Civil Resolution Tribunal

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File: SC-2023-010116

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Kleanza Consulting Ltd. v. Ewonus*, 2024 BCCRT 407

B E T W E E N :

KLEANZA CONSULTING LTD.

APPLICANT

A N D :

PAUL EWONUS

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Micah Carmody

INTRODUCTION

1. Kleanza Consulting Ltd. (Kleanza) is in the business of archaeological consulting. It employed Paul Ewonus as a project manager and field director. On August 4, 2022, Kleanza terminated Dr. Ewonus's employment and asked him to put all company-

owned equipment into a company-owned truck that its employees would retrieve. Kleanza says Dr. Ewonus included some equipment but failed to include other equipment, including a laptop computer.

2. Kleanza seeks orders that Dr. Ewonus return all the equipment in working order or pay to fix or replace any lost or damaged items. Kleanza values its claim at $3,748.49. Kleanza is represented by an employee or principal.

3. Dr. Ewonus says he returned all equipment that belonged to Kleanza. He also says Kleanza has made similar, unsuccessful, claims in two other proceedings. Dr. Ewonus represents himself.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has authority over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA says the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly.

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. At first glance, the parties in this dispute appear to question each other's credibility, or whether they are telling the truth, about whether Dr. Ewonus returned the laptop and other items. In *Downing v. Strata Plan VR2356*, 2023 BCCA 100, the court recognized that oral hearings are not necessarily required where credibility is in issue. It depends on what questions turn on credibility, the importance of those questions, and the extent to which cross-examination may assist in answering those questions. Here, an oral hearing would give Dr. Ewonus and Kleanza's witnesses the opportunity to provide more detailed evidence, and test each other's evidence, about which items Dr. Ewonus returned or failed to return.

6. I decided against an oral hearing for several reasons. First, neither party asked for one. Second, as I explain below, I find that Dr. Ewonus's position is not that he

returned the laptop and other equipment, but that he returned all Kleanza property. I find he argues that certain equipment belonged to him, not Kleanza, so he was not required to return the equipment. For that reason, I find little in this dispute actually turns on credibility. Given the CRT's mandate that includes efficiency and proportionality, I am satisfied that I can decide this dispute on the written submissions before me.

7. 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 court.

8. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to pay money, return personal property, or do things required by an agreement about personal property or services. The order may include any terms or conditions the CRT considers appropriate.

9. Kleanza requested alternative orders that Dr. Ewonus provide Kleanza with a list of documents contained on the laptop, a warranty that he has deleted all those documents, and proof that the documents were deleted. These are injunctive orders, meaning orders to do or stop doing something. The CRT does not have jurisdiction to make injunctive orders except as set out in CRTA section 118. Since the employment agreement did not require Dr. Ewonus to do these things, I find I have no jurisdiction to make these orders.

ISSUES

10. The issues in this dispute are:

    a. Is the claim *res judicata* or an abuse of process?

    b. If not, what equipment was Dr. Ewonus required to return, and what did he fail to return?

    c. What remedy, if any, is appropriate?

EVIDENCE AND ANALYSIS

11. As the applicant in this civil proceeding, Kleanza must prove its claims on a balance of probabilities, meaning more likely than not. While I have considered all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.

12. Dr. Ewonus signed a December 21, 2020 employment agreement to work for Kleanza as a project manager and field director. Under that agreement, Dr. Ewonus provided archaeological consulting services, among other things. He often worked from home or on the road.

13. Two clauses in the employment agreement are particularly relevant to this dispute. Under clause 12, the agreement said that upon termination, Dr. Ewonus will return to Kleanza all company equipment, including but not limited to keys, access cards, laptops, field equipment, devices, notes, and other things.

14. Under clause 6, the agreement said Kleanza will reimburse Dr. Ewonus for all travel and other expenses actually and properly incurred in connection with his employment. I return to these clauses below.

15. On August 4, 2022, Kleanza wrote Dr. Ewonus a letter confirming that his employment was terminated effective that day. Kleanza asserted that it had just cause for termination, but offered a without-prejudice payment of 2 weeks' wages upon the return of a company truck and a list of items Kleanza described as company property.

16. The letter also confirmed that, as previously discussed, Dr. Ewonus was to put all Kleanza property into the company truck, advise Kleanza of its location and meet 2 Kleanza employees at the truck to hand over the keys. Kleanza employees retrieved the truck on August 10. Dr. Ewonus was not present and left the keys in the truck.

17. On August 11, Kleanza emailed Dr. Ewonus, providing a list of claimed outstanding property:
    a. Macbook Pro 13.3" laptop

b. USB-C adapter,

c. Dell 27” FreeSync gaming monitor,

d. Dell wireless keyboard and mouse,

e. Work chair from Monk Office,

f. Spot device,

g. Tablet,

h. Artifacts, cultural material, faunal material, field notes and field data from any Kleanza projects, and

i. Any other equipment in Dr. Ewonus’s possession that belonged to Kleanza.

18. Dr. Ewonus responded that he had returned all Kleanza’s equipment, and he did not have any additional equipment or materials that belonged to Kleanza.

