2019 SCC NO. 492963

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Jing v. Chapman*, 2020 NSSM 32

BETWEEN:

JI XIAO JING

CLAIMANT

and

ADRIANNE CHAPMAN

DEFENDANT

REASONS FOR DECISION

BEFORE: A. Robert Sampson, Q.C., Adjudicator

DATE OF HEARING: Hearing held at Sydney, Nova Scotia on December 4, 2019

DECISION RENDERED: February 5, 2020

APPEARANCES:

For the Claimant: Self-Represented – Ji Xiao Jing

For the Defendant: Self-Represented – Adrianne Chapman

Witnesses: none

BY THE COURT:

[1] This claim was commenced by a Notice of Claim filed with the court on October 16, 2019 and scheduled to be heard on December 4, 2019. The Claimant's statement claims for the return of five hundred and eight dollars ($508.00) representing tuition she had paid on behalf of her daughter for music lessons (voice and piano). The claim states (page 1) the Defendant changed a number of policies associated with the program (particularly how make-up lessons were to occur - video or Zoom) after the fall lessons commenced in September 2019. It further states that as a result of these changes she was not satisfied with the proposed method of delivery of the make-up lessons and her daughter stopped attending in early October and she requested a refund. The notable change principally related to the ability of the Defendant to re-direct the teaching method of learning to an "on-line" program. The claim included an additional written statement (two pages) as well as additional pages which provided more particulars of payment dates and amounts paid (invoices) confirming a total of $768.00 had been paid which included a sum for course materials. Finally, the additional pages to the claim also alleged that the Defendant had made a discriminatory remark about China which she took to be personal against her. The Claimant states that she attempted to speak with the Defendant about the changes to on-line learning, confirming she did not want her daughter to learn in this manner. With no resolve her daughter stopped taking lessons on October 3rd, 2019 and she claimed a refund. The Defendant refused to return her tuition as requested.

[2] The Defence filed states there had been a clear set of policies which included "no refunds" and that the Claimant had signed the policies acknowledging her acceptance of them. Included with the Defence was a written submission (six

pages) filed with the court together with a number of attachments which were tendered as exhibits at the time of hearing.

[3] This is a claim arising out of a contract between the parties relating to the supply of music lessons by the Defendant to the Claimant's daughter. Evidence was given by both parties which shall be briefly reviewed below. Ultimately, the issue to be decided is whether a contract existed and, if so, was it breached by the Defendant as claimed. As for the second claim advanced relating to possible discrimination, while the claim itself does not advance any requested remedy, this court is not the appropriate court to advance such claims. Clearly evidence of discriminatory actions including remarks may be relevant to the court in its overall assessment of credibility amongst the parties; however, matters of this nature are generally advanced under human rights legislation. Therefore, there will be no ruling on that aspect of the claim.

[4] At the outset, the court reviewed the general procedure to be employed in hearing the claim, the role of each party and how evidence was to be received including the opportunity of both parties to provide their "side of the story", that each would be afforded a chance to question the other and further that at the end of the evidence, each would be afforded a chance to sum up their positions based on all the evidence presented. The parties were not represented by counsel. The Claimant and Defendant were placed under oath and/or affirmed at the outset as is the practice of this court when dealing with self-represented parties. Each was advised that any comments made by them at any time throughout the proceeding would be considered information given "under oath".

[5] The court is appreciative to both parties for the organized and respectful manner in which they presented their position including the documents presented to the court. There were two principal exhibits tendered. Exhibit #1 included the Claimant's personal statement to the court together with a number of attachments. Exhibit #2 was the personal statement of the Defendant together with a number of attachments. In both exhibits many of the attachments, particularly copies of e-mail exchanges between the parties, were the same. In the Defendant's exhibits she included sample copies of her policies and contract documents. No executed copy of any contract was tendered.

[6] Finally, from the court's introductory summary of this matter, based on the pleadings of the parties and the evidence and exhibits received by the court, this matter can clearly be identified as a "claim" arising from a contract between the parties. As previously noted, the contract between the parties related to the supply of music lessons to the Claimant's daughter. The main issue is whether, in accordance with the terms of the contract and the events which occurred in September 2019, the Claimant is entitled to be refunded a portion of the tuition she had paid to the Defendant.

