Civil Resolution Tribunal

Date Issued: August 4, 2023

File: SC-2022-009502

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *J.M. v. K.M.*, 2023 BCCRT 655

B E T W E E N :

J.M.

APPLICANT

A N D :

K.M.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Leah Volkers

INTRODUCTION

1. This dispute is about childcare services. The applicant, JM, says she entered into a childcare services contract with the respondent, KM, for her two children, SM and LM.

2. In late September 2022, KM provided 5 weeks' notice that she would terminate the childcare services contract unless LM and SM received the COVID-19 vaccine. JM says KM doing so unilaterally changed the contract's terms, in breach of the contract. JM collectively claims $3,137.65 for a refund of some daycare fees, reimbursement of a government childcare subsidy, increased childcare fees paid elsewhere, and damages for mental distress, frustration, anxiety and inconvenience.

3. KM denies breaching the childcare services contract. She says she was entitled to terminate the contract and has already reimbursed JM for the childcare subsidy. She says she owes nothing further.

4. The parties are each self-represented.

5. I anonymized the parties' identities to protect the identity of two minor children.

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. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.

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.

SM and LM's claims

10. Both SM and LM were initially named as parties to this dispute through JM as their litigation guardian. They both claimed damages for inconvenience, frustration and anxiety as a result of KM's alleged breach of contract. In her submissions, KM argues that neither SM nor LM were parties to the daycare services contract, and says neither were entitled to any damages flowing from the alleged breach of contract. In her reply submissions, JM explicitly agrees with KM on this issue. As their litigation guardian, JM says she withdraws SM and LM's claims for damages on that basis. Therefore, I find SM and LM's respective claims for damages in this dispute have been withdrawn, and I have amended the style of cause accordingly.

11. JM argues that her children's distress is still relevant to her own damages claim because of how it impacted her as their primary caregiver. I will address JM's claims below.

Additional requested remedy

12. In her final reply submissions, JM asks for an order that KM stop her alleged public campaign to damage JM's reputation related to this dispute. I decline to grant this requested order for several reasons.

13. First, an order for someone to stop doing something, like slandering or defaming JM, is known as "injunctive relief". With limited exceptions that do not apply here, under CRTA section 118, orders for injunctive relief are outside the CRT's small

claims jurisdiction, so I cannot make such an order. Second, CRTA section 119 expressly says the CRT has no jurisdiction over claims for defamation, which I find is what this request is essentially about. Finally, JM did not raise this claim in her application for dispute resolution. I find it is not properly before me and it would be procedurally unfair to consider this requested remedy given that KM has not had the opportunity to respond to it in any event. For all these reasons, I have not further addressed this additional requested remedy in this dispute.

Subsidy reimbursement

14. One of JM's claimed remedies is reimbursement of a government childcare subsidy for August and September 2022. The evidence shows KM reimbursed JM $1,432.34 for her August and September subsidy, and JM acknowledges she was reimbursed the subsidy amounts paid to KM. So, I find JM has already received reimbursement of her August and September 2022 subsidy for the days KM provided care.

15. However, in submissions, JM says KM only reimbursed her $959.14 for her September 2022 subsidy and argues that her September 2022 subsidy was reduced by $169.26 because KM only provided care for 17 days in September 2022 instead of 20 days. So, I find JM claims the $169.26 difference between the maximum September 2022 subsidy amount and the reimbursed amount as damages for breach of contract. I will discuss JM's breach of contract claim below.

Claim amount

16. In the Dispute Notice, JM collectively claimed a total of $3,047.65. In submissions, the amount changed to $3,137.65, without explanation. CRT staff advised me that JM requested to change the claim amount to reflect an error in how she calculated part of her claimed damages. CRT staff changed the claim amount but did not amend the Dispute Notice to reflect this change. In any event, given my findings below, I find nothing turns on this increased claim amount. So, I have not addressed it further.

ISSUES

17. The issues in this dispute are:

    a. Did KM breach the parties' contract when she ended it with 5 weeks' notice?

    b. If so, is KM responsible to pay any of JM's claimed damages?

EVIDENCE AND ANALYSIS

18. In a civil claim like this one, JM, as the applicant, must prove her claims on a balance of probabilities (meaning more likely than not). I have reviewed all the parties' submissions and evidence but refer only to what I find necessary to explain my decision.

Background

19. JM emailed KM in early June 2022 inquiring about daycare for LM and SM. KM responded that she had space available for September 2022, and asked JM to confirm that "everyone" was fully vaccinated against COVID-19 before meeting because she took the pandemic very seriously. KM also indicated that she was hopeful "under 5's" would be able to be vaccinated soon. In response, JM confirmed she was vaccinated. KM then agreed to connect with JM to discuss care for SM and LM, who were both under 5 years old. It is undisputed that LM started care with KM on August 15, 2022 and SM started on September 1, 2022.

20. Around the middle of September 2022, KM inquired with JM as to when she would be vaccinating LM and SM for COVID-19. Based on the text message and email evidence, I find KM and JM had some further verbal discussions about this issue where JM advised that her husband did not want the children vaccinated and KM advised that unvaccinated children were a "no go".

21. On September 23, 2022, JM texted KM and asked her to clarify whether KM was immediately terminating the contract. KM responded and said she would not terminate the contract immediately, but provided notice she would cease providing

childcare services to SM and LM at the end of October 2022 (5 weeks later) unless JM vaccinated them against COVID-19. I note JM argues KM did not expressly end care at that time, but rather only threatened to do so. I disagree and I find the above text message is express written notice that the contract would be terminated in 5 weeks if the children remained unvaccinated.

