Civil Resolution Tribunal

Date Issued: October 8, 2019

File: SC-2019-003544

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *W.W. et al v. ABC Ltd.,* 2019 BCCRT 1175

B E T W E E N :

W.W. and L.W.

APPLICANT

A N D :

ABC LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Sarah Orr

INTRODUCTION

1. The applicants, W.W. and L.W., sent 2 of their grandchildren to a daycare operated by the respondent, ABC Ltd. The applicants say they provided sufficient notice to cancel the respondent's daycare services at the end of March 2019, and they want the respondent to refund their $1,832 prepayment for 1 month of daycare services for April 2019.

2. The respondent says the applicants did not provide sufficient cancellation notice, and so it is not required to provide a refund.

3. The applicants are represented by W.W. and the respondent is represented by an owner.

4. I have anonymized the parties in this decision to protect the identity of the applicants and their minor grandchildren who are all involved in ongoing family litigation.

JURISDICTION AND PROCEDURE

5. 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.

6. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.

7. 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.

8. 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.

ISSUE

9. The issue in this dispute is whether the respondent is required to refund the applicants $1,832 for one month of daycare fees.

EVIDENCE AND ANALYSIS

10. In a civil claim like this one, the applicants must prove their claim on a balance of probabilities. This means I must find it is more likely than not that the applicants' position is correct.

11. I have only addressed the parties' evidence and submissions to the extent necessary to explain and give context to my decision. For the following reasons, I dismiss the applicants' claims.

12. The parties agree that in September 2018, 2 of the applicants' grandchildren started attending the respondent's daycare.

13. The respondent submitted a contract L.W. signed on August 27, 2018 which states, "I understand that one month notice must be given in writing before the first of the last month's attended. One month's fees will be charged if proper notice is not received" (quote reproduced as written). L.W. signed her initials below this paragraph. She also signed her name to indicate that she read and fully understood the respondent's policies and procedures handbook.

14. The respondent submitted its handbook, which requires one month's notice of cancellation in writing before the first of the month that will be a child's last month in daycare in order to avoid being charged for an extra month. It states, "For example…if you give notice on September 1…and your intent is not to be in attendance for October, you will still be charged for October."

15. The applicants acknowledge that while only L.W. signed the contract, W.W. reviewed the handbook at the same time as L.W. They say the applicants each had implied authority to act for each other on matters related to their family as they were both caregivers for their grandchildren. The respondents do not dispute this, and I agree.

16. The parties agree that the applicants paid the respondent $3,404 in daycare fees for September and October 2018. The parties also agree that after the applicants made these payments, the BC Affordable Child Care Benefit (ACCB) paid the respondent the applicants' daycare fees for September and October, and the respondent refunded the applicants $1,300. It is undisputed that the respondent retained $1,832 as prepayment for future daycare fees. The applicants did not explain what happened to the $272 balance, but they are not claiming that amount in this dispute.

17. The parties agree that starting in November 2018, the ACCB paid the applicants' daycare fees directly to the respondent.

18. The applicants say that on March 1, 2019, they learned that the BC government might return their 2 grandchildren to their mother's care at the end of that month. They did not provide any evidence to show that they learned this information on this date, but it is undisputed that the applicants' plans were uncertain and that they had little control over the situation.

19. It is undisputed that on March 1, 2019, the applicants notified the respondent by email that their 2 grandchildren would no longer attend the daycare after March 31, 2019. On March 2, 2019, the respondent responded by email stating that it required one month's notice of cancellation.

20. The parties submitted March 8, 2018 text messages showing a representative of the respondent asked L.W. to "send an email to me for written notice for the kids, dated yesterday." L.W. responded, "Sure what should it say? To the end of March?" Another text message from the respondent's representative later in the conversation says, "…can you date letter yesterday's date…"

21. It is unclear why the respondent's representative asked L.W. to date her letter for March 7, 2018. However, I find the messages indicate that L.W. understood that the applicants had not cancelled their daycare services with sufficient notice to receive a refund of their $1,832 prepayment for April 2019.

22. On March 13, 2019, the respondent's representative notified the applicants by email that 30 days was "more than reasonable notice," but she said she only received their written cancellation notice on March 12, 2019. It is unclear what she meant by "reasonable notice" since she had already communicated the daycare's 1-month notice policy to the applicants. It is also unclear why she said the respondent did not receive written notice until March 12, 2019. Regardless, the parties now agree that the applicants gave written notice on March 1, not March 12, 2019.

23. On March 18, 2019, the respondent notified the applicants by letter that it would retain their fees for April 2019 because the applicants did not provide cancellation notice as required by its handbook. The respondent said that if it filled the 2 spaces for April 1, 2019, then it would refund the applicants $1,832, and if it filled the spaces mid-month it would refund the applicants $916. It said it offered this as a goodwill gesture, and that it was not required to provide any refund under the terms of the contract.