Is the claim res judicata or an abuse of process?

19. Dr. Ewonus submits that Kleanza’s claims have “by and large,” been raised and dismissed in two other proceedings before independent bodies. One is the Director of Employment Standards, the other is the British Columbia Association of Professional Archaeologists (BCAPA).

20. I infer Dr. Ewonus argues that the legal doctrine of *res judicata* applies to prevent me from hearing this dispute. *Res judicata* is a legal principle that prevents people from bringing multiple legal proceedings about the same issue.

21. *Res judicata* can arise in two ways. The first is called cause of action estoppel, which stops someone from pursuing a matter that was or should have been the subject of a previous process. The second is called issue estoppel, which stops someone from raising an issue that has already been decided in another process (see *Erschbamer v. Wallster*, 2013 BCCA 76 at paragraph 12).

22. While they are worded differently, the tests for both estoppels require that there be a final decision from an administrative body with jurisdiction or authority to make the decision. On August 16, 2022, Dr. Ewonus filed a wage complaint with the Director of Employment Standards. A May 26, 2023 letter from a delegate of the director confirmed that Dr. Ewonus received certain funds from Kleanza in full satisfaction of his complaint and that the director would take no further action. It is undisputed that Kleanza voluntarily paid these funds. There is no evidence that the director conducted a hearing, made findings of fact, or issued a determination. Further, the *Employment Standards Act* does not give the director authority to consider property theft allegations or to set off wages. As a result, there was no final decision, and the tests of issue estoppel and cause of action estoppel are not met.

23. Kleanza filed a grievance about Dr. Ewonus with the BCAPA. On April 12, 2023, the BCAPA Investigation Committee issued a report recommending against a disciplinary hearing. One of Kleanza's 13 allegations was that Dr. Ewonus stole company property. The committee noted that theft and breach of an employment contract were beyond the scope of its bylaws. It then went on to say that evidence was presented that any Kleanza property had been returned, or offered for return, and dismissed the claim. Because the theft and contract breach were undisputedly beyond the scope of the committee's bylaws, I find it did not have jurisdiction to decide those questions. Therefore, the committee's decision to dismiss the claim was not a judicial decision from a body with jurisdiction to decide the issue. This means the tests for issue estoppel and cause of action estoppel are not met.

24. Based on the above, I find that Kleanza's claims are not *res judicata*.

What property was Dr. Ewonus required to return, and what did he fail to return?

25. In submissions, Kleanza seeks an order for specific performance requiring Dr. Ewonus to return the equipment immediately. In the alternative, it seeks damages of $3,842.10, which is slightly more than it claimed in the Dispute Notice. This is based on purchase prices for the following 5 items:

a. Laptop $2,743.78

b. Monitor and cable $275.50

c. Keyboard and mouse $66.05

d. Office chair $557.28

e. Tablet $199.49

26. I find that from the list of company equipment Kleanza requested in the August 11, 2022 email, it is no longer seeking monetary compensation for any "spot device", artifacts, cultural material, faunal material, field notes, field data, or any other equipment. In any event, Kleanza provided no evidence about those things.

27. As noted, Dr. Ewonus appears to argue that these items belong to him. In the Dispute Notice, he said, "I returned all equipment *that belonged to the company*" (my emphasis added). Similarly, in his August 11, 2022 response to Kleanza's email advising that he failed to include the laptop and other items in the company truck, he said, "I have returned all the equipment *that belongs to Kleanza*" (my emphasis added). Kleanza responded by telling Dr. Ewonus that he did not own the equipment and Kleanza did.

28. In submissions, Dr. Ewonus says he has returned all "office equipment" without being specific about what is included in that term. He also says there is "no evidence whatsoever that I continue to have any of these items in my possession." However, he does not deny having the items in his possession. He also does not say that he put the laptop or other items in the company truck, or how he otherwise returned them to Kleanza. On the evidence, including the two written statements from employees who retrieved the company truck, I find Dr. Ewonus did not put the items listed above in the truck.

29. This dispute, therefore, is about ownership of the items, or what was "company equipment" that Dr. Ewonus was required to return under the employment contract.

Kleanza bears the burden of proving that the items listed above are company property.

30. Personal property ownership is determined not only by who purchased the property but also by implied or express agreements between the parties and depending on the circumstances, the law of gifts and other factors.

31. I start with the office chair. Kleanza says that in November 2021, Dr. Ewonus purchased an office work chair for $557.28. Kleanza also say it reimbursed Dr. Ewonus through company cash expenses. Kleanza's statements are supported by receipts and expense ledgers. For reasons that are not entirely clear, Dr. Ewonus says that the chair invoice and receipt are not associated with his name. Kleanza says it is Dr. Ewonus's partner's name on the receipt. In any event, Dr. Ewonus does not deny that he selected the chair, that he has the chair, or that Kleanza reimbursed him for it. I find those things are true.

32. Neither party says there was any discussion about who owned the chair or what would happen if the chair outlasted the employment relationship. The employment contract did not mention chairs among its examples of company equipment that had to be returned, although the list presented was explicitly not exclusive, so that is not determinative.

