



# Civil Resolution Tribunal

Date Issued: October 7, 2019

File: SC-2019-003011

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *T.S. v. XYZ Daycare*, 2019 BCCRT 1166

**B E T W E E N :**

T.S.

**APPLICANT**

**A N D :**

XYZ Daycare

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Micah Carmody

## INTRODUCTION

1. This dispute is about a refund for daycare services.

2. The applicant T.S. withdrew her child from the respondent XYZ Daycare after one day. She seeks a refund of her \$200 deposit and the \$420 fee she paid for the first month of daycare.
3. The respondent says the applicant is not entitled to any refund because she did not provide a written withdrawal notification in time.
4. The applicant is represented by a legal representative, Alex Lonergan. The respondent is represented by M.B., the respondent's lead teacher.
5. I have anonymized the published reasons for this decision due to the sensitive nature of the allegations and to protect the identity of the applicant's minor child.

## **JURISDICTION AND PROCEDURE**

6. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal 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.
7. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, both parties in this dispute call into question each other's credibility. Credibility of 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. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not necessarily required where credibility is in issue. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. Bearing in mind the tribunal's mandate that

includes proportionality and a prompt resolution of disputes, I decided to hear this dispute through written submissions.

8. The tribunal 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 tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
9. Under tribunal rule 9.3(2), in resolving this dispute the tribunal may make one or more of the following orders, where permitted under section 118 of the CRTA:
  - a. order a party to do or stop doing something;
  - b. order a party to pay money;
  - c. order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

10. The issues in this dispute are:
  - a. Is the applicant entitled to a refund of all or part of her \$200 deposit?
  - b. Is the applicant entitled to a refund of all or part of her \$420 fee for the first month?

## **EVIDENCE AND ANALYSIS**

11. In a civil claim such as this, the applicant must prove her claim on a balance of probabilities. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain and give context to my decision.
12. The respondent operates an in-home multi-age childcare centre licensed for up to 8 children.

13. There is no dispute that on November 19, 2018, the applicant paid a deposit of \$200 to register her child in the respondent's daycare beginning in December 2018.
14. The applicant says on December 5, 2018, her child's first day attending the daycare, she paid \$420 in cash for December and was promised a receipt by email. She did not receive that receipt. However, the respondent does not dispute that the applicant made the cash payment. I find that the applicant paid the respondent \$420 for part-time childcare for December.
15. The applicant says that upon picking up her daughter on December 5, her daughter reported experiencing physical abuse from M.B.. The applicant reported M.B. to the Vancouver Island Health Authority (VIHA), and subsequently to the RCMP. M.B. denies abusing the child in any way and says investigations completed by the RCMP and VIHA found no evidence to support the applicant's claim. Neither party provided any documented conclusions from the VIHA investigation. The applicant's arguments focused on whether the parties' contract permitted refunds and under what conditions. She did not argue that the respondent breached the contract. Given that she did not pursue this argument despite having legal representation, and given the scant evidence about the incident, I have based my analysis on the applicant's decision to withdraw from the existing contract.
16. The respondent's position is that its daycare was the applicant's back-up daycare, and on December 6 the applicant's child was accepted into another, larger preschool. It says the applicant has fabricated the abuse allegation to obtain a refund and move her child to the other centre. The respondent did not provide any supporting evidence to show that the applicant's child was accepted into another daycare or preschool.
17. On November 18, 2018, the applicant completed the respondent's registration form. By signing the registration form, the applicant agreed to pay a deposit of \$200 to hold the child's spot in the daycare. In turn, the respondent agreed to deduct the deposit from the fees for the child's final month. The registration form says if the parent terminates the agreement without notice, the parent will pay a "30-days fee".

