Civil Resolution Tribunal

Date Issued: December 21, 2020

File: SC-2020-005449

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Elto Developments Ltd. v. Dielschneider,* 2020 BCCRT 1440

B E T W E E N :

ELTO DEVELOPMENTS LTD.

APPLICANT

A N D :

JACOB DIELSCHNEIDER

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Micah Carmody

INTRODUCTION

1. This dispute is about an employee's failure to return an employer's property after termination of employment.

2. The applicant, Elto Developments Ltd. (Elto), terminated the employment of the respondent, Jacob Dielschneider. Mr. Dielschneider failed to return a set of keys, which allowed access to the mall in which Elto operates. The mall administrator had the locks rekeyed and charged Elto for the locksmith's invoice. Elto now seeks to recover that $146.95 charge from Mr. Dielschneider.

3. Mr. Dielschneider is self-represented. Elto is represented by an employee or principal.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

5. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, the parties in this dispute call into question each other's credibility. 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 *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not necessarily required where credibility is in issue. In the circumstances of this dispute, I find that I am able to assess and weigh the evidence and submissions before me. Bearing in mind the CRT's mandate that includes proportionality and prompt resolution of disputes, I decided to hear this dispute through written submissions.

6. Section 42 of the CRTA says the CRT 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 CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

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

ISSUE

8. The issue in this dispute is whether Mr. Dielschneider is responsible for the $146.95 lock rekeying invoice.

EVIDENCE AND ANALYSIS

9. As the applicant in this civil dispute, Elto must prove its claim on a balance of probabilities. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain my decision. Mr. Dielschneider provided a Dispute Response but no evidence and no submissions despite CRT staff providing him with opportunities to do so.

10. Most of the facts are not in dispute. On March 13, 2020, Elto "laid off" Mr. Dielschneider due to the COVID-19 pandemic. The parties kept in touch and Elto eventually told Mr. Dielschneider he could return to his regular Friday-Saturday shifts on May 22 and May 23, 2020. Mr. Dielschneider agreed but was absent for both shifts – May 22 with Elto's consent and May 23 unexcused.

11. By letter, which is not in evidence but I infer was delivered by May 27, 2020, Elto terminated Mr. Dielschneider's employment with 2 weeks' working notice. I infer from the parties' subsequent text messages that the letter asked Mr. Dielschneider to return his keys.

12. The parties exchanged the following text messages:

a. May 27, 2020: Mr. Dielschneider told Elto he would drop off his uniform and keys if Elto offered him severance pay rather than 2 weeks' working notice.

b. May 28, 2020: Elto said it was firm about the working notice period. Mr. Dielschneider replied that it was not worth his "time, money or energy to go any further." He mentioned some issues that bothered him, such as Elto's hiring another person during his layoff. He again said he would return his keys and uniform but said he would also be reporting Elto to provincial employment authorities.

c. May 30, 2020: Mr. Dielschneider said he could not find his keys but would drop them off when he found them. He said he had let his children play with them.

d. June 2, 2020: Elto told Mr. Dielschneider that unless he found the keys, the mall would rekey the lock at 4 p.m. that day because it was a security risk. Elto said the mall administrator would charge Elto for changing the lock, and Elto in turn would charge Mr. Dielschneider.

13. Mr. Dielschneider did not return the keys. In his Dispute Response, Mr. Dielschneider said he misplaced his keys at some point "during his layoff." The layoff ended May 22. I find it unlikely that Mr. Dielschneider would twice offer to return the keys on May 27 if he had already misplaced them. On balance, I do not accept Mr. Dielschneider's explanation that he lost the keys. Other than saying he let his kids play with the keys, Mr. Dielschneider did not provide any details about when the keys were misplaced or what efforts, if any, he undertook to locate them.

14. I find it more likely that Mr. Dielschneider failed to return the keys because he felt he no longer owed Elto anything. This is supported by the dissatisfaction he expressed about Elto's employment practices, and his statement that working the notice period was not worth his time, money or energy.

