



Civil Resolution Tribunal

Date Issued: May 21, 2020

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Krush v. Surdell Kennedy Taxi Ltd.*, 2020 BCCRT 558

BETWEEN:

JOSEPH KRUSH and MARILYN KRUSH

APPLICANTS

AND:

SURDELL KENNEDY TAXI LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Rama Sood

INTRODUCTION

1. The applicants, Joseph and Marilyn Krush, say that a taxi driver sent by the respondent, Surdell Kennedy Taxi Ltd., failed to transport them to Mrs. Krush's medical appointment. The applicants seek \$2,000 for the respondent's "failure to provide ordinary service".

2. The respondent says the taxi driver left because of the way he was treated while he was waiting for the applicants.
3. The applicants are both represented by Joseph Krush.
4. The respondent is represented by its manager, DG.

JURISDICTION AND PROCEDURE

5. 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* (CRTA). 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.
6. 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.
7. 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.
8. Where permitted by section 118 of the CRTA, in resolving this dispute the tribunal may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

ISSUES

9. The issues in this dispute are:

- a. whether the respondent's taxi driver breached an agreement or was negligent when he failed to transport the applicants to their appointment, and
- b. if so, what remedy is available to the applicants?

EVIDENCE AND ANALYSIS

10. In a civil claim such as this, the applicants bear the burden of proving their claims on a balance of probabilities. I have only addressed the evidence and arguments to the extent necessary to explain my decision.
11. Mrs. Krush uses a wheelchair. The parties agree that on October 18, 2019, the respondent sent a van cab to the applicants' house to transport them to a medical appointment. The applicants say they told the taxi driver the medical appointment was important. The applicants also say they loaded 2 bags into the cab and, while Mr. Krush was in the house assisting Mrs. Krush with her wheelchair, the taxi driver removed the bags and drove off without any prior warning or explanation.
12. Mr. Krush also says he tried arranging another cab with the respondent after the taxi driver left but it was taking too long. He says he then called for an ambulance to transport them to the medical appointment, but it was too late and they missed the appointment.

Adverse inference

13. The respondent did not provide a statement from the taxi driver or provide any explanation about what happened on October 18, 2019. I find the best source of evidence for why the taxi driver left would have been a statement from the taxi driver himself. The courts have said that an adverse inference can be drawn against a party where without sufficient explanation, they fail to produce evidence or call a witness expected to provide supporting evidence. An adverse inference should only be drawn after a "prima facie" case has been established by the party bearing the burden of proof (see *Port Coquitlam Building Supplies Ltd. v. 494743 B.C.*

Ltd., 2018 BCSC 2146). The words “prima facie” mean that the applicant’s case appears on its face to have merit.

14. As discussed below, I find the applicants have established a prima facie case that the respondent failed to perform its end of the contract. I draw an adverse inference against the respondent for its failure to provide a statement from the taxi driver. The respondent says providing details from the taxi driver would have only led to a “he said – she said” situation and that “the truth lies in the circumstance”. The respondent did not explain what that phrase meant. I find the respondent’s explanation for not providing a statement from its taxi driver is inadequate.

Was there a breach of contract?

15. Having reviewed the evidence, I find the respondent agreed to pick up the applicants and transport them to their appointment. I find the respondent breached the agreement since its taxi driver refused to transport the applicants.
16. The respondent relied on the “Taxi Bill of Rights” which stated that a taxi driver had the right to refuse to transport a passenger if the passenger was acting in an offensive manner. I note that the Taxi Bill of Rights is similar to section 12(1) and section 12.1 of the *Passenger Transportation Regulation* which state that a taxi driver can refuse to transport a passenger who uses profane or offensive language or acts in a manner that is offensive to the driver. Hence, I find the onus is on the respondent to show that the applicants’ behavior was offensive.
17. The respondent says the taxi driver left for several reasons including:
 - a. “the way he was treated at the pick up [caused] him to leave”,
 - b. the applicants’ “behavior at the pick up point”,
 - c. the taxi driver had “the right to leave a hostile environment”,
 - d. the taxi driver’s “efforts to fulfil duties were hindered” by the applicants, and

- e. the “situation” created by the applicants “caused the taxi driver to believe it was in his best interest not to continue in the environment the customer was putting him in”.
18. Aside from these broad statements, the respondent did not provide any further details of what happened on October 18, 2019.
 19. The respondent says the tone of an October 19, 2019 email that Mr. Krush sent to DG showed the taxi driver was “not lying”. The respondent did not explain what it meant by this. The email contained similar description of the events as the applicants’ Dispute Notice and submissions. The only significant difference was that the email contained profanities. Since the email was prepared and sent after the incident occurred, I find it showed Mr. Krush’s frustration and state of mind after the cab left. However, I find it did not necessarily reflect Mr. Krush’s behavior when the taxi driver was present, and I give it little weight.
 20. I find the weight of the evidence does not show that the applicants’ behavior was offensive. I also find the respondent failed to comply with section 12.1(2) of the *Passenger Transportation Regulation*, which states that a taxi driver must not refuse to transport a passenger without reason.
 21. The respondent also says taxis fail to provide service for multiple reasons such as traffic, weather, shift change, wrong information from dispatch, and mechanical failures. I find this is not relevant since the respondent did not allege that the taxi driver left due to any of those reasons.

