Civil Resolution Tribunal

Date Issued: March 22, 2019

Files: SC-2018-006033 and SC-2018-006794

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Rosey Cheeks Daycare et al v. Gupta*, 2019 BCCRT 360

B E T W E E N :

Rosey Cheeks Daycare and Marella Crudgington

APPLICANTS

A N D :

Umesh Gupta

RESPONDENT

A N D :

Rosey Cheeks Daycare

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member: Kate Campbell

INTRODUCTION

1. This dispute is about daycare fees.

2. Umesh Gupta sent his child to Rosey Cheeks Daycare (the Daycare), which is co-owned by Marella Crudgington (MC).

3. For convenience, in this decision I refer to the Daycare and MC as the applicants, and Umesh Gupta as the respondent, although Umesh Gupta filed a counterclaim is therefore also an applicant.

4. The applicants say the respondent owes $1,175 in daycare fees, as he did not give 4 weeks' notice as required in its termination policy.

5. The respondent denies this claim, and says he paid in full and gave 4 weeks' notice as required under the parties' contract. In his counterclaim, the respondent says that on 7 occasions the Daycare was not open at 7:30 am as promised, so he could not send his child to the daycare on those days and missed hours from work. The respondent seeks a refund of $385 for daycare services on those 7 days, plus $1,000 as compensation for lost wages. The respondent also says AH, a principal of the Daycare, threatened and harassed him, and he seeks an order that she stop.

6. The applicants deny the respondent's counterclaims.

7. The applicants are represented by AH. The respondent is self-represented.

8. Based on the provided evidence, I find that neither the applicants nor the respondent have proven their claims. For the reasons set out below, I dismiss the applicants' claim, and the respondent's counterclaims.

JURISDICTION AND PROCEDURE

9. 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* (Act). 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.

10. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the tribunal'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 BC Supreme Court recognized the tribunal's process and found that oral hearings are not necessarily required where credibility is in issue.

11. 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.

12. Under tribunal rule 126, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

ISSUES

13. The issues in this dispute are:

    a) Did the respondent provide the required notice to terminate service, and if not, must he pay the applicants $1,175 in daycare fees?
    b) Is the respondent entitled to $1,000 in compensation for work missed due to the Daycare's changed hours?

c) Is the respondent entitled to a refund of $385 for daycare services not provided?
d) Should I order AH to stop threatening and harassing the respondent?

EVIDENCE AND ANALYSIS

14. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. This means the applicants must prove their claim, and the respondent must prove his counterclaims. I have only addressed the evidence and arguments to the extent necessary to explain my decision.

15. The parties agree that the respondent's child began attending the Daycare in June 2018. The respondent signed the Daycare's written contract on June 4, 2018.

Payment in Lieu of 4 Weeks' Notice

16. The written contract states that in order to terminate service, a parent is required to provide notice 4 weeks prior to the last day of care. It says that if notice is not given, full payment is expected.

17. On July 1, 2018, the Daycare sent an email to parents, including the respondent, updating various policies, including notice requirements. The email said that in order to cancel care, notice must be provided on the 1st of the month, with a minimum of 1 months' written notice. The email said that any notice of cancellation provided after the 1st of the month would take effect in the second month.

18. On July 9, 2018, the respondent sent the applicants an email giving notice to end daycare services as of July 31, 2018. The applicants say this notice did not meet the requirements of the updated termination policy or the signed contract between the parties, so the respondent owes it $1,175 for daycare fees for August 2018.

19. The respondent says that since he gave notice on July 9, he was only required to pay for 4 more weeks (until August 9), which he did. He says he was not required to pay for all of August 2018 under the terms of the signed contract, and that the

Daycare's policies changed too often, suddenly, and without consent, so they are not binding on him.

20. I accept that the Daycare was entitled to make changes to the contract, with proper notice. However, I find the change to the Daycare's termination policy is not binding on the respondent in the circumstances of this dispute, as he did not have sufficient notice of the policy change.

21. When the respondent signed the contract on June 4, it only required 4 weeks' notice. There was no stipulation that notice be given by the 1st of the month, or that notice could not take effect until the following month. Under the terms of the contract, the respondent was only required to pay until August 9, given his emailed notice on July 9.

22. The Daycare sent out the policy change to the respondent and other parents on at 12:38 pm on July 1, 2018. By doing so, they effectively gave any parent wanting to cancel daycare services at any time before August 31 less than 12 hours to give written notice. Given that most would not see the email immediately, the notice window was even less. I find this was unreasonable in the circumstances. In order to change the terms of the written contract and impose a requirement for notice by the 1st of the month, the Daycare ought to have notified the respondent of the change before the 1st of the month.

