



Civil Resolution Tribunal

Date Issued: February 29, 2024

File: SC-2023-000209

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Percival v. Mueller dba Countryside Woodworks*, 2024 BCCRT 205

B E T W E E N :

JOSHUA PERCIVAL

APPLICANT

A N D :

KEVIN MUELLER (Doing Business As COUNTRYSIDE
WOODWORKS)

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Megan Stewart

INTRODUCTION

1. This dispute is about severance pay.

2. Joshua Percival says Kevin Mueller (dba Countryside Woodworks)¹ wrongfully terminated his employment without notice or severance pay in lieu of notice. Mr. Percival claims \$5,000 in damages. He is self-represented.
3. Kevin Mueller denies Mr. Percival's employment was terminated at all, and says Mr. Percival stopped showing up to work. If Mr. Percival's employment was terminated, Kevin Mueller says Mr. Percival is not entitled to severance pay as he mitigated any loss by taking on new work. Kevin Mueller is also self-represented.

JURISDICTION AND PROCEDURE

4. These are the Civil Resolution Tribunal's (CRT) formal written reasons. The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). CRTA section 2 states 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.
5. CRTA section 39 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 I am properly able to assess and weigh the documentary evidence and submissions before me without an oral hearing.
6. CRTA section 42 says the CRT may accept as evidence information it considers relevant, necessary, and appropriate, whether or not the information would be admissible in court.
7. Where permitted by CRTA section 118, 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.

¹ The CRT has a policy to use inclusive language that does not make assumptions about a person's gender. As part of that commitment, the CRT asks parties to identify their pronouns and titles to ensure the CRT addresses them respectfully throughout the process, including in published decisions. Kevin Mueller did not provide their pronouns or title. So, I will use gender neutral pronouns and their full name to refer to them throughout this decision, intending no disrespect.

ISSUES

8. The issues in this dispute are:
 - a. Did Kevin Mueller wrongfully dismiss Mr. Percival, or did Mr. Percival quit?
 - b. If Mr. Percival was wrongfully dismissed, is he entitled to the claimed \$5,000?

EVIDENCE AND ANALYSIS

9. As the applicant in a civil proceeding, Mr. Percival must prove his claims on a balance of probabilities, meaning more likely than not. I have read all the parties' submissions and evidence, but only refer to information I find necessary to explain my decision.

Background

10. Mr. Percival began working for Kevin Mueller as a construction manager around April 2021. There is no written contract in evidence, but it is undisputed Mr. Percival was employed at a rate of \$30 per hour for an indefinite term. In May 2022, Mr. Percival stopped working for Kevin Mueller.
11. Mr. Percival says on May 2, 2022, Kevin Mueller terminated his employment by phone. In support, Mr. Percival relies on a text message he sent Kevin Mueller that day thanking them for the call and indicating he enjoyed working with them. The text also set out Mr. Percival's expectation of 3 to 4 months' severance pay. The following day, May 3, Mr. Percival did not attend work, and handed over Kevin Mueller's debit card on request in a public location.
12. For their part, Kevin Mueller says during the phone conversation on May 2, they raised the possibility of ending Mr. Percival's employment, but told him they had not yet made a final decision. They say when they met Mr. Percival to collect their debit card, they told him that based on his expectations for severance pay, they would not be able to let him go. They also say Mr. Percival refused to return to work, saying he already had other projects lined up.

13. Around September 2022, Mr. Percival filed a complaint against Kevin Mueller with the Employment Standards Branch for unpaid wages. The parties settled the complaint in August 2023. However, Mr. Percival says Kevin Mueller still owes him severance pay.
14. The Employment Standards Branch has exclusive jurisdiction over statutory entitlements under the *Employment Standards Act*. However, an employee is only prevented from bringing a civil action when the employee is seeking to enforce a right that is only available under the *Employment Standards Act*. The employee may still make a claim under the parties' contract or under the common law, such as through a CRT dispute.² I find Mr. Percival's severance pay claim for wrongful dismissal arises under the common law.

Wrongful dismissal or quit?

15. On May 2, 2022, Kevin Mueller responded to Mr. Percival's earlier severance pay expectations text. They said that as Mr. Percival had been with them for just over a year, it appeared he was entitled to 2 weeks' notice, or pay in lieu of notice. Kevin Mueller calculated Mr. Percival's severance pay at \$3,035.40, based on an 8-week average of 50.59 hours per week, which they said "it looks like I need to pay". I find Kevin Mueller's text message response, together with their request for the return of their debit card, shows Kevin Mueller terminated Mr. Percival's employment as alleged, and did not simply tell Mr. Percival they were considering termination.

