



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *McGarrigle v. Nur dba Zoom Lube*, 2022 BCCRT 67

Default decision – non-compliance

B E T W E E N :

JENNIFER MCGARRIGLE and GLEN MCGARRIGLE

APPLICANTS

A N D :

NUZEEB NAZEEN NISHA NUR (Doing Business As ZOOM LUBE)

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Sherelle Goodwin

INTRODUCTION

1. This final decision of the Civil Resolution Tribunal (CRT) has been made without the participation of the respondent, Nuzeeb Nazeen Nisha Nur (doing business as Zoom

Lube), due to her non-compliance with the CRT's mandatory directions as required, as discussed below.

2. This dispute is about allegedly negligent car servicing. The applicants, Jennifer McGarrigle and Glen McGarrigle, say that Ms. Nur or her employees negligently changed their car's oil. The McGarrigles say paper or cardboard got into the car's oil filter housing during the oil change, damaging the engine. The McGarrigles claim \$2,563.07 in repair costs.
3. In her Dispute Response filed at the outset of this proceeding, Ms. Nur denied any wrongdoing. She says paper or cardboard is not used during an oil change and says the McGarrigles have not proved that any engine damage was caused by Ms. Nur or her employees.
4. The applicants are represented by Ms. McGarrigle. The respondent represents herself.

JURISDICTION AND PROCEDURE

5. Section 36 of the *Civil Resolution Tribunal Act* (CRTA) applies if a party to a dispute fails to comply with the CRTA or its regulations. It also applies if a party fails to comply with CRT rules in relation to the case management phase of the dispute, including specified time limits, or an order of the CRT made during the case management phase. After giving notice to the non-compliant party, the case manager may refer the dispute to a CRT member for resolution and the CRT member may:
 - a. Hear the dispute in accordance with any applicable rules,
 - b. Make an order dismissing a claim in the dispute made by the non-compliant party, or
 - c. Refuse to resolve a claim made by the non-compliant party or refuse to resolve the dispute.

6. The case manager has referred Ms. Nur's non-compliance with the CRT's rules to me for a decision as to whether I ought to hear the dispute, refuse to resolve it, or dismiss it.
7. These are the CRT's formal written reasons. The CRT has jurisdiction over small claims brought under section 118 of the CRTA. 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 parties to a dispute that will likely continue after the dispute resolution process has ended.
8. Where permitted under section 118 of the CRTA, the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.

ISSUES

9. The issues in this dispute are:
 - a. Whether Ms. Nur is non-compliant with the CRTA and the CRT's rules and, if so, should I refuse to resolve, dismiss, or decide this dispute without Ms. Nur's further participation?
 - b. If I decide this dispute, did the oil change done by Ms. Nur or her employees cause engine damage and, if so, how much should Ms. Nur pay for repair costs, if anything?

EVIDENCE AND ANALYSIS

Non-compliance

10. On December 17, 2021, I decided to hear this dispute without Mr. Nur's participation, due to her non-compliance, for the reasons I explain below. The case manager communicated that preliminary decision to the parties.

11. Ms. Nur is the non-compliant party in this dispute and has failed to participate in the case management phase, as required by sections 25 and 32 of the CRTA and CRT rules 1.3(1), 5.1 to 5.4, and 7.1 to 7.4, despite multiple attempts by the case manager to contact her with a request for a reply.
12. Ms. Nur filed her Dispute Response on May 26, 2021, which included her email address and phone number to be used for this dispute. The case manager then made the following attempts at contact:
 - a. On June 15, 2021, the case manager emailed both parties and asked them to respond by 9 a.m. on June 17, 2021. Ms. Nur did not respond.
 - b. On June 17, 2021, the case manager emailed Ms. Nur and asked her to respond by 4 p.m. on June 18, 2021. On June 18, 2021, at 2:30 p.m. "M" from Zoom Lube left a voicemail message asking the case manager to call him back at the same phone number Ms. Nur provided on her Dispute Response.
 - c. On June 23, 2021, the case manager called Ms. Nur but she was not available, so the case manager left a message with the staff member who answered the phone. The case manager left another telephone message with a staff member on June 25, 2021. Later that day, M called the case manager and left a voicemail asking for a call back. Still later that day the case manager returned M's call, who said Ms. Nur wanted to speak to the case manager, but was not in the office. The case manager and M agreed that Ms. Nur would call the case manager on July 5, 2021, but Ms. Nur did not call on that date.
 - d. On July 7, 2021, the case manager emailed Ms. Nur and scheduled a telephone call at 1 p.m. on July 9, 2021. The case manager also asked Ms. Nur to complete and return an evidence worksheet. Ms. Nur did not respond to the email and was not available for the scheduled telephone call. The case manager left a message with a staff member for Ms. Nur to return the call.
 - e. On September 24, 2021, the case manager emailed Ms. Nur and scheduled a telephone call at 2:30 pm on September 27, 2021. The case manager again

asked Ms. Nur to complete and return the evidence worksheet. Again, Ms. Nur was not available for the scheduled September 27, 2021 telephone call so the case manager left a message with a staff member.

