Civil Resolution Tribunal

Date Issued: April 2, 2019

File: SC-2018-008324

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Gregoire v. Fusion Hospitality Inc.,* 2019 BCCRT 409

B E T W E E N :

Christina Gregoire

APPLICANT

A N D :

Fusion Hospitality Inc.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Shelley Lopez, Vice Chair

INTRODUCTION

1. On July 17, 2018, the applicant, Christina Gregoire, says on July 17, 2018 suffered an allergic reaction at a Mr. Mike's Restaurant, operated by the respondent, Fusion Hospitality Inc. This happened because her meal contained peppers, and the applicant says she explicitly explained she had a peppers allergy and was assured

there were none in her order. The applicant claims $4,000 in general damages for pain and suffering, plus $44.75 for reimbursement of medication costs.

2. The respondent denies liability, and in particular says the applicant did not correctly specify her allergy to her server. The respondent also says the applicant's claimed damages are excessive given she was fine at the restaurant. The applicant is self-represented and the respondent is represented by Brady Young, who I infer is the respondent's principal or employee.

JURISDICTION AND PROCEDURE

3. These are the tribunal's formal written reasons. The tribunal has jurisdiction over small claims brought under section 118 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. Some of the evidence in this dispute amounts to a "she said, she said" scenario. Credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note that in *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the BC Supreme Court recognized the tribunal's process and found that oral hearings are not necessarily required where credibility is in issue.

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 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 respondent was negligent in serving the applicant peppers in her meal, given her known allergy, and if so, what are the appropriate damages.

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 referenced the evidence and submissions as necessary to give context to my decision.

Liability

9. The central issue on liability in this dispute is whether the applicant disclosed the particular nature of her peppers allergy to the staff on July 17, 2018.

10. However, the parties agree that the applicant's peppers allergy was known to the staff at the respondent's restaurant, as she had eaten there several times before and disclosed it. It is undisputed that on July 17, 2018 the applicant reiterated her allergy and the server, L, made a note of it. After eating some of the meal, the applicant developed a burning sensation in her mouth and her tongue began to swell. After questioning her server about whether there were peppers in her meal,

the server investigated and learned that the “Mr. Mike’s Spice” in the meal did contain peppers (Seasoning).

11. There is some confusion in the evidence before me whether the Seasoning was on the applicant’s chicken or on her vegetables. Nothing turns on it, as I find the respondent’s staff knew she had a peppers allergy.

12. The respondent originally stated in its Dispute Response that the applicant told her server L that she had a “fresh pepper allergy”. This is not consistent with L’s August 3, 2018 witness statement, nor with any of the other witness statements provided by the respondent’s staff. L wrote that the applicant had been at the restaurant before “saying she has a pepper allergy”. L stated that after the applicant expressed concern about whether there were peppers in her meal, L said “the kitchen and I went back to the spices and realized there is dried red peppers”. There is however nothing in L’s statement that indicates the applicant ever limited her allergy to fresh peppers. Rather, L’s statement indicates that despite intending to not serve the applicant peppers, the restaurant did so by not being aware the Seasoning contained peppers. The restaurant manager R’s statement confirms the staff were unaware the Seasoning contained dried peppers. I will address in the damages section below the respondent’s evidence about how the applicant reacted.

13. The above conclusion is consistent with the cook D’s statement that an order came in for “smugglers chicken” with a modification to the topping, instead of Cajun they requested garlic butter. Nothing in this statement likely means the applicant limited her pepper allergy to fresh peppers. Rather, I find the opposite is likely: Cajun (which based on the evidence I infer is a dried spice mixture) was not okay because she was allergic to the peppers in it. The cook describes how after the cook re-made the applicant’s vegetables, L came and “asked if there was any peppers in anything on the plate” because the applicant was allergic. The cook wrote (my bold emphasis added), “**at the time I wasn’t sure if our seasoning had it so I checked and it did** so I told her I would make a new chicken breast”. At that point, the applicant had already eaten.

