Civil Resolution Tribunal

Date Issued: June 17, 2021

File: SC-2020-006862

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Arabiana v. Bafkar dba Everyday Sunshine Family Childcare*
2021 BCCRT 665

B E T W E E N :

JAKE ARABIANA

APPLICANT

A N D :

MAHNAZ BAFKAR (Doing Business As EVERYDAY SUNSHINE FAMILY CHILDCARE)

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Micah Carmody

INTRODUCTION

1. This dispute is about a deposit for childcare services.

2. In August 2018, the applicant, Jake Arabiana, signed a contract for childcare with the respondent, Mahnaz Bafkar (Doing Business As Everyday Sunshine Family Childcare) and paid a $1,600 deposit.

3. On November 1, 2019, Mr. Arabiana gave notice of his intention to withdraw his child from Ms. Bafkar's care effective November 30, 2019. Mr. Arabiana says he gave 30 days' notice as required under the contract, so the $1,600 deposit should have been applied to the last month's fees. Mr. Arabiana seeks a refund of $1,600.

4. Ms. Bafkar says Mr. Arabiana was required to give 60 days' notice, based on a second contract the parties signed in August 2019. She says Mr. Arabiana is therefore not entitled to a deposit refund. Mr. Arabiana acknowledges that he signed the 2019 contract but says the notice period change is not enforceable. This dispute therefore turns on whether a 60-day or 30-day notice period was applicable.

5. Both parties are self-represented. For the reasons that follow, I find the applicable notice period was 60 days and I dismiss Mr. Arabiana's claims.

JURISDICTION AND PROCEDURE

6. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

7. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, the 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 able to assess and weigh the evidence and submissions before me. Bearing in mind the CRT's mandate that includes proportionality and prompt resolution of disputes, I decided to hear this dispute through written submissions.

8. Section 42 of the CRTA says the CRT 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 CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

9. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

ISSUE

10. The issue in this dispute is whether Mr. Arabiana was required to give 30 or 60 days' notice to be eligible for the claimed $1,600 refund.

EVIDENCE AND ANALYSIS

11. As the applicant in this civil dispute, Mr. Arabiana must prove his 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.

12. On August 15, 2018, Mr. Arabiana enrolled his child in Ms. Bafkar's childcare centre and the parties signed their first contract (2018 contract). The 2018 contract said Mr. Arabiana must pay a $1,600 deposit upon registration, which he paid.

13. The 2018 contract said the deposit was not refundable in the event of cancellation of care, but would be applied to the last month's fee when proper notice of withdrawal was given. The 2018 contract said Mr. Arabiana must give 30 days' written notice of

withdrawal, and if proper notice is not given, the deposit is forfeited. It said, by way of example, that if the last day of care will be June 30, notice must be given by June 1.

14. Ms. Bafkar says in June 2019 she and the other parent of Mr. Arabiana's child had an incident and she gave them 1 month's notice to find another childcare provider. She says after a vacation period in July, Mr. Arabiana wished to continue with Ms. Bafkar's childcare in August, so she required him to sign a new contract. Mr. Arabiana does not dispute this. Ms. Bafkar also she says she wanted a longer notice period because the process of enrolling a new family is time consuming.

15. On August 19, 2019, the parties signed another contract (2019 contract). In the notice period clause, "30" is crossed out and "60" is written above it. As well, the months used in the example are changed to reflect 60 days' notice, rather than 30.

16. Mr. Arabiana originally argued, in written submissions he filed as evidence, that Ms. Bafkar changed the notice period in the 2019 contract from 30 days to 60 days after he signed it. It appears that he abandoned that argument after seeing Ms. Bafkar's evidence, before the argument submission stage. Ms. Bafkar's evidence demonstrated that the 2019 contract the parties signed was based on a photocopy of a template contract on which she had made several additions and amendments by hand. It was similar to the 2018 contract but with more additions and amendments. One of those amendments was the 60-day modification. The parties signed the photocopied contract in blue ink. Although it no longer appears to be in dispute, for certainty I find that the notice period in the 2019 contract was already changed from 30 to 60 days when Mr. Arabiana signed it.