- f. On September 27, 2021, the case manager emailed Ms. Nur and asked her to call by 3:30 p.m. on September 29, 2021. Ms. Nur did not respond.
 - g. On October 15, 2021, the case manager emailed Ms. Nur and asked her to call by 3:30 pm on October 20, 2021. The case manager warned Ms. Nur that, if she did not comply with the case manager's directions, the dispute may be referred to a CRT member to hear the dispute without Ms. Nur's further participation, under section 36 of the CRTA.
13. The case manager then referred the matter of Ms. Nur's non-compliance with the CRT's rules to me for a decision as to whether I should hear the dispute without her participation.
14. At my request, the case manager gave Ms. Nur one last opportunity to respond. On December 1, 2021, the case manager emailed Ms. Nur that she had failed to comply by not completing and returning the evidence worksheet as requested, not being available for a scheduled telephone call, and not returning phone calls as requested. The case manager warned Ms. Nur that the dispute would be referred to a CRT member to hear the dispute without her further participation, and without warning, if she did not telephone the case manager by 3:30 pm on December 8, 2021. Ms. Nur did not call within the requested timeframe.

Should the CRT hear the McGarrigles' dispute without Ms. Nur's participation?

15. As referenced above, Ms. Nur filed a Dispute Response and provided her contact information. Ms. Nur was informed in writing at the beginning of the facilitation process that she must actively participate in the dispute resolution process and respond to the case manager's communications, including emails and telephone messages. I find the case manager made a reasonable number of contact attempts.

Ms. Nur has provided no explanation about why she failed to communicate with the CRT as required. Given the case manager's telephone conversation with M, and messages left with Ms. Nur's staff, I find it more likely than not that Ms. Nur knew about the case manager's contact attempts and failed to respond.

16. Rule 1.4(2) states that if a party is non-compliant, the CRT may:

- a. Decide the dispute relying only on the information and evidence that was provided in compliance with the CRTA, a rule or an order,
- b. Conclude that the non-compliant party has not provided information or evidence because the information or evidence would have been unfavourable to that party's position, and make a finding of fact based on that conclusion,
- c. Dismiss the claims brought by a party that did not comply with the CRTA, a rule or an order, and
- d. Require the non-compliant party to pay to another party any fees and other reasonable expenses that arose because of a party's non-compliance with the CRTA, a rule or an order.

17. Rule 1.4(3) says that to determine how to proceed when a party is non-compliant, the CRT will consider:

- a. Whether an issue raised by the claim or dispute is of importance to persons other than the parties to the dispute,
- b. The stage in the facilitation process at which the non-compliance occurs,
- c. The nature and extent of the non-compliance,
- d. The relative prejudice to the parties of the CRT's order addressing the non-compliance, and
- e. The effect of the non-compliance on the CRT's resources and mandate.

18. In the circumstances of this case, I find it is appropriate to hear the McGarrigles' dispute without Ms. Nur's further participation, relying on the information and evidence provided by the McGarrigles and in Ms. Nur's Dispute Response form. My reasons follow.
19. First, this dispute does not affect anyone other than the named parties.
20. Second, the non-compliance here occurred early in the facilitation process, and Ms. Nur has provided no evidence or submissions. I find she has effectively abandoned the process after providing a response.
21. Third, I find the nature and extent of the non-compliance is significant, given the case manager's multiple attempts at contact and Ms. Nur's failure to respond, despite being given 2 written warnings of the consequences.
22. Fourth, I see no prejudice to the McGarrigles in hearing the dispute without Ms. Nur's participation. The prejudice to Ms. Nur in proceeding to hear the dispute is outweighed by the circumstances of her non-compliance. If I refused to proceed to hear the dispute, the McGarrigles would be left without a remedy, which would be unfair to them.
23. Finally, the CRT's resources are valuable. Its mandate to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly is severely impaired if one party refuses to participate. I find that it would be wasteful for the CRT to continue applying its resources on this dispute, such as by making further attempts to seek Ms. Nur's participation.
24. In weighing all the factors, I find the McGarrigles' claim should be heard.
25. Having decided to hear the dispute without Ms. Nur's further participation, I turn to the merits of the dispute.

