Date Issued: November 28, 2019

File: SC-2019-004535

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *JF v. AA*, 2019 BCCRT 1338

B E T W E E N :

JF

APPLICANT

A N D :

AA

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Trisha Apland

INTRODUCTION

1. The applicant, JF, is a behavior interventionist. The applicant worked under contract for the respondent, AA, providing therapy for his 5-year-old twins with autism.

2. The applicant claims a total of $930.00 for 15.5 hours of work. The respondent says this is double the agreed amount and he owes only ½ that amount through his children's government autism funding.

3. The applicant is self-represented. The respondent is represented by the Executive Director of Autism Community Training ("DP").

4. In the published version of this decision, I have anonymized the parties' names to protect the privacy of the respondent's minor children who are not parties.

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. Some of the evidence in this dispute amounts to a "she said, he said" scenario. Credibility of interested 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. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me.

7. 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.

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.

10. In addition to her monetary claim, the applicant asks that the respondent not yell at her or cause her “emotional harm” when she talks to him about the dispute. The tribunal does not have inherent jurisdiction to grant injunctive relief. I can only order a party to stop doing something where permitted under section 118 of the CRTA. I find the applicant’s requested non-monetary resolution is not for specific performance of an agreement relating to personal property or services and does not otherwise fall under section 118. In any event, I find the applicant submitted insufficient evidence to corroborate this aspect of her claim. I decline to grant the requested injunctive remedy and refuse to resolve this aspect of the claim.

ISSUE

11. The issue in this dispute is whether the applicant is entitled to payment per child, per hour.

EVIDENCE AND ANALYSIS

12. In a civil claim such as this, the applicant bears the burden of proving her claims on a balance of probabilities. I have only addressed the evidence and arguments to the extent necessary to explain my decision.

13. On April 2, 2019, the respondent hired the applicant behavior interventionist to provide therapy to the respondent's two children through the Ministry of Children and Family Development (MCFD), Autism Funding Program (the program). The applicant conducted 7 therapy sessions between April 12, 2019 and May 17, 2019. The parties had no written service provider contract. These facts are not disputed.

14. As background, MCFD provides families with $22,000 a year in funding to pay for early intervention programs for children under the age of 6 and diagnosed with autism. The funds are held by MCFD's Autism Funding Branch for each child. Under this program the parent is the employer, not MCFD. The parent hires the behavior interventionist and negotiates the wage, which is then submitted to MCFD for approval under its fee guidelines. Once approved, the behavior Interventionist directly bills MCFD through its online portal, and MCFD directly pays the behavior interventionist from the child's funding account up to the maximum authorized amount. These facts are also not disputed.

15. On May 28, 2019 the applicant submitted her list of hours to the program's behavior consultant and manager, "JM", who had developed and oversaw the intervention program for the respondent's children. According to the submitted list, the applicant claimed a total of $930 for 15.5 hours over 7 sessions. The applicant says she worked simultaneously with both children and is entitled to $60 per hour for each session, (or $30 per child, per hour). The respondent and JM both say they only approved the applicant to bill a total of $30 per hour, and not per child. Additionally, they say for some sessions, the applicant claimed time for working with 2 children when there was only 1 child at the session. On receipt of the applicant's list, JM and the respondent say they contacted MCFD, and MCFD "blocked" the applicant's

ability to "double-bill". MCFD made a total of 15.5 hours of funding available at $30 per hour for both children combined. This is not in dispute.

16. An August 27, 2019 email written by a MCFD program representative states that it was up to the parties to decide whether the applicant could "charge the full rate for both children or divide the rate billed" when working with twins. In other words, MCFD leaves it to the parties to negotiate the terms of their individual service contracts.

17. The key issue in this dispute is whether the parties agreed to $30 per hour, per child, when the children's sessions were held together. In other words, $60 per hour for joint sessions. On the weight of the evidence, I find they did not. My reasons follow.

