Civil Resolution Tribunal

Date Issued: May 2, 2019

File: SC-2018-008472

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Morrow v. Jones Emery Hargreaves Swan LLP*, 2019 BCCRT 520

B E T W E E N :

Jie Hua Morrow

APPLICANT

A N D :

Jones Emery Hargreaves Swan LLP

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Eric Regehr

INTRODUCTION

1. The applicant, Jie Hua Morrow, is a former client of the respondent law firm, Jones Emery Hargreaves Swan LLP. The applicant claims $4,046 as a partial refund of legal fees and travel expenses that she says were the result of the respondent failing to file a court document on time. The respondent says that it was not

negligent in providing legal services to the applicant and the error did not have any consequences for the applicant's court case.

2. The applicant is represented by a non-lawyer representative. The respondent is represented by one of its partners, Michael Hargreaves, who was the responsible lawyer in the applicant's matter.

JURISDICTION AND PROCEDURE

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal 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.

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 9.3(2), 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.

ISSUE

7. The issue in this dispute is whether the respondent was negligent in providing legal services to the applicant and, if so, what remedy is appropriate.

EVIDENCE AND ANALYSIS

8. In a civil claim such as this, the applicant must prove her case on a balance of probabilities. While I have read all of the parties' evidence and submissions, I only refer to what is necessary to explain and give context to my decision.

9. The applicant was a co-defendant in a civil lawsuit in the Vancouver Registry. On September 21, 2016, she met with Mr. Hargreaves and decided to hire him to represent her. The applicant lived in Victoria. The respondent is also in Victoria.

10. It is undisputed that there is no signed, written retainer agreement between the parties. This appears to have been an oversight by the respondent. However, Mr. Hargreaves confirmed some of the key terms of a retainer agreement, including his hourly rate, in an email that he sent the same day as the parties' initial meeting.

11. Between September 21, 2016 and the fall of 2017, the parties had regular email communication, all of which has been provided as evidence in this dispute.

12. The primary issue in this dispute relates to the preparation for a trial that was scheduled to start on November 27, 2017. A trial management conference was scheduled on October 25, 2017.

13. Rule 3 of the BC Supreme Court Civil Rules requires the plaintiff to file and serve a trial brief at least 28 days before a trial management conference. Court Rule 3.1 requires any other party to file and serve a trial brief at least 21 days before a trial management conference. Accordingly, the plaintiff's trial brief was due on September 27, 2017 and the applicant's trial brief was due on October 4, 2017. Neither the plaintiff's lawyer nor the respondent filed a trial brief on time.

14. Court Rule 3.3 says that if any party fails to file a trial brief on time, the trial will be struck from the trial list unless the court orders otherwise.

15. According to the respondent's time sheets, the plaintiff's lawyer contacted Mr. Hargreaves on October 17, 2017 about "trial brief issues". I infer that this was when Mr. Hargreaves realized that he and the plaintiff's lawyer had both failed to file trial briefs. Under Court Rule 3.3, the Court Registry had struck the trial from the trial list. The plaintiff's lawyer asked that the applicant consent to an order that the Court reinstate the trial to the trial list.

16. Mr. Hargreaves sent the applicant a lengthy email on October 18, 2017, explaining the trial brief issue and the applicant's options. In that email, Mr. Hargreaves admitted that his office made an error by failing to file a trial brief. Mr. Hargreaves suggested that the applicant oppose the plaintiff's application to reinstate the trial. Mr. Hargreaves believed that delaying the trial was in the applicant's best interest. The applicant gave the respondent written instructions to oppose the plaintiff's application.

17. The cost to have a lawyer attend the application in Vancouver was $3,046.19, which the applicant rounded down to $3,046 in this dispute. The respondent was successful in convincing the Court not to put the trial back on the trial list for November 27, 2017, and the trial was rescheduled for July 2018.

18. After the trial was delayed, Mr. Hargreaves recommended that the applicant bring a summary trial application to have the plaintiff's claim dismissed. The applicant agreed but the application was unsuccessful. After learning of the unsuccessful result, the applicant terminated the retainer.

19. While the applicant does not use these exact words, I find that her claim is a negligence claim against the respondent. To succeed in a case of negligence against a lawyer, the applicant must prove that the respondent's legal services fell below the standard of a reasonably competent lawyer and that the applicant suffered damages as a result.

20. The applicant’s primary argument is that Mr. Hargreaves’ failure to file a trial brief was the reason that a lawyer had to attend the application in Vancouver.

21. The respondent says that its normal practice is to put the due date of its obligation to file a trial brief in its computer system. Unfortunately, this did not occur. However, the respondent says that the plaintiff was supposed to file a trial brief first, which would have prompted the respondent to prepare its own trial brief. The respondent also says that it had no obligation to file a trial brief because the plaintiff did not file hers first.

22. In addition, as a general point, the respondent argues that the applicant needs expert evidence about a lawyer’s standard of care to succeed in a professional negligence claim. It is undisputed that the applicant has provided no expert evidence.