33. Because Dr. Ewonus selected and purchased the chair, I find he likely chose it for specific features and to meet his needs. A chair would be more difficult and expensive to ship or transport back to Kleanza, given Kleanza did not have an office in Victoria where Dr. Ewonus worked. Further, the fact that the parties treated the chair as an expense suggests it fell under the employment contract's clause 6. That is, Kleanza considered it an expense properly incurred in connection with Dr. Ewonus's employment duties. Nothing in the employment agreement said Dr. Ewonus had to repay such expenses at the end of his employment. In the absence of evidence of some kind of agreement about the chair, I find that Kleanza reimbursed Dr. Ewonus for the chair as an employment benefit or perk. I find the chair was Dr. Ewonus's property and he did not breach the employment agreement by failing to return it.

34. I turn to the laptop, monitor, cable, keyboard and mouse. I refer to these items as together as the “laptop and related equipment”. They were purchased around the same time in early 2021.

35. Dr. Ewonus’s undisputed evidence, which I accept, is that Kleanza employees generally used their personal computers to carry out work for the company. Employees were not to store digital files on computer hard drives and instead were to access and edit them from a Dropbox cloud server. Kleanza did not have remote access to or control over the laptops.

36. Dr. Ewonus’s request for the laptop and related equipment is documented in a February 8, 2021 email to Kleanza. Kleanza responded that the request sounded reasonable. Kleanza said it would add a clause to Dr. Ewonus’s contract “to work out the details regarding ownership.”

37. It is not clear what this statement meant, and neither party addresses it in submissions. There is little to glean from the surrounding context, as it is apparent that when Dr. Ewonus wrote his email request, he already had at least tentative approval for the purchase, presumably from a verbal discussion or an email the parties did not provide in evidence. However, I find Kleanza’s statement about ownership in the email is evidence that the parties understood that the purchases were not an employment benefit, and that Kleanza retained at least some ownership rights in the laptop and related equipment. Also, the evidence shows that Kleanza bought all the equipment and had it shipped directly to Dr. Ewonus rather than having Dr. Ewonus purchase it and reimbursing him as an expense as it did with the chair. Finally, I note that the employment contract explicitly said laptops are company equipment that must be returned. Together, the factors supporting Kleanza’s ownership of the laptop and related equipment outweigh the fact that Dr. Ewonus selected the laptop and related equipment himself and that Kleanza did not have remote access to it. I find Dr. Ewonus breached the employment contract by not returning the laptop and related equipment when he was fired.

38. Lastly, there is the tablet. Kleanza's receipt shows that it purchased 4 Samsung Galaxy tablets on May 19, 2022. I find that Kleanza selected it and purchased the tablets to satisfy its work requirements. I find it was implied when Kleanza distributed the tablet to Dr. Ewonus that it was to be used for work purposes. I find Kleanza owns the tablet. I find Dr. Ewonus breached the employment contract by not returning the tablet when he was fired.

Remedy

39. As noted, Kleanza asked for an order that Dr. Ewonus return all the equipment in good working order, or alternatively that he pay damages. Kleanza argues that aside from the laptop's monetary value, it contains confidential information about Kleanza and its clients. However, Kleanza did not dispute Dr. Ewonus's evidence about its cloud server use policy, which I accept means it is unlikely that Dr. Ewonus stored confidential information on the laptop. In law, if monetary compensation will suffice, it is generally ordered instead of specific performance. I find monetary compensation is appropriate here because the tablet, laptop and related equipment are all replaceable. Further, Dr. Ewonus does not confirm he has the items or what condition they are in.

40. I reject Kleanza's assessment of damages based on the equipment purchase prices. The general principle is that the non-breaching party should be placed in the same position as if the breaching party had fulfilled their contractual obligation. If Dr. Ewonus had returned the items as required upon termination, then Kleanza would have received used equipment, not brand-new equipment. I find the appropriate measure of damages is the items' market value in August 2022 when Dr. Ewonus should have returned them.

41. Neither party gave evidence of the items' market value. The laptop was purchased in February 2021 for $2,499 before tax. Taking into account that it was 1.5 years old in August 2022, I find its market value, on a judgment basis, was $1,700.

42. The monitor, cable, keyboard and mouse purchased around the same time I find were worth $150. The tablet was purchased in May 2022 for $190 before tax. Since it was nearly new when Dr. Ewonus failed to return it, I find its market value was $150.

43. In total, I find Kleanza's damages are $2,000. Kleanza said it did not want to claim interest, so I have not applied any interest.

44. Under section 49 of the CRTA and CRT rules, a successful party is generally entitled to reimbursement of their CRT fees and reasonable dispute-related expenses. Kleanza was generally successful, so I find it is entitled to reimbursement of $175 in paid CRT fees. Neither party claims dispute-related expenses.

ORDERS

45. Within 21 days of the date of this order, I order Dr. Ewonus to pay Kleanza a total of $2,175, broken down as $2,000 in damages and $175 in CRT fees.

46. Kleanza is entitled to post-judgment interest, as applicable.

47. This is a validated decision and order. 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.

Micah Carmody, Tribunal Member