



# Civil Resolution Tribunal

Date Issued: January 21, 2020

File: SC-2019-006617

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Clouston v. Ildiko deRoy (dba Step By Step In Home Multi Age Childcare Centre)*, 2020 BCCRT 71

B E T W E E N :

KIRSTEN CLOUSTON

**APPLICANT**

A N D :

ILDIKO DERROY (Doing Business As STEP BY STEP IN HOME MULTI AGE CHILDCARE CENTRE)

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Micah Carmody

## INTRODUCTION

1. This dispute is about fees for childcare services.

2. The applicant, Kirsten Clouston, says the respondent, Ildiko deRoy doing business as Step By Step In Home Multi Age Childcare Centre, could not provide care for her twin children as agreed. The applicant seeks a refund of \$2,115 for July 2019 childcare fees, plus \$800 for the 2 deposits and \$100 for the 2 registration fees. She also seeks \$837.59 for time she missed work to care for the children and find a new childcare provider.
3. The respondent says she cared for the children for the first week of July before realizing she needed an exemption from her licensing officer. She was prepared to care for them in August and beyond, but the applicant withdrew without notice. She says the childcare fees, deposit and registration fees are non-refundable, so the claims should be dismissed.
4. Both parties are self-represented.

## **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. 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.

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. Where permitted by section 118 of the CRTA, in resolving this dispute the tribunal may order a party to do or stop doing something or pay money. The tribunal may also order any terms or conditions the tribunal considers appropriate.

## **ISSUES**

9. The issues in this dispute are:
  - a. Is the applicant entitled to any refund for the July 2019 daycare services?
  - b. Is the applicant entitled to any refund for the deposit and registration fee?
  - c. Is the applicant entitled to compensation for lost wages?

## **EVIDENCE AND ANALYSIS**

10. In a civil claim such as this, the applicant must prove their claim on a balance of probabilities. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain my decision.
11. The following background facts are not in dispute. On June 1, 2019, the applicant registered her children in the respondent's childcare centre by completing a registration form. The applicant paid the respondent \$900 on May 31 for two \$400 deposits and two \$50 registration fees.

12. On June 27, 2019, the applicant paid the respondent \$2,115 for July daycare fees. The agreed-upon days of care were Tuesday through Friday, and there were 18 applicable days in July payable at \$58.75 per day.
13. On July 2, 2019, the children began attending the respondent's childcare centre. The first week was a "transition week", with gradually increasing hours. They were scheduled to begin full-time attendance on July 9, 2019.
14. On July 8, the respondent told the applicant that she could not care for the children because of regulatory limits on the number of children under a certain age in her care. The respondent offered to ask her licensing officer for an exemption, and the applicant agreed to wait for the outcome. The initial request to the licensing officer was denied.
15. The children's birthday was at the end of July, which would put them in a different category under the regulations. On July 9, the applicant texted the respondent to ask if she was "100% positive" that she could take the children after their birthday. The respondent replied, "yes".
16. The parties spoke on July 12 and the content of that discussion is in dispute, which I return to below. On July 12, the respondent advised the applicant by text message that the only days she could care for the children in July were July 16, 17, 23 and 24. The applicant replied that she had to look elsewhere for care.
17. On July 15, the applicant formally requested a refund. On July 23, the respondent wrote to the applicant, advising that she could take the children in August except Thursdays. She also said the deposit could be applied to August's fees, but there would be no refund.

### ***July 2019 daycare services***

18. The parties disagree about who terminated the childcare contract and why. In her Dispute Response, the respondent said that the applicant failed to provide 1 month's notice. I find this indicated her position was that the applicant terminated

the contract. However, in later submissions the respondent says she terminated the contract by providing a "Termination of Care" form on July 12, 2019. She says she did this because she felt "bombarded" by the applicant's high volume of emails, texts and phone calls. Neither party provided the Termination of Care form. Elsewhere in her submissions, the respondent says she terminated the contract because the applicant suggested contacting the respondent's other clients and asking them to look elsewhere. I find the respondent's position is inconsistent.