23. First, I disagree with the respondent that it had no obligation to file a trial brief because the plaintiff failed to file a trial brief. A plain reading of the Court Rules does not support a conclusion that a defendant’s obligation to file a trial brief is contingent on the plaintiff filing a trial brief. They are independent obligations.

24. With respect to the missed deadline, I find that the applicant does not require expert evidence about a lawyer’s standard of care. I find that missing a Court imposed deadline that carries a significant automatic consequence clearly falls below the applicable standard of care, not unlike a missed limitation period.

25. That said, to succeed in a negligence claim, the applicant must prove that she suffered a loss because of the respondent’s failure to file the trial brief. The respondent argues that the applicant suffered no damages and I agree. The Court Rules require the Court Registry to cancel a trial if any trial briefs are not filed. Therefore, even if the respondent had filed a trial brief on time, the Court Registry still would have cancelled the trial and the parties would have been in the exact same position. The plaintiff still would have needed to bring an application to

reinstate the trial date. In other words, the respondent’s failure to file a trial brief on time had no practical consequences.

26. Because the applicant did not suffer any damages because of the respondent’s failure to file a trial brief, the applicant has failed to prove all the elements of a negligence claim for failing to file the trial brief. I dismiss this aspect of the applicant’s claim.

27. The remaining $1,000 that the applicant claims is for “additional costs” associated with the respondent’s “error”. In her submissions, the applicant makes several complaints about the respondent, although it is not clear how she arrived at a $1,000 claim for these alleged errors. That said, for the reasons that follow, I find that the applicant failed to prove that any of the respondent’s other actions fell below the standard of a reasonably competent lawyer.

28. I summarize the applicant’s remaining complaints as follows:

- Mr. Hargreaves should have advised her to hire an interpreter.
- Mr. Hargreaves was overly optimistic about the strength of the applicant’s case.
- Mr. Hargreaves should have provided a formal retainer agreement and should have told the applicant to hire a lawyer in Vancouver.

29. With respect to these allegations, I agree with the respondent that the applicant needs expert evidence that Mr. Hargreaves’ advice fell below the standard of care of a reasonably competent lawyer. The applicant claims to have received legal advice about the quality of Mr. Hargreaves’ work, but she did not provide any evidence from the other lawyer. For this reason, I find that the applicant failed to prove that Mr. Hargreaves’ work fell below the applicable standard. That said, in the interests of providing closure to the parties, I will address the applicant’s allegations. In summary, I find each of them to be unfounded.

30. The applicant alleges that she had difficulty communicating in English. She says that Mr. Hargreaves should have realized that she was not understanding his advice and should have recommended an interpreter. I disagree. The applicant was in the best position to know whether she was able to understand Mr. Hargreaves's advice or recommendations. She never raised any concerns with Mr. Hargreaves. In addition, I have reviewed dozens of emails that the applicant wrote to Mr. Hargreaves. They indicate that the applicant had a strong command of English.

31. It is true that some of Mr. Hargreaves's emails to the applicant contained complicated legal analysis. This reflected the fact that some aspects of the plaintiff's claim against the applicant and the applicant's defence involved complex and highly technical legal issues. Mr. Hargreaves recognized that the issues could be difficult to understand and regularly invited the applicant to arrange a phone call or meeting. Mr. Hargreaves says that he had several verbal discussions with the applicant and never formed the impression that she did not understand her case.

32. The applicant also claims that the respondent was overly optimistic about her chances, particularly for the summary trial. However, Mr. Hargreaves was always careful to advise the applicant that even though he believed that she had a strong defence, there was no guarantee of success and that litigation always includes a risk of losing. In addition, the Court did not disagree with the substance of Mr. Hargreaves's arguments. Rather, the Court decided that the matter was not appropriate for a summary trial.

33. Finally, I do not agree that there was any misunderstanding about the terms of the parties' agreement even though there was no formal retainer agreement. I find that the applicant knew that the respondent's lawyers would need to travel to Vancouver. Mr. Hargreaves first travelled to Vancouver on May 12, 2017 to conduct the plaintiff's examination for discovery and charged the applicant for his travel. There is no evidence that the applicant took issue with these expenses. Furthermore, in September 2017, after the plaintiff brought an application, the respondent advised the applicant that the cost to oppose the application, including

travel, would likely be around $5,000. Again, the applicant did not question the cost of travelling to Vancouver. I find that the applicant knew that hiring a Victoria lawyer involved paying the lawyer to travel to Vancouver from time to time. The respondent had no obligation to advise the applicant to hire a Vancouver lawyer.

34. Therefore, I dismiss the applicant's claim for a $1,000 refund for the respondent's other alleged "errors".

35. Under section 49 of the Act, and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. Because the applicant was unsuccessful, I dismiss her claim for tribunal fees and dispute-related expenses. The respondent did not claim any dispute-related expenses.

ORDER

36. I dismiss the applicant's claims, and this dispute.

Eric Regehr, Tribunal Member