17. Mr. Arabiana's argument in his written submissions is that when he signed the 2019 contract, he was not aware of the change from 30 to 60 days' notice. He says Ms. Bafkar did not review all of the changes with him, did not advise him that she had changed the notice period, did not ask him to initial the notice period change, and did not give him a copy of the 2019 contract after he signed it, despite his requests. He argues that the 60-day notice period therefore did not apply, and the 30-day notice period from the 2018 contract continued to apply.

18. Ms. Bafkar says when they signed the 2019 contract she explained that some terms had changed and that by signing the new contract he would be bound by the new terms. She does not say that she brought it to Mr. Arabiana's attention that the notice period had changed. For the reasons that follow, I find that Ms. Bafkar was not required to bring to Mr. Arabiana attention that the notice period had changed.

19. A signature on a written agreement normally demonstrates consent to the agreement's terms. However, in some circumstances, surprisingly onerous or unfair contract terms will be unenforceable if the party presenting the contract does not draw the terms to the signing party's attention. Those circumstances include where the party presenting the contract knows that the other party will not read it, where the contract is a standard form contract or not written in plain language, and where the term is in small type or faint and hardly legible: *Tilden Rent-A-Car Co. v. Clendenning*, 1978 CanLII 1446 (ON CA). This requirement is a limited principle and does not generally excuse a party's failure to read a contract (*Apps v. Grouse Mountain Resorts Ltd*., 2020 BCCA 78, at paragraph 79).

20. I find that the 2019 contract was not the type of contract referred to in *Clendenning* and similar cases. This was not a lengthy, standard form contract presented in a rushed consumer transaction like the car rental contract in *Clendenning*. This was a contract about childcare. It was 3 pages long and written in plain language, with appropriate headings. There was no fine print or "legalese".

21. I also find that the 60-day notice period clause was not onerous or unusual. The contract contained several clauses creating corresponding obligations for the parents and benefits for Ms. Bafkar, such as late fees, paid vacation, and closure days. In this sense, the notice clause was not out of place. I do not consider the increase from 30 days to 60 days' notice particularly onerous given the need to secure new placements. The notice clause was not confusing or difficult to understand. It was on the first page of the contract, under a clear "Notice" heading.

22. Mr. Arabiana argues that the change from 30 days to 60 days required the parties' initials to acknowledge it. Although initialing minor contractual changes serves to

indicate that both parties were aware of the change when they signed, the absence of initials does not necessarily make a modified term unenforceable*: Cariboo-Chilcotin Helicopters Ltd. v. Ashlaur Trading Inc*., 2006 BCCA 50. Although the change from 30 to 60 days' notice is a hand-written change, there are several hand-written changes in the contract, including several clauses Ms. Bafkar added. Both the 2018 and 2019 contracts are a mix of template wording and hand-written wording. I find it would be unreasonable to require every hand-written entry or change to be initialed in order to be enforceable.

23. Ms. Bafkar did not dispute Mr. Arabiana's assertion that he asked for a copy of the 2019 contract and she did not provide it until after he cancelled the contract, nearly 2 months later. However, I am not aware of any applicable legal requirement to provide a copy of a written contract in the circumstances here. Mr. Arabiana does not suggest that he did not have sufficient time to read the contract or provide any other reason he was not bound by it.

24. I find that Mr. Arabiana was required to give 60 days' written notice under the 2019 contract. As he undisputedly gave 30 days' notice, he is not entitled to any refund.

25. Under section 49 of the CRTA and CRT rules, a successful party is generally entitled to recover their CRT fees and reasonable dispute-related expenses. Ms. Bafkar was successful but did not pay fees or claim expenses. I dismiss Mr. Arabiana's claim for reimbursement of CRT fees.

ORDER

26. I dismiss Mr. Arabiana's claims and this dispute.

Micah Carmody, Tribunal Member