19. The respondent's evidence is also internally inconsistent. In the respondent's July 23 letter to the applicant she stated that she was able to provide care for August, and advised that if the applicant wished to withdraw, she had to provide 1 month's written notice. The letter does not square with the respondent's earlier decision to terminate the contract and provide a Termination of Care form on July 12, 2019.
20. The respondent also submits that she guaranteed care for both children from September 2019 and onward. The applicant disagrees and says that on July 12, 2019 the respondent said she could only care for the children until the end of August, and that the applicant would have to find alternative care for September. The applicant says the respondent told her that she had too many children in her care after August. On balance, I prefer the applicant's evidence on this point because it is more consistent with the parties' text messages and emails. I find that the respondent was unable to provide care for the children beyond August. I also find that the respondent said she could not care for the children on Thursdays, consistent with her July 23 letter.
21. The applicant says she had no choice but find alternative care for her children. I agree. I find that providing care for the children 4 days per week was a fundamental contractual term. I find that applicant breached that term on July 9, by failing to provide childcare that week. Although the applicant agreed to wait for approval, I find that agreement was conditional on the respondent's promise that she would obtain an exemption, and that the respondent could care for the children as agreed (4 days per week) after their birthday, in August and beyond. The respondent could

not fulfill either promise. It is undisputed that the respondent was only able to care for the children for 4 days in July after the transition week, so I find that she did not obtain the exemption. It is also undisputed that the respondent could only provide care for 3 days per week in August. Finally, I have found that she was unable to care for the children after August.

22. In contract law, if a party shows an intention not to perform an essential aspect of a contract, the innocent party is entitled to treat the contract as being at an end. In that case, the innocent party will not be required to perform further obligations. I find that on July 8 when the respondent informed the applicant that she could not take the children that week, the respondent breached the contract. I find that on July 12, when the respondent advised that she could only care for the children 3 days per week in August, and not at all in September, the applicant was entitled to treat the contract as being at an end. I therefore find the applicant is entitled to a refund for services after the first week.
23. I make this finding despite clear language in the contract saying there will be no refunds under any circumstances. This is because I find those provisions only apply when the contract is in force, not when the contract is at an end because of the respondent's breach.
24. So, how much of a refund for July's daycare fees is the applicant entitled to? The applicant had the benefit of four introductory days of childcare the first week before the contract ended. From the parties' correspondence it is clear that the days were treated as regular days – there was no discount for introductory days. Under the parties' agreement, each day was charged at \$58.75 per child. Accordingly, I find applicant is entitled to a refund of the remaining 14 days, or \$1,645.

### ***Registration fee and deposit***

25. The registration fee covered the children's registration in the respondent's childcare centre. The contract said the fee is non-refundable, and there is no evidence that the applicant understood otherwise. The respondent's breach happened after the

registration and after providing a week of care. I find that the applicant is not entitled to a refund of the registration fee.

26. As for the two \$400 deposits, the parties' written contract said deposits will be applied to the last month's fees provided 1 month's written notice is given. However, given that the respondent's breach brought the contract to an end during the first month, I find the applicant was not required to give 1 month's notice and the deposits should have been applied to July's fees. Accordingly, I find that the respondent must refund the deposits, totaling \$800.

### ***Compensation for lost wages***

27. The applicant says she had to take time off work to care for her children and search for a new daycare. I accept that. She provided a summary of the days and hours she spent caring for her children, which I also accept. She claims compensation for the hours at an hourly rate, presumably her hourly wage in her regular employment. However, the applicant bears the burden of proving her loss. She did not provide evidence of lost wages, such as wage statements showing the days she missed work and the resulting wage loss. Elsewhere in her evidence she admitted that she was able to use paid vacation time, or paid sick days from her employer. I find that the applicant has not proven her claim for lost wages.
28. In sum, I have found that the applicant is entitled to reimbursement of \$1,645 for the July childcare fees plus \$800 for the deposit. In total, she is entitled to \$2,445.
29. The *Court Order Interest Act* applies to the tribunal. The applicant is entitled to pre-judgement interest on the reimbursement from July 15, 2019 when the contract was at an end, to the date of this decision. This equals \$24.95.
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. I see no reason in this case not to follow that general rule. I find the applicant is entitled to reimbursement of \$175 in 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 \$2,644.95, broken down as follows:
  - a. \$1,645.00 as partial reimbursement for July 2019 childcare fees,
  - b. \$800.00 as a refund of the deposit,
  - c. \$24.95 in pre-judgment interest under the *Court Order Interest Act*, and
  - d. \$175.00 in tribunal fees.
32. The applicant is entitled to post-judgment interest, as applicable.
33. The applicant's remaining claims are dismissed.
34. 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.
35. 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