Severance pay

16. There is a common law presumption that an employer must give their employee reasonable notice to terminate a contract of indefinite duration.³ This presumption can be rebutted if the contract clearly specifies some other notice period. Given the lack of a written contract in evidence, I find the presumption of reasonable notice has not been rebutted here.

² See the non-binding but persuasive decision in *Bellagamba v. International Tentnology Corp.*, 2018 BCCRT 549.

³ See *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986.

17. When employment is terminated without reasonable notice, an employee is entitled to damages equal to what they would have earned during the notice period.⁴ So, I find Mr. Percival was entitled to pay in lieu of reasonable notice as of May 2.
18. Reasonable notice at common law is based on factors such as Mr. Percival's age, the type and length of employment, and the availability of similar employment in terms of responsibility, training, and compensation.⁵
19. Mr. Percival did not provide evidence of his age at the time his employment was terminated, just over a year after it began.
20. I turn to the availability of similar employment. Employees who have been wrongfully dismissed have a duty to take reasonable steps to obtain equivalent employment.⁶ The employer bears the burden of proving the employee failed to reasonably mitigate their loss. Post-termination income earned during the reasonable notice period may be deducted from the damages claim.⁷
21. Kevin Mueller says Mr. Percival avoided loss by starting his own business. They submitted text messages they say prove Mr. Percival was busy working shortly after May 2, and tried to recruit some of their employees for his new business. They also provided photos of Mr. Percival's truck at a hardware store in what they say was July 2022, and a \$246.40 invoice for work Mr. Percival performed after May 2.
22. Mr. Percival says he started to look for work as a construction manager in line with his previous role but was not immediately able to find any, so he started his own business as a general contractor. He says as a result of this he went into debt, which took him 6 months to pay off before he began earning an income.
23. While Mr. Percival undisputedly began working for himself shortly after Kevin Mueller terminated his employment, there is no conclusive evidence he was or should have

⁴ See *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26 at paragraph 59.

⁵ See *Honda Canada Inc. v. Keays*, [2008] 2 SCR 362.

⁶ See *Adriano v 0886899 B.C. Ltd. (Kartners Bathroom Accessories)*, 2021 BCSC 166 at paragraph 97.

⁷ See *Pakozdi v. B & B Heavy Civil Construction Ltd.*, 2018 BCCA 23 at paragraph 50.

been able to secure similar, steady work in construction. I accept that starting a business would have caused Mr. Percival to incur debt, and that it is unlikely he would have started out earning an income that would have replaced what he would have earned had he not been dismissed. I find Kevin Mueller has not shown Mr. Percival was able to fully mitigate his damages, as alleged.

24. In a 2009 decision⁸, the BC Court of Appeal considered a “short service” employee who earned \$60,000 a year in a non-managerial position and whose employment was terminated after about 9 months. The court found at paragraph 15 (my bold emphasis):

Absent inducement, evidence of a specialized or otherwise difficult employment market, bad faith conduct or some other reason for extending the notice period, **the B.C. precedents suggest a range of two to three months for a nine-month employee in the shoes of the respondent when adjusted for age, length of service and job responsibility.**

25. Here, Mr. Percival was employed for slightly more than a year at an annual salary of around \$72,849.60, based on the average number of weekly hours he worked in the 2 months before his dismissal. Given his title and supervisory role, his position appears to have been one of some responsibility. For these reasons, I allow Mr. Percival’s claim for \$5,000, which is the equivalent of about 3.5 weeks of severance pay. I find Mr. Percival’s circumstances would typically warrant an award based on a significantly longer notice period. However, the CRT’s small claims monetary limit is \$5,000, so I order Kevin Mueller to pay Mr. Percival this amount.

INTEREST, CRT FEES, AND EXPENSES

26. The *Court Order Interest Act* applies to the CRT. Mr. Percival is entitled to pre-judgment interest on the \$5,000 damages award from May 2, 2022, the date his employment was terminated, to the date of this decision. This equals \$324.29.

⁸ *Saalfeld v. Absolute Software Corporation*, 2009 BCCA 18.

27. 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. As Mr. Percival was successful, I find he is entitled to reimbursement of \$175 in CRT fees. Mr. Percival did not claim dispute-related expenses, so I award none.

ORDERS

28. Within 30 days of the date of this order, I order Kevin Mueller to pay Mr. Percival a total of \$5,499.29, broken down as follows:

- a. \$5,000 in damages,
- b. \$324.29 in pre-judgment interest under the *Court Order Interest Act*, and
- c. \$175 in CRT fees.

29. Mr. Percival is entitled to post-judgment interest, as applicable.

30. 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.

Megan Stewart, Tribunal Member