



Civil Resolution Tribunal

Date Issued: June 12, 2023

File: SC-2022-005969

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Hong v. Nixon (dba VMG Vancouver Mountain Guides Company)*,
2023 BCCRT 497

B E T W E E N :

JASON HONG

APPLICANT

A N D :

BRENT NIXON (Doing Business As VMG VANCOUVER MOUNTAIN
GUIDES COMPANY)

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Nav Shukla

INTRODUCTION

1. The applicant, Jason Hong, purchased an introduction to mountaineering course from the respondent, Brent Nixon (Doing Business As VMG Vancouver Mountain Guides Company). Mr. Hong says during the course, Mr. Nixon's hired guide, PD, failed to

provide the paid for services. In particular, Mr. Hong says PD failed to properly guide the participants during the course, including not ensuring Mr. Hong's safety throughout the course, and also failed to guide and teach for the course's full duration. Mr. Hong seeks a \$1,573.95 refund for the amount he paid for the course.

2. Mr. Nixon denies Mr. Hong's allegations. He says poor weather conditions affected the course, but that PD taught the participants many new skills while ensuring their safety during the course. Mr. Nixon also says that Mr. Hong agreed to his company's terms of services and signed a liability waiver. Mr. Nixon asks that I dismiss the claim.
3. Both parties are self-represented.

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. Some of the evidence in this dispute amounts to a "he said, he said" scenario. The credibility of interested 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. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. 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. I also note that in *Yas v. Pope*, 2018 BCSC 282, at paragraphs 32 to 38,

the British Columbia Supreme Court recognized the CRT's process and found that oral hearings are not necessarily required where credibility is an issue.

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.
8. In his written argument, Mr. Nixon alleges that Mr. Hong has slandered both his business and PD on social media. Mr. Nixon asks the CRT to order Mr. Hong to refrain from publicly slandering his business and PD. I make no findings about the slander allegations because there is no counterclaim and also because slander and defamation are outside the CRT's small claims jurisdiction, as expressly set out in CRTA section 119. Further, ordering someone to do something or to stop doing something is known as "injunctive relief". This includes Mr. Nixon's requested order for Mr. Hong to stop making slanderous comments. The CRT has no jurisdiction to grant injunctive relief under its small claims jurisdiction under CRTA section 118, with certain exceptions which I find do not apply here.

ISSUE

9. The issue in this dispute is whether Mr. Hong is entitled to a refund of \$1,573.95, or some other amount, from Mr. Nixon.

EVIDENCE AND ANALYSIS

10. As the applicant in this civil proceeding, Mr. Hong must prove his claims on a balance of probabilities (meaning "more likely than not"). I have considered all the parties'

submitted evidence and argument but refer only to what I find relevant to provide context for my decision.

11. As noted above, Mr. Hong seeks a full refund for the \$1,573.95 he undisputedly paid to Mr. Nixon for the Bugaboos Camp Introduction to Mountaineering course. I find Mr. Hong's refund claim is based in breach of contract since the gist of his allegations is that he paid \$1,573.95 for services that he says he did not receive. Mr. Hong alleges that PD failed to oversee Mr. Hong's safety or navigation during the course and that PD abandoned the course participants at times. Mr. Hong also alleges that PD failed to teach or guide certain days of the 7 day course which ran from July 30, 2022 to August 5, 2022. In particular, Mr. Hong says PD failed to teach or guide on July 30, August 3, August 4, and August 5. In his written argument, Mr. Hong adds that PD belittled and shamed him repeatedly, did not answer another participant's question about safety, and was "distracted" by PD's wife who joined PD for the trip. For the reasons that follow, I find Mr. Hong is not entitled to any refund.

12. On March 27, 2022, Mr. Hong received an email from Mr. Nixon's business, Vancouver Mountain Guides (VMG), confirming his booking for the mountaineering course that was scheduled to start July 30, 2022. The email included VMG's terms of service. Mr. Nixon says, and Mr. Hong does not dispute, that Mr. Hong would have been required to agree to VMG's terms of service before he could check out and complete his purchase for the course. Mr. Nixon provided a screenshot printout of VMG's online checkout procedure which includes a box that says "by completing this booking, you agree to our policies and to Zau's terms of service". It is unclear what "Zau" is from the evidence before me but based on the above, and since Mr. Hong does not dispute it, I find it likely that Mr. Hong was required to and agreed to VMG's policies (set out in its terms of service), when he completed his purchase for the mountaineering course. The terms of service say, among other things, that all participants are required to read, understand, and sign an electronic waiver of liability emailed to them before their program start date. The terms of service also say that VMG cannot provide refunds or postponements for guests that did not achieve their objective due to weather concerns or other reasons. The terms of service go on to

note that weather is unpredictable, and all weather decisions and objectives are subject to the guide's discretion.