18. When completing the registration form, the applicant signed to acknowledge that she had read and agreed to comply with all provisions in the respondent's 'family handbook'. The handbook contains more detailed information about the deposit and termination policy.
19. There are two versions of the handbook in evidence and the parties dispute which version the applicant read when completing the registration form. The respondent submitted an "updated" version of the handbook but did not state when the handbook was updated. The updated version requires notice of withdrawal in writing by the 15<sup>th</sup> of the month to receive a 50% refund. The applicant, through a freedom of information request to VIHA, obtained the handbook that VIHA reviewed in its investigation.
20. The handbook included in the VIHA materials is stamped "Received Dec 07 2018". Accordingly, I reject the respondent's assertion that this version of the handbook was submitted to VIHA when it applied for its licence (a date the respondent did not provide). I find that the version of the handbook in the VIHA materials is the version that the applicant reviewed when signing the registration form.
21. The handbook says when pre-payment is made to hold a spot, the money will be put towards the first month's payment. It says if the family decides not to attend, the money will be refunded if the respondent is able to fill that particular spot.
22. As for withdrawal, the handbook says parents must give 1 month's notice of withdrawal. However, it also says there is 1-month trial period for both the child and the caregiver to determine if there is a good "fit". Parents have the right to withdraw their child during this period. The handbook says, "if the child leaves before the 30-day trial period is over, the family will only be charged for the days in attendance, if [the respondent] is able to fill that particular spot with a new client. Otherwise, the month's payment will be retained."

23. I find that the terms of the handbook were explicitly incorporated into the registration that the applicant signed and therefore formed part of the parties' contract. Accordingly, the applicant's contractual eligibility for a refund turns on whether the respondent was able to fill the applicant's child's vacant spot.
24. The respondent says it was unable to fill the child's spot in December. The weekly attendance records confirm this. It appears attendance returned to early December 2018 levels in January 2019.
25. The applicant argues that the respondent was or should have been able to immediately to fill the child's spot. She refers to a Facebook post made by M.B. on December 7, 2018, in a local childcare group looking for a "second set of hands" to help with transitioning new children. M.B. says she required help because she had to participate in the VIHA investigation, which required her to find another person to look after the children. I accept that explanation and find it was reasonable for her not to include such details in the post.
26. The applicant also refers to the respondent's December 2, 2018 email in which she advised the applicant that if she did not confirm her child's registration the respondent would give the spot to other families. The applicant says this shows that the respondent had multiple clients waiting to immediately take the spot. I find that is not necessarily the case.
27. The applicant's email records show that she first contacted the respondent on or around November 2, followed by a visit on November 8 and an observation day November 15. She was able to register her child for the following month. These records suggest that there was no waiting list. They also demonstrate the length of time needed to bring a new family into the daycare. Weighing all the evidence, I find the respondent was not reasonably able to fill the spot for December.
28. According to the handbook, the applicant is therefore not entitled to a refund of any fees paid for December. However, there is still the matter of the deposit. The registration form said the deposit would be applied to the final month's payment,

while the handbook said the deposit would be applied to the first month's payment. Either way, the first and final month is December, so the result is the same. The \$200 deposit must be applied to the \$420 that the applicant owed for December. As the applicant paid December's fees in full, she is entitled to a refund of \$200.

29. The *Court Order Interest Act* applies to the tribunal. The applicant is entitled to pre-judgment interest on the \$200 refund from December 6, 2018, to the date of this decision.
30. Under section 49 of the CRTA and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. The applicant had partial success in this dispute. I find the applicant is entitled to reimbursement of \$62.50 for half of her tribunal fees. She did not claim any dispute-related expenses.

## **ORDERS**

31. Within 14 days of the date of this order, I order the respondent to pay the applicant a total of \$265.68, broken down as follows:
  - a. \$200 as a refund for the deposit.
  - b. \$3.18 in pre-judgment interest under the *Court Order Interest Act*, and
  - c. \$62.50 in tribunal fees.
32. The applicant is entitled to post-judgment interest, as applicable.
33. Under section 48 of the CRTA, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.

34. Under section 58.1 of the CRTA, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

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Micah Carmody, Tribunal Member