



Civil Resolution Tribunal

Date Issued: January 17, 2023

File: SC-2022-003532

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Cross v. J's Waterproofing Inc.*, 2023 BCCRT 43

B E T W E E N :

DEREK WELDON CROSS

APPLICANT

A N D :

J'S WATERPROOFING INC.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Christopher C. Rivers

INTRODUCTION

1. This is an employment dispute about unpaid wages and severance pay. The applicant, Derek Weldon Cross, claims that the respondent, J's Waterproofing Inc. (JWI), owes him \$5,000 for unpaid regular wages, unpaid overtime, and severance pay.

2. JWI says the parties settled the matter of wages and overtime. JWI also says Mr. Cross has no entitlement to severance as he was terminated for cause. Further, JWI says Mr. Cross has no entitlement to severance pay under the *Employment Standards Act* (ESA), as JWI is a construction business, and its employees are exempted from severance pay under the ESA.
3. Mr. Cross is self-represented. JWI is represented by its president, J.B.

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. Mr. Cross claims, in part, "severance pay". I infer that he is claiming severance pay in lieu of notice as damages for wrongful dismissal. For simplicity, I will refer to this part of his claim as "severance pay" throughout this decision.
7. Mr. Cross submitted evidence that says he is owed more than \$5,000. However, he has limited his claim to \$5,000, which is the CRT's monetary limit in small claims disputes. I find he has abandoned any portion of his claim that is over \$5,000.

CRT Jurisdiction - ESA

8. A preliminary issue is whether Mr. Cross' claim is within the CRT's jurisdiction, or whether it falls within the jurisdiction of the Employment Standards Branch (ESB).
9. I do not have jurisdiction to grant entitlement to wages, overtime, or severance pay that are available under the ESA. Only the ESB has jurisdiction to order compensation payable under the ESA. The CRT has jurisdiction over the applicant's claims based on the law of contract, which falls under its small claims jurisdiction over debt and damages.
10. 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.
11. 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

12. The issue in this dispute is whether JWI owes Mr. Cross any money for unpaid wages, overtime, or severance pay, and if so, how much.

EVIDENCE AND ANALYSIS

13. In a civil proceeding like this one, usually the applicant must prove his claim on a balance of probabilities. That is the case for his claim for unpaid wages and overtime. However, where an employer says they do not need to provide notice when dismissing an employee, they bear the burden of proving just cause (see *Hawkes v. Levelton Holdings Ltd*, 2012 BCSC 1219, at paragraph 28, affirmed 2013 BCCA 306).

14. I have read all the parties' submissions and evidence but refer only to the evidence and argument that I find relevant to provide context for my decision.
15. JWI provides waterproofing services. Based on the signed employment contract in evidence and the parties' submissions, I find Mr. Cross worked for JWI from August 8, 2017 until April 14, 2021.

Unpaid Wages and Overtime

16. Mr. Cross claims unpaid wages for his "first two and a half years" of working at JWI. He also claims unpaid overtime for "all the days [he] went over 8 hours and for the weeks [he] went over 80 hours."
17. The parties provided emails from May and June, 2022 showing they had settlement discussions about overtime, regular wages, and vacation pay, with assistance from a worker at the ESB. Settlement negotiations are protected by settlement privilege, and so I do not rely on any of these emails apparently generated for the purpose of reaching settlement.
18. However, Mr. Cross submitted an email dated June 9th, 2022 that he says is about "past winning settlements." That email says the "without prejudice settlement" includes both overtime and regular wages for the period of May 4, 2020 to April 14, 2021. In their Dispute Response, JWI writes that the parties agreed to a payout of \$530.29 to cover unpaid overtime and wages. Neither party provided a copy of any final settlement agreement. I find that, taken together, the parties agree they reached a settlement on unpaid overtime and wages for the period of May 4, 2020 to April 14, 2021.
19. In their submissions, JWI claims they had 'overpaid' Mr. Cross over the course of his employment. However, JWI did not file a counterclaim. So, I infer that JWI is seeking a set-off against any amount that it may owe as a result of Mr. Cross' claim. I find that any alleged overpayments by JWI were with respect to wages and overtime and so were addressed by the parties' settlement of those issues.

20. I find the parties settled the issue of unpaid wages and overtime from May 4, 2020 to Mr. Cross' termination on April 14, 2021. That leaves Mr. Cross' claim for unpaid wages and overtime before May 4, 2020.
21. The *Limitation Act* (LA) applies to the CRT. The LA sets out limitation periods, which are specific time limits for pursuing claims. If the time limit expires, the right to bring the claim disappears, and the claim must be dismissed. Section 6 of the LA says the basic limitation period is 2 years, and that a claim may not be started more than 2 years after the day on which it is "discovered".
22. Mr. Cross filed his application to the CRT on May 25, 2022. This means if any of Mr. Cross' claims arose before May 25, 2020 he is out of time to bring his application. His remaining claims for wages and overtime are from before May 4, 2020, so are out of time. I dismiss his claims for unpaid wages and overtime.

Severance Pay

23. Mr. Cross claims he is entitled to severance pay. The employment agreement contains a term that requires at least 10 days' notice for termination, with an exception for termination with just cause. JWI argues Mr. Cross has no entitlement to severance pay for two reasons: Mr. Cross was terminated with just cause, and Mr. Cross is not entitled to compensation under the ESA.
24. Just cause is conduct that is seriously incompatible with the employee's duties, goes to the root of the employment contract, and fundamentally strikes at the heart of the employment relationship (see *Panton v. Everywoman's Health Centre Society* (1988), 2000 BCCA 621, at paragraph 25). Put another way, the test for just cause is whether the employee's misconduct amounts to an irreparable breakdown in the employment relationship: *McKinley v. BC Tel*, 2001 SCC 38 and *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127 at paragraphs 27 to 28.
25. In submissions, JWI alleges that Mr. Cross was terminated for a number of reasons, including poor performance, encouraging co-workers to quit for other jobs, poor attitude, and "fraudulent actions." In a document submitted in evidence, JWI also

advances grounds of willful misconduct, fraud, serious undermining of the corporate culture, and serious breach of employment rules and policies.