[7] Essentially the basis of the Claimant's claim was that she did not get what she bargained for as it related to the method of teaching that was to be provided (in person). She claims that the Defendant's policy regarding make-up lessons changed "after" she had entered into her contract and she was not satisfied with this change. Her position was that lessons began in early September and this change was introduced later in September after the lessons began. As a result, shortly after the introduction of the change she attempted to speak with the Defendant to resolve the situation and she advised her of her dissatisfaction. She

requested a refund and the Defendant refused. The Claimant's daughter was withdrawn from the program on October 3rd. The Defendant's policy was that lessons for the following month were to be paid in advance by the 22nd of each month. If late, an additional payment (late penalty) of $15.00 was due. The evidence was that the Claimant made her first payment in June 2019 which included $168.00 to cover material costs for both voice and piano. She again paid $300.00 in August to cover the September tuition and finally a further payment of $300.00 on September 23rd to cover October lessons. As the last payment was one day late, she was further invoiced and paid an additional $15.00 on September 27th. It was the Claimant's position that the contract was to include "in person" private lessons which were to be held at the Defendant's home. She further stated that in connection with "missed lessons" there may be a make-up class if the teacher was available or otherwise a direct video lesson and/or group lesson. At the time she entered into the contract and based on previous experience she had with this teacher, there had been no previous use of or reference to "on-line" lessons.

[8] The Defendant included with her Exhibit 2 (entitled exhibit "A") a copy of a document entitled "Music Lesson Policies 2019-2020. On page 2 of that document it provides reference to "cancellations/missed lessons". In the body of this section it only deals with what is to occur if the 'student' misses a lesson and states that such missed lessons would not be made up with in-person sessions but rather by way of either live video, video streaming lesson using Zoom or possibly the student could swap with another student. Further on in this policy statement it references "Missed Lessons" and states no refunds will be given unless the teacher becomes unable to teach for an extended period of time. It goes on to state that if the teacher needs to be absent then the class may be re-scheduled or a video lesson

would occur. The policy references discontinuance and again states no tuition will be refunded and further there is required a one month's notice and payment required. The policy exhibited to me was not signed by anyone.

[9] A further document included in the Defendant's Exhibit 2, noted as Exhibit "C" entitled updated Cancellation/Illness Policy was presented. From my review this appears to deal with a situation where the teacher may not be available for several days to provide private lessons. In such case it states the teacher (Defendant) can set up a "group lesson" for those who were affected. It also deals with situations where either students or the teacher should avoid contact and as such lessons may need to be cancelled. There is no reference in this document to on-line or video lessons as a means of substitution for any missed lesson. This document is undated and although it appears set up for signatures by both teacher and student (parent), it was not signed by anyone. The evidence given suggested it was introduced sometime in September 2019.

[10] What is noticeably absent in the Defendant's exhibit(s) is a copy of what appears to be a general e-mail sent to the Claimant but addressed to "Students and Parents" dated September 29th, 2019 entitled "Important Info re Schedule & Cancellation Policy". This document was included in the Claimant's exhibit(s). In the body of this notice the Defendant confirms she has updated her cancellation policy with a few changes. She notes that "I am no longer teaching in person if a student is sick or contagious, I will offer on-line or video lessons instead". She further notes that she has detailed her policies for when she is sick or unable to teach lessons.

[11] Clearly the evidence from the Claimant was that she was not pleased with this proposed change and met or spoke with the Defendant several times (using e-mail as well), expressing her dissatisfaction. Also included in this email exchange were references to other issues of conflict between the parties. One related to the late charge that the Defendant was claiming ($15.00) because the October fee was late. The other seemed to relate to some friction that arose between the parties arising from the Claimant expressing her concern about the new policy where there would be no in-person make-up sessions. Repeatedly, in the Defendant's response she concluded by stating to the Claimant "…if you are not happy then find another teacher for her".

[12] As noted, the court had been presented with a significant number of documents, e-mails, etc., and while I have reviewed them all, many are simply not relevant to the issue I have determined needs to be decided. The essential question is, based on the change in policy introduced by the Defendant sometime in September and formally communicated by e-mail in late September, was this sufficient to have given rise to a form of breach where a customer is entitled to some relief, in this instance a refund?