14. In its later submissions, the respondent states that the applicant had described her allergy as “bell peppers and chilli peppers” and that it was after the allergic reaction that she “further elaborated” that the severity of her allergy included dehydrated spices.

15. I find there was no obligation on the applicant to isolate or highlight that her allergy included “dehydrated” spices. I have no evidence before me to suggest that a restaurant operator would reasonably think an allergen present in fresh food would not be a problem in a dehydrated form.

16. Further, going back to the respondent’s initial statement in its Dispute Response, the only evidence that indicates the applicant said she was “fine with dried peppers” comes from the respondent’s manager R. R stated that after L told the applicant there were dried peppers in the Seasoning, the applicant said she is “fine with dried peppers” but the cook made her a new chicken breast anyway. I do not accept R’s evidence that the applicant said this. The applicant denies it and L, who was the person who allegedly heard it, did not say the applicant said this. I also find it unlikely the applicant would go to her car to use her EpiPen if she was in fact “fine with dried peppers”.

17. I find the server L and the cook were in the best position to determine what the staff’s understanding was at the time the applicant’s meal was prepared. I find their evidence shows they unwittingly served the applicant peppers with the Seasoning on her meal, whether on the chicken breast or the vegetables. This conclusion is supported by the fact that all witness statements note L went back to the kitchen to ask if there were any peppers in the applicant’s meal, after the applicant had started eating.

18. I turn to the legal analysis of liability. In order to succeed in a claim of negligence, the applicant must prove each of the following on a balance of probabilities:

    a. The respondent owed the applicant a duty of care;

    b. The respondent breached the standard of care;

c. The applicant sustained a loss;

d. The respondent's breach of the standard of care caused the applicant's damages, in fact and law.

Mustapha v. Culligan of Canada Ltd., 2008 SCC 27 at paragraph 3

19. There is no dispute the respondent owed the applicant customer a duty of care in its restaurant. There is also no dispute the applicant suffered an allergic reaction as a result of consuming peppers in the restaurant, though as discussed below the respondent argues it was not significant.

20. As for the central question of whether the respondent breached the standard of care, I find the answer is yes. I say this because I find the standard was not to serve a customer food that contains a known allergen. Given my conclusions above, I find the respondent was careless in being unaware that the Seasoning contained peppers, and this amounted to a breach of the standard of care. I find the applicant's unwitting consumption of peppers caused her allergic reaction and her damages, as discussed below.

21. In short, I find the applicant has on balance proved the respondent is liable for her allergic reaction after consuming peppers in its restaurant.

Damages

22. As noted above, the applicant claims $4,000 in general damages for pain and suffering, which are also known as non-pecuniary damages.

23. As set out in *Kilian v. Valentin*, 2012 BCSC 1434:

> The purpose of an award for non-pecuniary loss is to compensate the plaintiff for pain, suffering, disability, and loss of enjoyment of life. The loss must be assessed for both losses suffered by the plaintiff to the date of trial and for those she will suffer in the future. The award of a sum of money is to permit the plaintiff to substitute other amenities for those she has lost.

24. In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal set out the factors to be considered in making a general damages award, also known as a non-pecuniary award:

    - the age of the plaintiff (applicant);
    - the nature of the injury;
    - the severity and duration of pain;
    - disability;
    - emotional suffering;
    - loss or impairment of life;
    - impairment of family, marital and social relationships;
    - impairment of physical and mental abilities;
    - the plaintiff's stoicism (a factor that should not penalize the plaintiff).

25. So, what happened to the applicant after the allergic reaction started in the respondent's restaurant?

26. After she developed symptoms in the restaurant, the applicant went to her vehicle to take medication. Her condition worsened so she attended hospital and was given epinephrine by injection and a prednisone (steroid) pill. The applicant followed up with her doctor a week later, who found continuing respiratory issues caused by the allergic reaction, so the applicant was prescribed prednisone for another week.

27. I acknowledge the respondent says the applicant said her usual reaction was that she gets extremely tired and she would just head home to rest. The applicant remained in the restaurant for another 30 minutes after her initial reaction, finishing her drink and chatting with L. I accept this evidence, however I find it is not determinative.