13. As noted above, Mr. Nixon relies on the terms of service and a waiver that he says Mr. Hong signed in support of his assertion that Mr. Hong is not entitled to any refund. In addition to the reference in the terms of service, Mr. Nixon's July 13, 2022 email to all course participants (including Mr. Hong) also mentioned the waiver. This email noted that VMG uses an electronic waiver which had already been emailed to each participant. It said that each participant should ensure they have read through the waiver in detail and ask any questions they may have. The email further said that by electronically signing the waiver, participants agree to the legal terms.
14. Mr. Nixon provided an unsigned copy of this waiver in evidence but says that Mr. Hong signed the waiver. While a signed copy of the waiver is not evidence, Mr. Hong does not deny signing a waiver, nor does he say that the terms of the waiver he signed are different from the unsigned waiver in evidence. I find that if Mr. Hong had not signed the waiver, or if the waiver he signed was different from the unsigned waiver in evidence, Mr. Hong would have argued so, and provided evidence in support of that argument, something he has not done here. Given that VMG's terms of service specifically require all participants to sign the waiver of liability, and since Mr. Hong does not deny that he signed it, I find it likely that Mr. Hong signed the waiver that is in evidence, and I find he is bound by its terms.
15. By signing the waiver, Mr. Hong agreed to "**WAIVE ANY AND ALL CLAIMS**" he may have against Mr. Nixon or the other named releasees, and also released Mr. Nixon and the other releasees from "any and all liability for any loss, damage, expense or injury including death" that Mr. Hong may suffer "as a result of [his] participation in wilderness activities, DUE TO ANY CAUSE WHATSOEVER, INCLUDING NEGLIGENCE, BREACH OF CONTRACT, OR BREACH OF ANY STATUTORY OR OTHER DUTY OF CARE..." [emphasis in original].
16. In the waiver the term "wilderness activities" is defined and includes hiking, trail running, mountaineering, rock climbing glacier travel, among other things".

17. Above the spot where a participant could click to sign the waiver, the waiver included in bold capital lettering, a statement that the participant confirms they have read and understood the release agreement prior to signing it and that they are aware that by signing it, they are waiving certain legal rights which they may have against the Releasees.
18. In *Wong v. The Chinese Canadian Historical Society of B.C.*, 2020 BCCRT 1220 at paragraphs 25 to 30, the tribunal member considered whether by signing a waiver that contained a similar release of liability and waiver of claims, the applicant in that dispute had waived their right to claim a refund for a tour the applicant did not end up attending. In *Wong*, the tribunal member found that by signing the waiver, the applicant gave up the right to make a claim against the respondent for a refund for the tour because the applicant's claims in that dispute arose or were connected directly or indirectly with their participation in the tour.
19. While the *Wong* decision is not binding on me, I agree with the tribunal member's reasoning in that decision and apply it here. I find Mr. Hong's claims in this dispute are claims for loss, damage or expense suffered as a result of his participation in the course, which I find falls within the definition of "wilderness activities" as defined in the waiver agreement. By signing the waiver, Mr. Hong specifically released Mr. Nixon from any liability for a breach of contract claim arising out of his participation in the course, which I find includes his refund claim. So, I find the liability waiver is a complete defense to Mr. Hong's claims against Mr. Nixon in this dispute.
20. Even if there was no waiver, I would dismiss Mr. Hong's claims in any event for the following reasons. I find the majority of Mr. Hong's allegations require expert evidence to prove since they are allegations that PD failed to perform in the manner Mr. Hong expected a professional mountain guide to perform. In general, expert evidence is required to prove a professional's work fell below a reasonably competent standard unless the work or services provided were obviously substandard or are non-technical (see *Schellenberg v. Wawanesa Mutual Insurance Company*, 2019 BCSC 196). Here, I do not find it obvious from the evidence before me that the mountain guiding

services PD provided were obviously substandard. So, I find expert evidence is required and there is none before me.

21. Mr. Hong's evidence includes a document from the Association of Canadian Mountain Guide's (ACMG) preliminary review committee that sets out various complaints made by Mr. Hong and another participant against PD. In this report, the preliminary review committee found that PD "potentially breached" 2 requirements from the ACMG's code of conduct and set out some proposed remedies that PD agreed to by signing the document. While Mr. Hong repeatedly refers to PD's signature on this document as an "admission of fault", I do not find any such admission apparent in this document. Further, I find the preliminary review committee's findings of "potential" breaches do not satisfy the burden of proof that Mr. Hong is required to satisfy in this dispute, which, as noted above, is on a balance of probabilities. So, based on all of the above, I find it unproven that PD provided substandard mountain guide services during the course.
22. Further, to the extent Mr. Hong argues a breach of contract based on PD's alleged failure to teach or guide on July 30, August 3, August 4, and August 5, I also find these allegations unproven. The evidence shows PD led the course participants up to their campgrounds on July 30, did an early morning hike with the participants on August 3, and attempted to do a hike with the participants on August 4 but the group turned back due to severe weather. The evidence also shows that on August 4, Mr. Hong and 2 other participants, including FW who provided a witness statement in this dispute, decided to leave the course early instead of staying until August 5 as originally scheduled. So, I find Mr. Hong cannot argue a breach of contract due to PD's alleged failure to teach or guide on August 5 when Mr. Hong undisputedly ended his participation on August 4.
23. I am also not satisfied based on the evidence before me that PD "abandoned" Mr. Hong on August 4 during the descent down the mountain as Mr. Hong alleges. The evidence before me on this point suggests that Mr. Hong made his decision to hike down on August 4 instead of August 5 independent of (and based on FW's witness

statement, before) PD's decision to also leave on August 4. It is not clear to me that there was any agreement that PD was going to lead the hike down for Mr. Hong and the others who decided to end their course participation early. So, I find it unproven that PD failed to teach or guide as Mr. Hong alleges. I also find Mr. Hong's other allegations, including his allegations that PD belittled or purposely shamed him, unproven.

24. For all of the above reasons, I dismiss Mr. Hong's claims.

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. Since Mr. Hong was unsuccessful, I dismiss his claim for reimbursement of his paid CRT fees. Mr. Nixon did not pay CRT fees. Neither party claims any dispute-related expenses, so I award none.

ORDER

26. I dismiss Mr. Hong's claims and this dispute.

Nav Shukla, Tribunal Member