[13] There is little doubt based on each of the policy documents and updates presented to me that the Defendant maintained a "no refund" policy. I am satisfied that this was a term included in the contract with the Claimant. However, it is also well accepted in any consumer and contract law that once the terms are settled and known to each other, it is those terms that are to govern the contract relationship. During the term of any such contract it is simply not open, to either party, to subsequently and unilaterally change the terms. While minor adjustments may be

found to be acceptable and often would not give rise to complaint, in this case before me I find the change to be beyond a simple, minor adjustment. I applaud the Defendant for wanting to provide certain levels of protection to both her and students as it relates to passing along illness such as flu, etc., however that is not the main substance of the change. From the evidence received and most telling is the Defendant's own e-mail dated September 29th, 2019, where the updated policy proposed a significant change in how make-up classes would be dealt with. The Defendant wished to introduce mandatory on-line or possible Zoom substitution classes instead of in-person either individually or by way of group sessions when dealing with make-up classes. As the nature of this type of learning can be delivered in many forms, clearly the in-person form would be considered the best for most students. My clear sense from the evidence was that the core business being offered by the Defendant was in fact "in-person" lessons. It was the Claimant's evidence that this is what she signed her daughter up for, which included alternative forms of in-person lessons for make-up classes that may be required because of either the student or teacher having to be absent. The Claimant's evidence confirmed that although she (her daughter) did try the on-line, they were not satisfied with this form of teaching.

[14] That is not to say that the Defendant cannot adopt any alternative method of teaching or change her past practice as to how the program would be delivered from time to time. I find from the evidence that the Defendant appears to conduct her affairs in a prudent manner insofar as ensuring that she formulates written policies which are provided to her students. However, in this instance she chose to introduce such change "mid-stream" so to speak and after the terms of the initial contract for the fall term classes was settled between the parties and had

commenced. To allow one party to unilaterally change any of the essential rules or conditions of the services to be provided after the agreement was struck and the tuition was paid would be unconscionable and unfair. I find, having regard to the nature of this type of contract for services, that any change to the manner in which the method of teaching would be delivered, whether during regular classes or make-up classes, would be considered a fundamental change which would require an agreed-upon amendment to the original contract. Otherwise, the parties would remain bound to the original terms which in this instance did not provide for make-up classes to be received through on-line learning.

[15] I am satisfied that the method of make-up classes, either individually or by way of group lesson was amended significantly enough to have caused a breach of the contract and, in spite of the Defendant's no refund policy, such cannot stand in a situation where the Defendant has caused the breach.

[16] As for the appropriate damage award for the Claimant the evidence tells me the following. First the total amount paid by the Claimant was $768.00. Included in this amount was $168.00 for materials to be distributed throughout the fall session. The evidence suggests the fall session was to run for four months and the monthly charge for teaching was $300.00 per month which covered both voice and piano. Finally in this regard, although there is some evidence that this new policy change was introduced in the latter part of September, it appears the Claimant's daughter did attend the September sessions which included one on-line session. The $300.00 paid in late September as well as the $15.00 late fee was for October. I am satisfied that the Claimant carried on a dialogue with the Defendant starting at the end of September into the first few days of October in an effort to find a resolution and

finally withdrew her daughter from the program on October 3rd, 2019 and did not return.

[17] I am prepared to award the Claimant her right to receive the return of the October fees she paid (together with the late fee) as well as a percentage of the "material" charges which had been fully paid up-front. The total was $168.00 for a 4-month lesson period. She attended lessons for one month (September) and therefore should be entitled to a return of three months which I find to be calculated at $126.00 ($168/4=$42.00 X 3=$126.00). I find for the Claimant in the amount of $300.00, plus the $15.00 late fee paid, plus $126.00 (material refund) as well as the cost of filing the claim with the court in the amount of $99.70 for a total of $540.70 and I hereby order that the Defendant pay this amount to the Claimant forthwith.

DATED at Sydney, Nova Scotia this 5th day of February, 2020.

A. ROBERT SAMPSON, Q.C.

Adjudicator