



Civil Resolution Tribunal

Date Issued: July 23, 2019

File: SC-2019-002383

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Timmis v. Dial-A-Geek Consulting Inc.*, 2019 BCCRT 894

B E T W E E N :

MARK W TIMMIS

APPLICANT

A N D :

DIAL-A-GEEK CONSULTING INC.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Lynn Scrivener

INTRODUCTION

1. This is a dispute about computer maintenance services. The applicant, MARK W TIMMIS, says that he took his computer to the respondent, DIAL-A-GEEK CONSULTING INC., for maintenance services. He says that the services were not performed properly, and that he lost data as a result. The applicant wants the

respondent to pay him \$4,875.00 in damages. The respondent denies that it is responsible for the applicant's losses.

2. The applicant is self-represented. The respondent is represented by a director.

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* (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 "he said, they said" scenario. The 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.
5. Here, 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 also note the British Columbia Supreme Court's decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized the tribunal's process and that oral hearings are not necessarily required where credibility is in issue.
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 is whether the respondent is responsible for the losses claimed by the applicant such that it must pay him \$4,875.00 in damages.

EVIDENCE AND ANALYSIS

9. In a civil dispute such as this, an applicant bears the burden of proof on a balance of probabilities. The parties provided submissions and evidence in support of their respective positions. While I have considered all of this information, I will refer to only that which is necessary to provide context to my decision.
10. The applicant uses his computer for his business, and says that important client information is stored on the computer's hard drive as well as on a back-up device. He states that he has used the respondent's computer maintenance services for many years, and has relied upon its expertise and advice.
11. On January 29, 2019, a technician employed by the respondent serviced the applicant's computer. On February 6, 2019, the applicant's hard drive crashed and it was discovered that the back-up device was not functioning. The applicant says that he lost a year's worth of important business information. At the respondent's recommendation, he arranged for a third party to retrieve his data.

12. The applicant's position is that the respondent is responsible for the loss of data and the cost of data recovery as it did not check the back-up device as part of its servicing of his computer. He says one of the respondent's technicians (K) and its Technical Director told him that the back-up device should have been checked as part of the general servicing process. He also says that a different technician (S) told him that the respondent has a checklist that includes determining whether a computer has a back-up device and, if so, whether it is operating properly. The applicant submits that, had the respondent checked the back-up device on January 29, 2019, his data could have been recovered with minimal cost and delay. Instead, he says he incurred costs of \$4,875.00 and was effectively out of business for 3 weeks.
13. The respondent denies that it is responsible for the applicant's losses or claimed damages. It says that it operates an "on demand" service model in which it only performs services at a customer's express instruction. The applicant did not specifically request that its technician check the back-up device, which is something that is not included in its "general tune" service. The respondent says other service providers have similar policies about back-up devices. The respondent provided statements from technician S and its Technical Director, both of whom denied having told the applicant that his back-up device should have been checked during the January 29, 2019 service. No statement was provided from technician K.
14. The applicant does not dispute that he did not make a specific request that the respondent attend to his back-up device, but says his understanding was that this device would be checked as part of the general servicing of his computer. Both the applicant and his assistant provided sworn statements that technician K told them that the back-up device should have been checked as part of this service. This is not consistent with the evidence from technician S and the Technical Director that back-up devices are not part of general servicing and work on these items is only done on request.

15. The evidence before me does not contain an advertisement or other source of information that lists the particular services that were involved with the service package the applicant purchased from the respondent. The January 29, 2019 invoice shows a charge for a “general tune” that involved cleaning and optimizing the computer, installing an ad blocker, ensuring the antivirus software was up to date, and checking internet connectivity. There was no reference to a back-up device in this invoice.
16. By contrast, the back-up device was mentioned in the invoice when the applicant specially requested service for that item. The February 27, 2019 invoice shows that the respondent provided the applicant with a new back-up device and performed the necessary set-up. This is consistent with the respondent’s evidence that services are performed “on demand” as requested by a customer.
17. Based on the evidence before me, I find that the applicant has not established that checking the back-up device was part of the maintenance service package he purchased from the respondent. As it was not within the scope of the parties’ agreement, the respondent was under no obligation to perform work on this device.
18. Even if my conclusion about the scope of the service package were different, I would not grant the applicant the award he seeks. I find that the applicant has not proven the nature of the malfunction in the back-up device, that the back-up device was malfunctioning on the date of the respondent’s service of his computer or, if it was, that checking it at that time could have prevented data loss during the hard drive crash. Accordingly, I dismiss the applicant’s claim for damages.
19. 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. As the applicant was not successful, I dismiss his claim for reimbursement of tribunal fees.

ORDER

20. I dismiss the applicant's claims and this dispute.

Lynn Scrivener, Tribunal Member