Remedy for breach of contract

22. A remedy for breach of contract should put the applicant in the same position as if the contract had been performed. If the respondent had fulfilled the parties’ contract, the applicants would have attended Mrs. Krush’s medical appointment. The applicants say they have not been able to rebook the appointment. They also say Mrs. Krush’s medical appointments have been delayed by 6 months. I give little weight to the applicants’ claim that additional medical appointments were delayed

since they did not provide any evidence of which appointments, the length of the delay, or that the delay was caused by the incident on October 18, 2019.

23. The applicants say they had to buy a 25 year old medivan equipped with a wheelchair lift for \$2,000 to ensure they could travel to medical appointments because they felt they could no longer rely on the respondent's cab company. I find their reason for buying a medivan based on this one incident is unjustified. The applicants admitted they have used cabs to travel to appointments for the past 15 years without any issues. The applicants did not explain why they couldn't simply use another taxi or cab service in the future. For this reason I find the purchase of the medivan was not reasonably foreseeable.
24. The applicants' submissions and email to DG clearly showed that they were very frustrated and upset by the incident. I acknowledge that there are some contract cases that allow damages for disappointment, mental distress, inconvenient and upset, such as a lost holiday or for damaged wedding photography (see *Wilson v. Sooter Studios Ltd.*, 1988 CanLii 3100 (BCCA), *Jarvis v. Swan Tours Ltd.*, [1973] Q.B. 233, 3 W.L.R. 954, [1973] 1 All E.R. 71 (C.A.)). Taking into account that the taxi driver was aware Mrs. Krush suffered from a disability and was trying to attend a medical appointment, in this case, I find a claim for mental distress (stress and anxiety) should be permitted. I accept the inconvenience was distressful and disturbing enough to warrant compensation in this case. I find under the circumstances, it went beyond incidental frustration.
25. The applicants referred to the cost of living to explain the amount they were seeking in damages. They say short taxi rides cost \$10, a pound of beef can cost \$15-20, a small bottle of vitamins costs over \$20, and, before Covid-19, gas was \$1.59 per litre. I find these comparatives are irrelevant when assessing damages for mental distress.
26. I find that since the applicants' mental distress appears to have lasted for approximately 1 day, a reasonable amount for damages for damages is \$100 each. I order the respondent to pay the applicants a total of \$200.

Was the respondent negligent?

27. I turn to the applicant's claim that the taxi driver's acted negligently. I find the respondent owed the applicants a duty of care to transport them to the medical appointment. I also find the respondent fell below the required standard of care by leaving for no discernable reason.
28. Did the applicants suffer a loss as a result of the respondent's actions? As discussed above above, I find the applicants' decision to purchase a medivan was not reasonably foreseeable and the applicants failed to prove the incident caused delays in Mrs. Krush's medical appointments.
29. I now turn to the applicants' emotional distress. The Supreme Court of Canada stated at paragraph 14 of *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 that "minor and transient upsets do not constitute personal injury, and hence do not amount to damage". The court in that tort case also confirmed that mental injuries must be reasonably foreseeable, just as they must be for a breach of contract claim.
30. In the more recent Supreme Court of Canada decision in *Saadati v. Moorhead*, 2017 SCC 28, the court discussed mental injury and stated that claimants must show that the disturbance suffered by the claimant was "serious and prolonged and rose above the ordinary annoyances, anxieties and fears" that come with living in civil society (see paragraph 38).
31. I find that while the applicants' distress was reasonably foreseeable, it did not meet the test in *Saadati* since the applicants did not show that it was serious and prolonged. Based on my reasons, I find that although the respondent breached the duty of care it owed the applicants, the applicants did not establish they suffered losses from the breach.

INTEREST, TRIBUNAL FEES, AND EXPENSES

32. The *Court Order Interest Act* applies to the tribunal. The applicants are entitled to pre-judgement interest on the \$200 from October 18, 2019, the date of the incident, to the date of this decision. This equals \$2.33.
33. Under section 49 of the CRTA and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I find the applicants are entitled to reimbursement of \$125 in tribunal fees. The applicants did not claim dispute-related expenses.

ORDERS

34. Within 14 days of the date of this order, I order the respondent to pay the applicants a total of \$327.33, broken down as follows:
 - a. \$200 for damages,
 - b. \$2.33 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$125 in tribunal fees.
35. The applicants are entitled to post-judgment interest, as applicable.
36. Under section 48 of the CRTA, 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.
37. The Minister of Public Safety and Solicitor General has issued a Ministerial Order under the *Emergency Program Act*, which says that tribunals may waive, extend or suspend a mandatory time period. The tribunal can only waive, suspend or extend mandatory time periods during the declaration of a state of emergency. After the

state of emergency ends, the tribunal will not have this ability. A party should contact the tribunal as soon as possible if they want to ask the tribunal to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.

38. Under section 58.1 of the CRTA, 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.

Rama Sood, Tribunal Member