28. I find the limited medical evidence before me supports a conclusion that while the applicant initially may have felt not too bad, her symptoms worsened. I accept she felt sick for about 3 or 3.5 weeks, largely due to the effects of the Prednisone, as alleged.

29. I note the Supreme Court of Canada's comments at paragraph 14 of *Mustapha* that "minor and transient upsets do not constitute personal injury, and hence do not amount to damage". Contrary to the respondent's apparent argument, I find the applicant's sick feeling, supported by the spirometry reports and the July 20, 2018 medical note, rose above the level of a minor and transient upset.

30. The applicant also submits that for about 3.5 weeks following the incident she experienced difficulty breathing and regularly experienced coughing fits. She says any attempt to engage in moderate activity or even speaking with any force would result in her gasping for air. She says the Prednisone had "disastrous" effects on her system, causing internal bleeding, sleep deprivation, and weight gain.

31. However, beyond the brief mention in the July 20, 2018 doctor's chart note that the applicant reported blood in stool, the applicant has provided no objective evidence of the sick feeling impacting her daily function or activities, such as evidence of further medical visits. She has not provided any evidence of missed work. She has provided no witness statements about her claimed symptoms.

32. On balance, I find that the applicant sustained a significant allergic reaction, with a delayed onset later in the evening on July 17, 2018 that required hospitalization for anaphylactic shock. She received steroid treatment for about 3 weeks, until August 6, 2018. However, as discussed further below, I find the applicant has not proved her symptoms were as significant as she claims.

33. The applicant cites *Martin v. Interbooks Ltd*., 2011 SKQB 251, in which the court awarded $25,000 to a plaintiff who sustained a severe allergic reaction after eating nuts despite having alerted the staff to his allergy. As acknowledged by the

applicant, the harm the applicant sustained in this dispute was not so extreme. In terms of assessing damages, this case is not helpful.

34. The applicant also cited 3 cases[1] involving motor vehicles accidents with an equivalent award in today's dollars in the range of $3,400 to $3,800. In those cases, the plaintiff's soft tissue or whiplash injuries lasted 4 to 6 weeks, with some residual symptoms in one case lasting a few more months. I do not find these motor vehicle cases particularly helpful. The nature of soft tissue injuries and an allergic reaction are significantly different. However, I am mindful of the somewhat similar duration of symptoms.

35. On balance, I find the appropriate award for general damages in this case is $2,000. I come to this conclusion given the short duration of the applicant's symptoms (about 3 weeks), the fact she did not miss any work, and the absence of significant impact on function or activities. I find the applicant's injuries were relatively minor.

36. The respondent does not dispute the amount of the $44.75 claimed for the prescribed medication, which she obtained on July 30, 2018 as set out on the receipts. I find this is reasonable and I award reimbursement according.

37. The applicant is entitled to pre-judgment interest under the *Court Order Interest Act* (COIA) on the $44.75, from July 30, 2018.

38. In accordance with the Act and the tribunal's rules, as the applicant was partly successful I find she is entitled to reimbursement of half her $175 in tribunal fees, namely $87.50. The applicant also claims $63 in dispute-related expenses but did not explain what this was for nor did she provide a receipt. I dismiss the $63 claim.

[1] *Austin v. Fernandez*, 2004 BCPC 69; *White v. Tsa*i, 2001 BCPC 331; and *Wong v. Corea*, 2001 BCPC 129.

ORDERS

39. Within 14 days of this decision, I order the respondent to pay the applicant a total of $2,132.75, broken down as follows:

    a. $2,000 in non-pecuniary damages for pain and suffering,

    b. $44.75 in special damages for medication,

    c. $0.50 in pre-judgment interest under the COIA, and

    d. $87.50 in tribunal fees.

40. The applicant is entitled to post-judgment interest, as applicable. The applicant's remaining claims are dismissed.

41. 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.

42. 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.

Shelley Lopez, Vice Chair