23. For these reasons, I find the respondent gave sufficient notice to cancel service, and is not required to pay any additional amount. I dismiss the applicants' claim for payment.

COUNTERCLAIMS

Operating Hours

24. The respondent says that on 7 occasions the Daycare was not open at 7:30 am as promised, so he lost hours from work.

25. The applicants deny the respondent's claims. They say the Daycare was opened each day at 7:30 by AH, or by MC when AH was on vacation.

26. The contract says the Daycare's hours were 7:30 am to 5:00 pm. I find the respondent has not proven his claim that the Daycare did not open at 7:30 am as required. While he says this happened 7 times, he did not provide the specific dates, and had no notes or records showing what time he arrived and how long he stayed.

27. Also, there is no correspondence confirming any incident where the respondent arrived and the Daycare was closed. I find that it more likely that if this had occurred, the respondent would have texted or emailed the Daycare staff, since the records show he corresponded with them frequently on other matters.

28. In a July 6, 2018 text, he said he wanted to start dropping off his child at 7:00 am (which was not part of the original contract). As previously noted, the contract only required the Daycare to open at 7:30, and not at 7:00. I find that the respondent would likely have raised the issue of finding the Daycare closed in that correspondence, if it had occurred. I also note that the applicants did not refuse this request, but instead agreed to arrange it starting on July 16.

29. In a June 22, 2018 email, the respondent asked the applicants to give him a "window" when he could drop off his child, and he would follow that. This was in response to the applicants' email asking him to maintain regular drop off and pick up times. Again, the respondent did not raise the issue of finding the Daycare closed in this correspondence. Similarly, in a July 30 text the respondent said the Daycares "sudden changes" were affecting his schedule, but he did not mention missing work or finding the Daycare closed.

30. On June 26, 2018, AH texted the respondent asking him to text her if he was going to drop off his child before 8:00 am. Similarly, on June 1, 2018 the applicants emailed all parents and said that for any drop offs before 8:00 am, parents should notify caregivers the night before by texting 2 provided numbers, or by sending an

email. I do not accept the respondent's argument that this constituted "pressure", and was contrary to the contract. Rather, I find that this was a reasonable request, and there is no evidence before me indicating that the applicants refused to open at 7:30, or that the respondent sent a text as requested and then was not able to drop off his child at 7:30.

31. For these reasons, I find the respondent has not met the burden of proving that the Daycare did not open as required in the contract.

32. I find the timesheet provided by the respondent is not sufficient evidence to establish that the Daycare was not open at 7:30. While the timesheet records the respondent's total hours worked each day, it does not specify a start time, and it does not indicate why he worked less than 8 hours on any given day. For example, it is possible that he left early on some occasions, or was late for reasons unrelated to the Daycare. Also, the respondent created the timesheet himself, and is not supported by any pay records from his employer.

33. Significantly, the timesheet does not show the respondent's hourly pay rate, and there is no other evidence such as a payroll slip to establish that rate. Also, the respondent gave contradictory statements about how much income he lost. In the Dispute Notice he said he lost $1,000 and in his submissions he said he lost $1,385. Since there are no financial records to support either claim, I find the respondent is not entitled to any compensation for lost wages, even if he had proven that the daycare did not open at the required time. I dismiss this claim.

$385 for Service Not Used

34. The applicant claims $385 for daycare service he says he did not use because the Daycare was closed when he arrived. For the reasons set out above, I find the respondent has not proven that the Daycare did not open as required. Accordingly, I dismiss this claim.

35. I also note that in his submissions, the respondent requested reimbursement for "late fees", but he did not provide an explanation of these fees, such as an amount or particulars. For that reason, I do not order reimbursement of late fees.

Harassment

36. The respondent says AH threatened and harassed him, and requests an order that she stop doing so. I find that none of the documents provided in evidence establish any conduct or statements rising to the level of threats or harassment. While the parties clearly had disagreements, I find the respondent has not proved harassment or threats by AH. I therefore decline to issue any order, and dismiss this claim.

Negligence Allegation

37. The respondent says that the Daycare was negligent in caring for his child. The applicants deny this allegation.

38. I find that it is not necessary for me to determine whether the Daycare provided negligent care, as the respondent did not claim a remedy for negligence, and the contractual issues of payment can be resolved without a finding about negligence. However, I note that the evidence provided by the applicant does not support these very serious allegations.

Fees and Expenses

39. Under section 49 of the Act, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees. As the applicants claim was unsuccessful, I deny their request for reimbursement of tribunal fees and dispute-related expenses. Since the respondent's counterclaims were unsuccessful, I also deny his reimbursement requests.

ORDERS

40. I dismiss the applicants' claim, the respondent's counterclaims, and these disputes.

Kate Campbell, Tribunal Member