Is Ms. Nur or her employees responsible for engine damage and, if so, what is the appropriate remedy?

26. Where a respondent filed a Dispute Response but has since failed to comply with the CRT's directions, an adverse inference may be drawn against them. This means that if the respondent refuses to participate, it is generally reasonable to assume that the applicant's position is correct on the issue at hand. This is similar to where liability is assumed when a respondent has failed to provide any response to the dispute and is in default.
27. Having said that, I reviewed the Dispute Response, because it was filed before the respondent's non-compliance. As noted, Ms. Nur denies any wrongdoing in the Dispute Response. However, since she did not participate in the adjudication process, including providing any evidence about the McGarrigles' oil change, I draw an adverse inference and find that such evidence would likely not support Ms. Nur's position.
28. Even if I did not draw an adverse inference, I would find that the McGarrigles' evidence establishes liability, as explained below.
29. It is undisputed that the McGarrigles' took their car to Zoom Lube for an oil change on March 12, 2021, and previously in October 2020. The McGarrigles say that Ms. Nur, or her employees, negligently left paper in the oil system which caused the car's engine to "run rough". I find that automotive work is a technical matter that is beyond common understanding and so requires expert evidence to determine whether Ms. Nur or her employees failed to meet the standard of care expected in the industry (see *Bergen v. Guliker*, 2015 BCCA 283).
30. An April 14, 2021 invoice shows the McGarrigles took their car to Fountain Tire to investigate a "rough running engine".
31. The McGarrigles submitted a July 19, 2021 email from Darrin Dale, owner of Fountain Tire. Mr. Dale says he has been a licenced automotive technician since 1992. I find this qualifies him as an expert on car engines, under the CRT rules. In his email Mr.

Dale says he and his employees found pieces of paper in the oil filter housing of the McGarrigles' engine. Mr. Dale said the paper pieces were plugging the engine's cam phaser screens and affecting the sensors, which were causing irregularities in the firing of the engine's cylinders. I infer that Mr. Dale means the paper debris was the cause of the "rough running engine". This is supported by the April 14, 2021 invoice which says that the engine was disassembled to determine the timing and misfire problem causing "rough running".

32. In his email Mr. Dale says the oil system has a filter so that no outside debris can get into the oil. He said the paper pieces found in the cam sensors may have been part of a previous oil filter, and that whoever changed the oil previously missed the debris. Mr. Dale says it is very important to checking the oil filter housing for debris that may be left behind when installing a new filter. He noted that the McGarrigles' current oil filter was still intact. Based on this opinion I find it likely that paper was either introduced, or left behind, inside the McGarrigle's oil system during the March 2021 oil change at Ms. Nur's business.
33. Based on the McGarrigles' evidence, I find the likely cause of the McGarrigle's rough running engine was the paper debris negligently left in the engine's oil system during the March 2021 oil change at Ms. Nur's business. As Ms. Nur is vicariously responsible for the negligence of her employees during the course of their employment, I find she is responsible for the McGarrigles' engine difficulties.
34. The April 14, 2021 invoice shows the McGarrigles paid \$2,563.07 for Fountain Tire to diagnose and remedy the clogged cam sensors which caused the rough running engine. I find Ms. Nur must reimburse the McGarrigles this amount and order her to do so.
35. The *Court Order Interest Act* applies to the CRT. I find the McGarrigles are entitled to interest from the April 14, 2021 repair invoice date to the date of this decision. This equals \$8.85.

36. Under the CRTA and the CRT rules, the unsuccessful party must generally reimburse the successful party for their CRT fees and any dispute-related expenses. So, I find the McGarrigles are entitled to reimbursement of their \$125 in paid CRT fees.

ORDERS

37. Within 14 days of the date of this order, I order Ms. Nur to pay the McGarrigles a total of \$2,696.92, broken down as follows:

- a. \$2,563.07 in damages as reimbursement for repair costs,
- b. \$8.85 in pre-judgment interest under the *Court Order Interest Act*, and
- c. \$125 in CRT fees.

38. The McGarrigles are entitled to post-judgment interest, as applicable.

39. 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. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

40. As set out in 58.1(3) of the CRTA, a party may only enforce this order if the time for making a notice of objection has passed and a Notice of Objection has not been filed. The non-compliant party has no right to make a Notice of Objection, as set out in section 56.1(2.1) of the CRTA.

Sherelle Goodwin, Tribunal Member