26. JWI says they chose to terminate Mr. Cross after a poorly done spray installation on the DT Project (DTP). In submissions, JWI says they had to pay to fix Mr. Cross' work, and that the DTP site superintendent demanded that Mr. Cross no longer work on the DTP.
27. Previously, JWI gave a December 13, 2020 warning letter to Mr. Cross. The letter is signed by both J.B. and Mr. Cross, and includes the phrase that it is a "first and final warning for employment" and it is being given due to "...the most recent breach of fiduciary duties with [JWI]." It also says:

If you do not partake in the agreed employee duties that entail and that have been agreed upon since May 4th, 2020...J's Waterproofing Inc will have the right to immediately dismiss you with no prediction or forecast.
(quote reproduced as written)

28. Submitted with the letter, JWI provided photographs of what they say is Mr. Cross' allegedly "very poor" installation in December, 2020. They provide a comparison photograph of what they say is a "perfect install (by others)".
29. With this evidence, JWI is advancing a defense of just cause based on an alleged lack of competence. At paragraph 53 of *Parakin v. Bandali Medical Services Inc.*, 1999 CanLII 2690 (BCSC), the court said incompetence may be just cause for dismissal, where the employer shows:
 - a. The incompetence is serious or gross,
 - b. The employee was aware of the employer's established standards of performance, which were objectively reasonable,
 - c. The employer had clearly warned of dismissal if the standards were not met, and

- d. The employee failed to correct their performance, despite a reasonable opportunity and sufficient time to do so.
30. While the warning letter addresses issues (b) and (c), I find there is no evidence to support JWI's allegation of a failure to correct his performance. JWI did not provide any evidence from the DTP site superintendent that sets out their concerns with Mr. Cross, such as emails, photographs, or text messages. While JWI did provide emails showing an invoice billed to a third party to "fix waterproofing," there is no evidence provided that explains how Mr. Cross was at fault or explaining the nature or scope of his errors.
31. JWI provided statements from a number of employees about Mr. Cross. Generally, the letters are vague, and lack clear details of specific incidents supporting the above grounds. I place little weight on them.
32. For the above reasons, I find that JWI has not proved that it had just cause to dismiss Mr. Cross. As a result, JWI was required to provide reasonable termination notice to Mr. Cross.
33. The parties' employment contract says at paragraph 38 that Mr. Cross is entitled to a "minimum notice period of 10 working days" (underline emphasis in the original) as reasonable and sufficient notice for termination. The same paragraph provides that if the "notice period is less than that required under any relevant legislation... the minimum time period required by legislation shall be the notice required for termination of employment."
34. I find that Mr. Cross is entitled by contract to a minimum of 10 working days' notice, but may be entitled to more under "relevant legislation," such as the ESA.
35. This brings the terms of ESA into the contract through a process called "incorporation by reference." This is where parties agree to be bound by a piece of legislation by including a reference to such legislation in the contract. They did so here by referencing "any relevant legislation," which I find includes the ESA.

36. I now turn to JWI's argument about the ESA. JWI says Mr. Cross has no entitlement to severance pay under section 65 of the ESA. Section 65(1)(e) of the ESA says employees "...employed at one or more construction sites by an employer whose principal business is construction" are not entitled to compensation for length of service upon termination under sections 63 and 64.
37. I accept JWI's position that Mr. Cross is exempt from section 65 of the ESA. "Construction" is defined at section 1 of the ESA as "the construction, renovation, repair, or demolition of property or the alteration or improvement of land." JWI states in the Dispute Response that they are a construction-based business. Mr. Cross does not dispute this in his submissions. Given the nature of the business' on-site work adding waterproofing to construction projects, I find that JWI is engaged in construction, and so Mr. Cross is exempt from section 65 of the ESA.
38. While Mr. Cross is not eligible for compensation for length of service under section 65 of the ESA, he is entitled to reasonable notice under the contract. As Mr. Cross does not claim any specific period of notice or amount in respect of severance pay, I find that contract's minimum 10 days' notice is reasonable in the circumstances.
39. In submissions, the parties both say Mr. Cross earned \$28.50/hr at the time of his termination. Neither party provided evidence on how many hours per week Mr. Cross normally worked at the time of his termination, but the employer submitted that in "3.5 weeks" Mr. Cross would work "120 hours." This works out to 34.3 hours a week, or 6.86 hours a day. Mr. Cross did not dispute that amount in his reply submissions. This amount is broadly consistent with pay stubs the parties submitted from 2019 and 2020, and in the absence of any evidence or submission to the contrary, I accept it as correct.
40. I find that pay for 10 days in lieu of notice is appropriate in the circumstances. The amount is \$1,955.10: 10 days x 6.86 hrs/day x \$28.50/hr.
41. Mr. Cross expressly says he does not claim pre-judgment interest, and so I do not award any.

42. 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. In this case, there was divided success. I find the applicant is entitled to reimbursement of \$87.50, being half of the \$175 paid in tribunal fees. Neither party claims dispute-related expenses.

ORDERS

43. Within 30 days of the date of this order, I order JWI to pay Mr. Cross a total of \$2,042.60, broken down as follows:
- a. \$1,955.10 in damages as severance pay, and
 - b. \$87.50 in CRT fees.
44. The applicant is entitled to post-judgment interest, as applicable.
45. 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.

Christopher C. Rivers, Tribunal Member