18. To support her position, the applicant relies on the MCFD's Request to Pay form, authorization letters, and a statement from a former behavior interventionist ("MH") who states double-billing is industry practice. As for the latter, I put little weight on MH's statement because she does not say how she came to know the industry-wide practice. Further, MH's statement is contrary to the evidence of witnesses, JM and DP, who are both undisputedly professionals in the field with years of experience overseeing the program. Both JM and DP say the normal industry practice is to bill per hour and not per child in sessions where children are together. I find their position on industry practice is supported by the job postings in evidence.

19. The applicant argues that the form and authorization letter show that the parties agreed to an hourly rate of $30 per child because there is a separate document for each child and each one states that the applicant's approved fee is $30 per hour. The respondents' representative, DP says she managed the program's complaints process from 2005 to 2017 and developed the program's informational materials. DP states that the documents show only the amount of the children's approved funding envelope. I accept DP's evidence as expert evidence as I find it meets the criteria under tribunal rule 8.3. I am persuaded by DP's experience with the program that her interpretation of the documents is correct. I find the documents do not prove

that the parties agreed the applicant could double-bill sessions where the children were together.

20. I find the applicant provided no objective and persuasive evidence that the parties agreed to $30 per hour, per child. On the other hand, the respondent's version of what was agreed is supported by JM, who has firsthand knowledge of the parties' agreement having participated in the hiring process and overseen the service contract. Additionally, I find the respondent's position is consistent with industry practice. Therefore, I find it more likely than not that the parties agreed to $30 per hour when both children were present, and not $60 for joint sessions.

21. Even if the parties agreed to double-billing, I find the applicant's list of hours in evidence is not sufficiently detailed to establish that she worked the numbers claimed with both children. Therefore, I find the applicant would still not have established that she is entitled to the full $930 because the evidence does not establish that she provided the services to both children.

22. The respondent agrees that the applicant is entitled to a total of $465 for $15.5 hours work at $30 per hour. In her submission, the applicant says the respondent should either pay her through MCFD or "from his own pocket". The respondent says the funds have been available to the applicant through the MCFD portal, which is corroborated by his representative DP. The applicant says she does not accept the offer of $465, but does not dispute that the funding was available to her in MCFD's portal if she had invoiced MCFD for it.

23. DP submitted evidence on the respondent's behalf that MCFD has a six-month deadline for a service provider to invoice a child's funding account, which has now passed. DP says that she and the respondent have been working with MCFD to allow an extension, and she expects it will extend the timeline until about December 22, 2019 for the applicant to submit her invoice on the funds and that the funds will remain in the accounts. The applicant provided no substantive reply to this limitation. However, I infer from her submissions that she is expecting to be paid

directly from the respondent if the funding is not available through MCFD. More below.

24. The tribunal cannot order a third party to do something. This means I cannot order MCFD to release the funds after the deadline or at all. Accordingly, I find it would not be appropriate for me in the circumstances, to order the respondent pay the applicant through the portal. If it ends up that MCFD's deadline bars payment, the respondent would not be able to comply with the order. I will not make an order that a party cannot comply with for reasons outside of their control. There is nothing in my decision that prevents the applicant from pursuing a claim against the MCFD directly, subject to any applicable limitation period.

25. As for "out of pocket" payment, I find the applicant has not established that the respondent is personally liable from his own funds to pay for the services. This is because it is undisputed that the parties entered into the service provider contract as part of MCFD's Autism Funding Program and that they agreed the applicant would be paid from MCFD directly with the funds it is holding for each child. I find no evidence that the respondent agreed to pay "from his own pocket" or outside the funds allocated to his children by MCFD. Therefore, I decline to order the respondent to pay the applicant's fees from his "own pocket".

26. For these reasons, I dismiss the applicant's claim for payment.

27. 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 find the applicant was primarily unsuccessful in this dispute. Therefore, I dismiss the applicant claims for her tribunal fees and dispute-related expenses.

28. Again, I anonymized the parties' identities to protect the identity of the respondent's minor children, who are not parties to this dispute.

ORDER

29. I dismiss the applicant's claims and this dispute.

Trisha Apland, Tribunal Member