24. To date, the respondent has not refunded the applicants any part of the $1,832. The applicants acknowledge that they did not provide sufficient notice under the terms of the contract, but they make numerous arguments as to why they are entitled to a refund.

25. The applicants say the respondent filled one of the spots in early March 2019, and that this new child attended the daycare with their grandchildren that month, but they submitted no evidence to establish this, and the respondent denies it.

26. The applicants also say the respondent failed to mitigate its damages. They say they recommended someone to take 1 of the 2 daycare spots for April 2019, but the respondent informed that person that its daycare was full. However, again the

applicants provided no evidence to support this allegation, and the respondent denies it. They also say the respondent's March 3, 2019 notice that the daycare would transition to a preschool in September 2019 unreasonably impacted its ability to fill the 2 empty daycare spots. I disagree. The respondent had the right to change the nature of its business, and the applicants have provided no evidence to show that the daycare's closure 6 months later affected its ability to fill spots in April 2019.

27. The applicants say the contract was frustrated because the applicants had no control over when their grandchildren would return to their mother's care. They rely on the tribunal's decision in *Magoo's Child Care Center LTD v. Ward*, 2018 BCCRT 188 in which the tribunal said that if a contract is frustrated, neither party is obligated to continue to carry out its terms. However, a contract is only frustrated when it is impossible for the parties to fulfill the contract's terms, not just inconvenient, undesirable, or uncomfortable.

28. The applicants have not established on the evidence that they did not learn of the possibility of their grandchildren returning to their mother's care until March 1, 2019. While I appreciate the situation was likely highly stressful and undesirable for the applicants, the evidence before me does not show it was impossible for them to fulfil the terms of the contract. Therefore, I find the contract was not frustrated.

29. The applicants also say the contract was unconscionable. They rely on the tribunal's decision in *Crius Financial Services Corporation v. Yang*, 2019 BCCRT 855, in which the tribunal relied on *Harry v. Kreutziger (1978),* 19 B.C.L.R. 166 (C.A.) for the legal test for unconscionability. That test says that for a contract to be unconscionable there must be 1) proof of inequality of the parties' positions due to the weaker party's ignorance, need or distress, which would leave them in the stronger party's power, and 2) substantial unfairness in the bargain.

30. The applicants submitted a news article from June 2019 discussing the low availability and high cost of licensed daycares in Vancouver, and they say they were unable to negotiate any of the provisions in the respondent's handbook. They also say the contract allowed the respondent to terminate daycare services immediately

without notice. While the low availability of daycare may have put the applicants in a weaker bargaining position with respect to the respondent, I do not find there was substantial unfairness in the bargain. I find the requirement to provide one month's notice to cancel daycare services is a reasonable period of time to allow the respondent to find other children to fill the spots. The respondent did not terminate its services, so I find this provision of the contract is irrelevant to this dispute. On balance, I find the contract was not unconscionable.

31. The applicants also say the notice requirement in the handbook meets the definition of a penalty clause. It relies on the tribunal's decision in *Super Save Disposal Inc. v. K.M.I. Holdings Ltd.*, 2018 BCCRT 285, in which it said the court's duty is to assess whether a liquidated damages clause is a genuine pre-estimate of the anticipated losses or a clause intended to compel performance of the contract. However, the notice period clause in the contract in this case is not for liquidated damages. I find the intent of that clause is to allow the respondent a reasonable amount time to fill an unused daycare spot, and I find it is not a penalty clause.

32. The applicants also say the respondent was unjustly enriched by keeping their prepayment for April's fees. However, to establish unjust enrichment the applicants must show that there was no "juristic reason" for the respondent's enrichment and the applicants' corresponding loss (see *Garland v. Consumers' Gas Co.,* 2004 SCC 25 (CanLII) at paragraph 30). I find the notice term in the contract is a valid "juristic reason," and I have not found the contract to be frustrated, unconscionable, or otherwise invalid. Therefore, I find the respondent was not unjustly enriched.

33. I appreciate that the applicants are going through a difficult, unpredictable, and ongoing legal situation with their family. While the respondent had the option to make an exception to its established 1-month notice policy given the applicants' difficult circumstances, it chose not to do so. I find the applicants have not established any legal basis entitling them to a refund, and so I dismiss their claims.

34. 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. I see no reason in this case not to follow that general rule. Since the applicants were unsuccessful I find they are not entitled to reimbursement of their tribunal fees or dispute-related expenses.

35. The respondent claims $336 in legal fees. However, under its rules the tribunal only awards reimbursement of legal fees in extraordinary circumstances, and I find there is nothing extraordinary about this case. I dismiss this claim.

ORDERS

36. I dismiss the applicants' claims and this dispute.

37. I dismiss the respondent's claim for legal fees.

Sarah Orr, Tribunal Member