15. Alternatively, if Mr. Dielschneider did lose the keys, I find he did not make a reasonable effort to find them. There is no evidence he took any steps whatsoever to find the keys.

16. Mr. Dielschneider said he spoke with a labour lawyer who advised that the lock replacement was a cost of doing business, for which he would not be liable.

17. There is no dispute that Mr. Dielschneider's relationship with Elto was one of employment, governed by the *Employment Standards Act* (ESA). Section 21(1) prohibits deductions from wages. Section 21(2) prohibits employer's from making employees pay the employers' "business costs," except as permitted by regulation. There is one such regulation, but it relates to police recruit training and does not apply here.

18. The purpose of ESA section 21 is to protect employees from employers engaging in "self-help" by unilaterally imposing costs on employees (*Health Employers Assn. of B.C. v. B.C. Nurses' Union*, 2005 BCCA 343). As set out in *Kirby v. Amalgamated Income Limited Partnership,* 2009 BCSC 1044, section 21 does not bar all employer claims against employees or former employees.

19. In *Kirby*, the court concluded that for an employer to recover damages from an employee, something more than simple negligence is required. The employer must establish that the employee failed to do something specifically promised or obviously implied in his or her employment contract.

20. There is no written employment contract in evidence. Elto provided excerpts from its policy manual, which I find formed part of the employment contract because Mr. Dielschneider signed to confirm he read and accepted the policies. One policy says, "On termination of employment, you must return all property belonging to [Elto], including but not limited to […] keys[.]" I find Mr. Dielschneider's failure to return the keys was a breach of this explicit term of his employment contract.

21. In *Kirby*, the court said the central question is whether the employee's error was sufficient enough to attract liability. Because I found Mr. Dielschneider willfully refused to return the keys, I find the breach of contract was serious. Even if Mr. Dielschneider lost the keys, my finding that he made no effort to find them makes his breach serious.

In the circumstances, I find Mr. Dielschneider is responsible for paying the reasonable costs associated with is failure to return the keys.

22. If I had found that Mr. Dielschneider innocently lost the keys, or negligently lost the keys but made a reasonable effort to find them, I would have found that the breach was less serious and that Elto had to accept the rekeying charge as a business cost. I also would have found Elto partially responsible because it should have insisted that Mr. Dielschneider turn in his keys when it laid him off in March, to minimize the risk of loss. However, business costs do not, in my view, include costs arising from an employee's willful refusal to return an employer's property after termination of employment.

23. Elto submitted the locksmith's and the mall administrator's invoices to support its claim for $146.95 for lock rekeying. I order Mr. Dielschneider to pay $146.95.

24. The *Court Order Interest Act* applies to the CRT. Elto is entitled to pre-judgment interest on the $146.95 from July 7, 2020, the date of the mall administrator's invoice, to the date of this decision. This equals $0.30.

25. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I find Elto is entitled to reimbursement of $125 in CRT fees. Elto did not claim any dispute-related expenses.

ORDERS

26. Within 14 days of the date of this order, I order Mr. Dielschneider to pay Elto a total of $272.25, broken down as follows:

    a. $146.95 as reimbursement for the lock replacement invoice,

    b. $0.30 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $125.00 in CRT fees.

27. Elto is entitled to post-judgment interest, as applicable.

28. Under section 48 of the CRTA, the CRT 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 CRT's final decision. The Province of British Columbia has enacted a provision under the *COVID-19 Related Measures Act* which says that statutory decision makers, like the CRT, may waive, extend or suspend mandatory time periods. This provision is expected to be in effect until 90 days after the state of emergency declared on March 18, 2020 ends, but the Province may shorten or extend the 90-day timeline at any time. A party should contact the CRT as soon as possible if they want to ask the CRT to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.

29. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT 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 CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Micah Carmody, Tribunal Member