



# Civil Resolution Tribunal

Date Issued: July 22, 2019

File: SC-2019-001362

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Searay Foods Inc. et al v. Lip*, 2019 BCCRT 883

BETWEEN:

SEARAY FOODS INC., RAYMOND WONG, AND PHILIP CHAN

**APPLICANTS**

AND:

SUI PING DANIEL LIP

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Eric Regehr

## INTRODUCTION

1. The respondent, Sui Ping Daniel Lip, is a former employee of the applicant, Searay Foods Inc (Searay Foods). The other respondents, Raymond Wong and Philip Chan, are directors of Searay Foods.

2. The respondent worked as a delivery driver. The applicants say that on his last day of work, he collected \$1,353.32 in cash payments that he kept because he was upset about not getting a bonus. The applicants ask for an order that the respondent reimburse them. The respondent denies the applicants' claims.
3. The applicants are represented by an employee of Searay Foods. The respondent is self-represented.

## **JURISDICTION AND PROCEDURE**

4. 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 (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.
5. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, this dispute amounts to dispute about the credibility or truthfulness of witnesses. Credibility of 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. In the circumstances of this dispute, I find that I am properly able to assess and weigh the 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 therefore decided to hear this dispute through written submissions.
6. 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.

7. 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**

8. The issue in this dispute is whether the respondent is liable to the applicants for the \$1,353.32 in cash that went missing on his last day of work.

## **EVIDENCE AND ANALYSIS**

9. In a civil claim such as this, the applicants must prove their case on a balance of probabilities. While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain and give context to my decision.
10. The respondent participated in the facilitation process but chose not to participate in the tribunal decision process. The tribunal case manager asked the respondent numerous times to provide evidence and submissions but the respondent did not respond.
11. As mentioned above, the respondent worked for Searay Foods as a delivery driver. On December 29, 2018, the respondent made 4 deliveries where the customer paid cash for a total of \$1,353.32. The respondent also made other deliveries where the customers paid with cheques.
12. The respondent was injured during this shift and did not return to Searay Foods at the end of his shift. The respondent later gave Searay Foods a doctor's note that he would need 3 weeks off.

13. The respondent went to Searay Foods on January 12, 2019, to collect his paycheque. While there, the respondent gave Searay Foods the cheques and invoices he had collected on December 29, 2018. According to Mr. Wong, the respondent said that he had forgotten to bring the cash.
14. On January 17, 2019, Searay Foods' sales director spoke to the respondent on the telephone about the missing cash. According to the sales director, the respondent said that he had lost the cash. The respondent also told the sales director that he was quitting his job.
15. Searay Foods made a police report about the missing cash on January 17, 2019. According to the police records, which are in evidence, a police officer spoke to the respondent on the telephone. The respondent told the police officer that he had lost the cash and would pay it back when he could.
16. According to the assistant manager, on January 30, 2019, the respondent telephoned saying that he would not repay the missing cash because he believed that Searay Foods owed him for overtime. The respondent has since made a claim to the Employment Standards Branch (ESB) about this overtime pay.
17. As mentioned above, the respondent filed a Dispute Response but did not make submissions or provide evidence in response to the applicant's submissions and evidence. While parties are under no obligation to provide evidence or submissions during the tribunal decision process, failing to do so can lead the tribunal making an adverse inference.
18. In the respondent's Dispute Response, he simply says that the allegations are "not true", although he does deny that the cash went missing or explain what happened to it. The respondent says that the applicants made a claim against him to retaliate for the ESB complaint.
19. The applicants believe that the respondent kept the cash because he was upset at not getting a Christmas bonus and because he believes that Searay Foods owes him for overtime.

20. I accept the applicants' evidence that the respondent collected \$1,353.32 in cash from Searay Foods' customers and failed to provide it to Searay Foods. I rely on the fact that the respondent did not provide any evidence or submissions to refute the allegation. I also rely on the police report that indicates that the respondent told a police officer that he had lost the cash. Even though that evidence is hearsay, I find that in these circumstances it is reliable evidence. As mentioned above, the tribunal can accept evidence that would not be admissible in court, which includes hearsay evidence.
21. Does the respondent have to pay the applicants back for money that he lost while on the job? In *Kirby v. Amalgamated Income Limited Partnership*, 2009 BCSC 1044, the Court found that just because an employee causes a loss to an employer, it does not necessarily mean that the employee must reimburse the employer. The Court said that it is not enough for an employer to prove that the employee was negligent or performed their job poorly. Rather, the employer must prove that the employee "failed to do something specifically promised or obviously implied" by the employment contract.
22. There is no written employment contract in evidence. However, based on nature of the respondent's job, I find that it was an implied term of the parties' employment contract that the respondent would promptly provide all payments he received from customers to Searay Foods. I also find that it was an implied term of the parties' employment contract that the respondent would reasonably safeguard any cash he received from customers while it was in his possession.
23. I find that that the respondent was more than simply negligent in losing the cash. I find it more likely than not that the respondent purposely kept the cash because he believed that Searay Foods owed him money. I rely primarily on the fact that the respondent returned the invoices and cheques on January 12, 2019, but not the cash. I find it is unlikely that he would misplace the cash but not the cheques and invoices. I also rely, again, on the fact that the respondent failed to provide any evidence or submissions to explain what happened. I find that keeping the cash was

a breach of the parties' employment contract. My conclusion is consistent with *Canada Packers Inc. v. Kennedy*, 1983 CanLII 2373 (SK QB), which has similar facts to this dispute.

24. Therefore, I find that the respondent must repay Searay Foods \$1,353.32.
25. As for the other 2 applicants, there is no explanation about why they are involved in this dispute, other than the simple fact that they are directors of Searay Foods. A director does not generally have a personal right to sue for their company's losses. There is no basis here for the directors to make personal claims against the respondent. Accordingly, I dismiss their claims.
26. 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. Searay Foods has been successful so I find that it is entitled to reimbursement of \$125 in tribunal fees. None of the applicants claimed any dispute-related expenses.

## **ORDERS**

27. Within 14 days of the date of this order, I order the respondent to pay Searay Foods a total of \$1,493.03, broken down as follows:
  - a. \$1,353.32 in debt
  - b. \$14.71 in pre-judgment interest under the *Court Order Interest Act* from December 29, 2018 to the date of this decision, and
  - c. \$125.00 in tribunal fees.
28. Searay Foods is entitled to post-judgment interest, as applicable.
29. Mr. Wong's and Mr. Chan's claims are dismissed.

30. 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.
  
31. 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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Eric Regehr, Tribunal Member