tribunal has jurisdiction over small claims brought under section 118 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.

10. Under tribunal rule 126, in resolving this dispute the tribunal may order a party to do or stop doing something or to pay money and may order any other terms or conditions the tribunal considers appropriate.

ISSUES

11. The first issue is whether I should proceed to decide the applicant's claim without the respondent's further participation given her non-compliance.
12. The second issue is whether or to what extent I should order the respondent to pay the applicant the claimed \$1,060.50.

EVIDENCE AND ANALYSIS

Non-Compliance

13. On December 21, 2018 I decided to hear this dispute without the respondent's participation because of her non-compliance. The tribunal facilitator communicated my summary decision to the parties. The details supporting that decision are set out below.
14. The respondent filed a Dispute Response on July 28, 2018 but did not respond to multiple attempts by the case manager for facilitation, as required by section 32 of the Act and tribunal rule 112.
15. The respondent last communicated with the tribunal on July 28, 2018 when she filed the Dispute Response. After that, the case manager made the following attempts to contact her:

- a. **December 5, 2018** – The case manager emailed the respondent asking for information in the facilitation process by December 7, 2018. The respondent did not reply.
- b. **December 10, 2018** – The case manager emailed the respondent asking her to respond to the December 5, 2018 communication by December 11, 2018. The respondent did not reply.
- c. **December 13, 2018** – The case manager phoned the respondent informing her that she needed to respond to the December 5, 2018 communication by December 14, 2018. The case manager left a voice mail. The respondent did not reply.
- d. **December 17, 2018** – The case manager emailed the respondent asking her to respond to the December 5, 2018 communication by December 19, 2018. The email warned that if the respondent failed to reply, a tribunal member may make a binding decision using only the information that had been submitted. The respondent did not reply.
- e. **December 17, 2018** – The case manager phoned the respondent informing her that she needed to respond to the December 5, 2018 communication and that a tribunal member may now decide the dispute without her further participation. The case manager left a voice mail. The respondent did not reply.

16. The case manager then referred the matter of the respondent's non-compliance with the tribunal's rules to me to decide whether I should hear the dispute without the respondent's participation.

Should the tribunal hear the applicant's dispute without the respondent's participation?

17. As referenced above, the respondent filed a Dispute Response, but has failed to communicate further. The respondent has provided no explanation about why she

did not communicate with the tribunal as required. I find the case manager made a reasonable number of attempts to contact the respondent.

18. Given that the respondent provided her contact information in the July 28, 2018 Dispute Response, I find it is more likely than not that the respondent knew about the case manager's contact attempts and failed to respond.
19. 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.
20. In considering these factors I find that this dispute does not affect persons other than the named parties.
21. Second, the non-compliance here occurred before the facilitation process, and the respondent has provided no evidence or submissions. The respondent effectively abandoned the process after providing a response.
22. Third, given the case manager's attempts at contact and the respondent's failure to respond despite written warning of the consequences, I find the nature and extent of the non-compliance is significant.
23. 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 may be left without a remedy, which would be unfair to him.

24. Finally, the tribunal's resources are valuable. Its mandate to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly is severely impaired if one party refuses to participate. I find that it would be wasteful for the tribunal to continue applying its resources on this dispute, such as by making further attempts to seek participation from the respondent.
25. In weighing all of the factors, I find the applicant's claim 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, and
 - c. the need to conserve the tribunal's resources.

Merits of the Dispute and Damages

26. Having decided to hear the dispute without the respondent's participation, I turn to the merits of the dispute.
27. 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.
28. Despite the adverse inference, I reviewed the Dispute Response, because it was filed prior to the respondent's non-compliance.
29. The applicant bears the burden of proof for the claim on a balance of probabilities. I refer only to the relevant evidence necessary to give context to my decision.

30. The applicant hired the respondent's husband to do some plumbing work for a fixed price. The applicant says that the respondent referred her husband for the work. The respondent denies the referral.
31. When the applicant and the respondent's husband entered into their agreement for service, the applicant gave the respondent's husband a deposit of 50% of the agreed amount totaling \$1,060.50.
32. The applicant says the respondent's husband cancelled the agreed start date multiple times. Eventually the applicant's husband cancelled the agreement.
33. Before cancelling the agreement, the respondent's husband gave the applicant a refund cheque. The cheque was from the respondent. The bank refused the cheque as the account had insufficient funds. The respondent says that she did not write the cheque and that her husband forged her signature.
34. I find that the applicant may not recover the \$1,060.50 damages from the respondent. The applicant did not have an agreement with the respondent and the respondent was not obligated to provide a refund. Nothing turns on the fact that the respondent may have recommended her husband as a plumber. There is no suggestion the respondent's husband was not a plumber.
35. Given my findings, I dismiss the applicant's claim.
36. As the applicant was unsuccessful, under the Act and rules I also dismiss the claim for reimbursement of tribunal fees. Nothing in this decision prevents the applicant from pursuing a claim against Grayson Jefferson.

ORDER

37. I dismiss the applicant's claim and therefore this dispute.

Megan Volk, Tribunal Member