Civil Resolution Tribunal

Date Issued: September 23, 2021

File: SC-2021-000520

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Zippka v. Gonçalves*, 2021 BCCRT 1022

B E T W E E N :

MARCO ZIPPKA

APPLICANT

A N D :

LEOMIR GONÇALVES, MARILENE QUINTANA ALVES, and E-VISA IMMIGRATION SERVICES INC.

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Leah Volkers

INTRODUCTION

1. This dispute is about immigration consultant services. The applicant, Marco Zippka, says the respondent, Leomir Gonçalves, misrepresented Mr. Zippka's eligibility for two immigration programs and induced him to enter into a contract with the respondent, e-Visa Immigration Services Inc.(eVisa). Mr. Gonçalves is an eVisa

employee. Mr. Zippka says the respondent, Marilene Quintana Alves, an eVisa director, terminated his eVisa contract but refused to refund him. Mr. Zippka seeks a refund of the initial consultation fee ($164.59) and the commitment fee ($1,575) he paid to eVisa, for a total of $1,739.59.

2. The respondents deny misrepresenting Mr. Zippka's eligibility for immigration programs. The respondents say the initial consultation was completed and the eVisa contract specifically states that the commitment fee is non-refundable.

3. Mr. Zippka and Mr. Goncalves are each self-represented. Mrs. Alves represents herself and eVisa.

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. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.

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.

Preliminary Issues

Admissible Evidence

8. Mr. Zippka submitted messages exchanged between the parties during the CRT's facilitation stage in evidence. The respondents say this evidence is inadmissible. CRTA rule 1.11 says that communications made attempting to settle claims by agreement in the tribunal process are confidential and must not be disclosed during the tribunal decision process. CRTA rule 1.11 exists to encourage settlement by allowing parties to make admissions without fear that those admissions will end up as evidence in a later hearing. While the messages contained a settlement offer, they did not contain any admissions or other information that would prejudice the respondents. So, while Mr. Zippka should not have included the messages as evidence, his decision to do so did not prejudice the respondents. In any event, I have not considered any of the above messages in reaching my decision.

Parties to this dispute

9. Mr. Zippka has named both Mr. Gonçalves, an eVisa employee, and Mrs. Alves, an eVisa director, as respondents to this dispute. At law, officers, directors and employees of corporations are not personally liable unless they have committed a wrongful act independent form that of the corporation (see: *Merit Consultants International Ltd. v. Chandler*, 2014 BCCA 121). Here, Mr. Zippka provided no evidence that either Mr. Gonçalves or Mrs. Alves committed a wrongful act independent of eVisa. So, I dismiss the claims against Mr. Gonçalves and Mrs. Alves personally.

Defamation

10. In its Dispute Response, eVisa alleged that Mr. Zippka engaged in defamation. However, eVisa did not file a counterclaim. In any event, defamation claims are expressly excluded from the CRT's jurisdiction under CRTA section 119. So, I have not addressed eVisa's defamation allegations.

ISSUES

11. The issues in this dispute are:

    a. Whether Mr. Zippka is entitled to a refund of the $164.59 initial consultation fee, and

    b. Whether eVisa misrepresented Mr. Zippka's eligibility for immigration programs, and if so, what is the appropriate remedy, and

    c. Whether Mr. Zippka is entitled to a refund of the $1,575 commitment fee after eVisa cancelled the contract.

EVIDENCE AND ANALYSIS

12. In a civil proceeding like this one, as the applicant Mr. Zippka must prove his claims on a balance of probabilities (meaning "more likely than not"). I have read all the parties' submissions but refer only to the evidence and argument that I find relevant to provide context for my decision.

13. It is undisputed that Mr. Zippka met with Mr. Gonçalves on July 4, 2019 for an initial consultation and paid $164.59. It is also undisputed that Mr. Zippka signed a retainer agreement with eVisa on July 24, 2019 (the contract) and paid eVisa a $1,575 commitment fee.

14. The contract's section 4.1 contains the following payment schedule:

    a. $1,500 commitment fee on signing this Retainer Agreement,

    b. $2,000 on receiving an invitation to apply for BCPNP, and

c. $1,500 on receiving an invitation to apply for the Express Entry (please note: the Company will only commence work on the Client's application draft following receipt of this payment)

(reproduced as written).

15. While the commitment fee listed in the contract is $1,500, it is undisputed that Mr. Zippka paid a $1,575 commitment fee.

Initial consultation refund

16. As noted, Mr. Zippka asks for a refund of his initial consultation fee. I find that even if eVisa misrepresented Mr. Zippka's eligibility for immigration programs at the initial consult, Mr. Zippka is not entitled to a refund of the $164.59 initial consultation fee. I say this because I find Mr. Zippka paid the initial consultation fee to meet with an immigration consultant to discuss immigration options, which he undisputedly did. So, I dismiss this aspect of Mr. Zippka's claim.

Misrepresentation

17. As noted above, Mr. Zippka alleges that eVisa misrepresented Mr. Zippka's eligibility for immigration programs during the initial consultation, which he says induced him to enter into the contract. A misrepresentation is a false statement of fact made during negotiations to induce a reasonable person to enter a contract: *Van Beek v. Dodd,* 2010 BCSC 1639.