22. On September 25, 2022, JM sent a lengthy email to KM. In the email, JM took the position that KM had attempted to unilaterally change the contract's terms by requiring vaccination, and in doing so, had breached the contract. JM said that as a result their contract was terminated, and said SM and LM's last day of care would be September 30, 2022. She said she was legally entitled to seek losses caused by the breach of contract, which she said currently totalled $160. JM did not explain the basis of her alleged losses. She also asked for reimbursement of $1,483.40 for the children's childcare subsidies for August and September 2022.

23. Later the same day, KM emailed JM and advised that she was providing notice that she was immediately terminating the contract effective September 25, 2022 due to JM's email.

Childcare services contract

24. There is no signed contract in evidence. JM argues the entire agreement is contained in 3 emails from KM, which included a typed "parent information package", daycare and holiday closures for 2022, and KM's COVID-19 policies. For her part, KM argues that the written elements of the parties' contract are partially contained in the 3 emails JM relies on, but says other various texts and email communications form part of the parties' contract as well. However, I find nothing turns on this.

25. Despite the disagreement over whether some additional emails and texts form part of the contract, JM and KM do not dispute that their contract contained a term allowing KM to terminate with 30 days' notice if she was "unable" to provide care. KM's COVID-19 policy also included a policy that KM was entitled to "end care

immediately" without any refund in the event anyone displayed "inappropriate behaviour (eg – aggressive, not following policies)" (reproduced as written). KM's COVID-19 policy was also subject to change "as the situation evolves and new information becomes available". JM undisputedly agreed to these terms and policies.

26. As noted, I find KM provided 5 weeks' notice that she would be terminating the childcare services if the children remained unvaccinated. KM says she was entitled to terminate the contract on 30 days' notice because she felt she was unable to provide care if JM was unwilling to vaccinate her children. I find KM cannot rely on this termination provision because although I acknowledge she was unwilling, I find KM was not "unable" to provide care at the time she gave JM 5 weeks' notice of termination.

27. The contract is silent about notice where KM wants to terminate care for reasons other than her being unable to provide care or for inappropriate behaviour.

28. In certain circumstances, contractual terms may be implied. Implied terms are terms that the parties did not expressly consider, discuss, or write down. Generally, the court (and the CRT) will only imply a term if it is necessary to give business efficacy to the contract. Such terms are founded on the parties' common presumed intention. In other words, an implied term must be something that both parties would have considered obvious when they entered into the contract. See *Zeitler v. Zeitler (Estate)*, 2010 BCCA 216.

29. JM argues there were no implied terms in the contract. I disagree. The childcare services contract was not for a fixed term and on that basis could continue for several years until the children attended school, if not indefinitely. I find that both JM and KM would consider it obvious that KM would be entitled to terminate the contract on reasonable notice for reasons other than her being "unable" to provide care or for inappropriate behaviour. Further, the contract required JM to provide 30 days' notice prior to withdrawing her children from KM's care. So, I find there was an implied term that KM could terminate the contract on reasonable notice. The

CRT has previously implied a reasonable notice period of 1 full month for daycare services contracts. See the non-binding CRT decision in *Fernando v. Martins*, 2023 BCCRT 78. I find the reasoning in *Fernando* persuasive, and adopt it here. I similarly find that 1 calendar month's notice is a reasonable notice period in the circumstances.

30. I find that on September 23, 2022, KM gave JM 5 weeks' notice to end childcare services if the children were not vaccinated. I find in doing so, she provided more than one full month's notice. As noted, JM alleges that KM requiring the children to be vaccinated was a unilateral change to the contract's terms. However, as noted, KM was permitted to change her COVID-19 policies, and to terminate the contract immediately if anyone failed to follow those policies. KM was also entitled to terminate the contract on reasonable notice. I find 5 weeks is a reasonable amount of notice for JM to comply with the policy change or have the contract terminated. The fact that KM terminated the contract because she did not wish to provide care to unvaccinated children does not change that she was entitled to unilaterally terminate the contract on reasonable notice, and does not mean that her reason for terminating the contract amounts to a unilateral breach of contract. I find that KM had fulfilled her obligations under the contract, and had provided reasonable notice as required.

31. I turn now to the parties' actions after KM provided 5 weeks' notice. As stated in *Kuo v. Kuo*, 2017 BCCA 245, unless an agreement is terminated, parties must fulfill their obligations. Termination by repudiation occurs when a party shows an intention not to be bound by the agreement and the other party accepts this repudiation.

32. Here, I find JM showed a clear intention not to be bound by the contract after receiving the 5 weeks' notice. As noted, after receiving notice, JM emailed KM on September 25, 2022 and said her children would not be attending after September 30, 2022. JM was contractually required to provide 30 days' notice prior to withdrawing her children from KM's care, and she only provided 5 days' notice.

33. As noted, KM says in response to JM's email, she terminated the contract immediately for inappropriate behaviour under her COVID-19 policy. However, I find this also amounts to KM accepting JM's repudiation on September 25, 2022. This terminated the contract.

34. As I have found KM gave sufficient notice of termination, and JM repudiated the contract on September 25, 2022, I find it unnecessary to address JM's claimed damages and I dismiss her claim. KM did not file a counterclaim.

CRT fees and expenses

35. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. As JM was unsuccessful, I dismiss her fee reimbursement claim. KM did not pay any CRT fees and none of the parties claimed any dispute-related expenses.

ORDER

36. I dismiss JM's claims and this dispute.

Leah Volkers, Tribunal Member