18. Mr. Zippka says that eVisa represented that Mr. Zippka had a "great profile" and would be eligible for the Express Entry + British Columbia Provincial Nominee Program (EE-BCPNP) and the paper-based British Columbia Provincial Nominee Program (BCPNP). Mr. Zippka also says that eVisa told him that if he completed his English test and diploma equivalency by October 2019, eVisa could create Mr. Zippka's profile in October. Mr. Zippka says he submitted his English test and diploma equivalency as required. He says despite this, eVisa advised him that could not apply to either EE-BCPNP or BCPNP in October. Mr. Zippka says that he later discovered

he did not have the minimum “points” required to apply for either program at the time of his initial consult or in October. Mr. Zippka says he was misled by eVisa to enter into the contract and pay the commitment fee when he was not eligible for either EE-BCPNP or BCPNP.

19. eVisa denies any misrepresentation. eVisa says it informed Mr. Zippka of the EE-BCPNP and BCPNP requirements and Mr. Zippka freely decided to start the immigration process with eVisa. eVisa says it advised Mr. Zippka he has a good profile based on the points cut off it “usually sees” between September and March, based on the 2018-2019 points. eVisa says it cannot predict the points for the immigration programs with certainty and cannot promise or guarantee approval.

20. eVisa also says it advised Mr. Zippka that his eligibility would be dependent on an English score of at least 8, which he failed to achieve. Mr. Zippka does not dispute this, but says that even with an English score of 8, he was not eligible. eVisa says that the “cut-off points” increased beyond what was initially expected.

21. Here, I find that in order to determine whether or not eVisa misrepresented Mr. Zippka’s eligibility, I need evidence of the eligibility requirements for EE-BCPNP and BCPNP. Mr. Zippka provided some evidence of the “points” required for EE-BCPNP and BCPNP. The point requirements provided in evidence appear to fluctuate monthly. I find it is also unclear whether the points represent the minimum eligibility to be considered for a BCPNP application, the estimated points required to receive an invitation to apply for BCPNP, or otherwise. Based on the available evidence, I find it is unclear exactly how eligibility is determined, and what it is applicable to. So, I find that I require expert evidence in order for me to determine the eligibility requirements for EE-BCPNP and BCPNP at the time of Mr. Zippka’s initial consult. Here, Mr. Zippka has not provided any expert evidence that confirms the eligibility requirements at the time of his initial consult, or whether Mr. Zippka was eligible at the time of his initial consult with eVisa on July 4, 2019.

22. Mr. Zippka says he spoke with three different immigration consultants, who said that eVisa should only have sent the contract to Mr. Zippka once it was very clear that Mr.

Zippka was eligible for EE-BCPNP and BCPNP. However, Mr. Zippka did not provide any evidence or statements from these immigration consultants. While the CRT's flexible mandate allows me to consider hearsay evidence, I find it would not be appropriate to do so here. So, I place no weight on this hearsay evidence.

23. As noted, Mr. Zippka has the burden of proving his claims. Here, I find that I do not have the evidence to determine whether eVisa misrepresented Mr. Zippka's eligibility. So, I find that Mr. Zippka has not proven that eVisa misrepresented his eligibility.

24. Even if Mr. Zippka had proven that eVisa misrepresented his eligibility at the initial consult (which I have already found he has not proven), I would also find it was not reasonable to rely on that representation. I say this because it is undisputed that the eligibility requirements vary. I find Mr. Zippka knew the eligibility requirements varied at the initial consult. I find that it was not reasonable for Mr. Zippka to rely on any eligibility assessment when eligibility requirements are subject to change at any time. I also say this because at the time Mr. Zippka entered into the contract, he did not have his English score, which would undisputedly affect his eligibility. Finally, I also find it is not reasonable to expect an immigration consultant to guarantee a successful immigration application.

25. In summary, I find Mr. Zippka has not proven that eVisa misrepresented his eligibility, or that it was reasonable for him to rely on any such misrepresentation. So, I find he was not induced to sign the contract with eVisa.

Contract termination

26. It is undisputed that eVisa terminated the contract on December 13, 2019, after the relationship between the parties deteriorated. I find eVisa was entitled to do so under section 11.4 of the contract, which says the eVisa can terminate the agreement if there is no prejudice to the client (here, Mr. Zippka). Mr. Zippka did not argue that he was prejudiced by eVisa's termination of the contract. Rather, Mr. Zippka accepted the termination, but reserved his right to seek a refund of the $1,575 commitment fee. Mr. Zippka did not pay any other fees under the contract.

27. I find the contract clearly states in section 5 that the commitment fee is non-refundable. eVisa says that despite this, in the event it cancels a contract, its practice is to calculate the time spent on the client file at $250 an hour and then provide a refund in the event this amount is less than the commitment fee. eVisa says it spent 11.5 hours on Mr. Zippka's file, totaling $2,875, so it did not provide any refund. Mr. Zippka questions eVisa's calculation of time spent. However, I find nothing turns on eVisa's calculation of time spent. I say this because I find the contract applies and there is no obligation for eVisa to provide a refund under the contract. So, I find Mr. Zippka is not entitled to refund of the $1,575 commitment fee.

Fees and expenses

28. 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. Mr. Zippka was unsuccessful, so I dismiss his claims for CRT fees and expenses, including his claim for $320 in wage loss for participating in the CRT process. The respondents did not pay any CRT fees or claim any dispute-related expenses, and so I award none.

ORDER

29. I dismiss Mr. Zippka's claims and this dispute.

Leah Volkers, Tribunal Member