

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Zysman v. Sims*,
2024 BCSC 1487

Date: 20240814
Docket: S240888
Registry: Vancouver

Between:

Maya Zysman

Petitioner

And

Jefferey Sims and the British Columbia Civil Resolutions Tribunal

Respondents

Before: The Honourable Mr. Justice Milman

On judicial review from: A decision of the Civil Resolution Tribunal,
dated December 5, 2023 (*Zysman v. Sims*, 2023 BCCRT 1062).

Reasons for Judgment

The Petitioner, appearing in person:

M. Zysman

Counsel for the Respondent, Jefferey Sims:

B.A. Marlatt

Place and Date of Hearing:

Vancouver, B.C.
July 25, 2024

Place and Date of Judgment:

Vancouver, B.C.
August 14, 2024

Table of Contents

I. INTRODUCTION 3

II. BACKGROUND FACTS..... 4

 A. Events of August and September 2022..... 4

 B. Procedural History..... 7

III. GROUNDS OF REVIEW..... 11

IV. STANDARD OF REVIEW 13

V. DISCUSSION 13

 A. Alleged Lack of Procedural Fairness..... 13

 B. Alleged Legal Errors..... 16

 C. Alleged Factual Errors..... 17

VI. SUMMARY AND CONCLUSION..... 17

I. Introduction

[1] This is a petition seeking judicial review of a decision of the Civil Resolution Tribunal (“CRT”) in a small claims action.

[2] The underlying dispute arises from a contract between the petitioner, Maya Zysman, who resides in San Francisco, California, and the respondent, Jefferey Sims, who resides in Victoria. In 2022, Mr. Sims hired Ms. Zysman to care for his cat and water his houseplants and the garden for a month while he and his wife went away on vacation overseas between August 24 and September 24, 2022. In exchange for her services, Ms. Zysman was to receive accommodation in Mr. Sims’ downstairs guest suite during that time.

[3] Although the parties had made similar arrangements in previous years without incident, this time it did not go well. Shortly after Ms. Zysman arrived at the house, the cat appeared to be ill. This led to a series of disagreements, culminating with a premature end to the arrangement, for which each blamed the other. They were then unable to agree about how, when and under what terms Ms. Zysman would leave. In the end, Mr. Sims asked the Saanich police to remove her, which they did on September 10, 2022. After being ejected by the police, she took a taxi from Mr. Sims’ house to the airport and flew back to San Francisco on the following day.

[4] On October 26, 2022, Ms. Zysman applied to the CRT for dispute resolution in relation to the matter. Mr. Sims denied liability and brought a counterclaim.

[5] The matter was eventually decided without a hearing by a member of the CRT in a written decision dated December 5, 2023, indexed as *Zysman v. Sims*, 2023 BCCRT 1062 (the “Decision”). In the Decision, the adjudicator dismissed Ms. Zysman’s claim and awarded Mr. Sims damages on his counterclaim in the amount of \$3,134, plus CRT fees and interest.

[6] In her petition to this court seeking judicial review, Ms. Zysman seeks an order setting aside the Decision as well as damages and costs. She alleges that the

process before the CRT was unfair and the Decision marred by many erroneous findings of fact and law.

[7] For the reasons that follow, I have concluded that the petition should be dismissed.

II. Background Facts

A. Events of August and September 2022

[8] The following background facts appear to have been undisputed before the CRT:

- a) the parties met one another online in 2019 when Ms. Zysman responded to an advertisement posted by Mr. Sims or his wife seeking someone to watch their cat and their home while they were away on vacation;
- b) the parties entered into that arrangement on a number of occasions prior to the events of August and September 2022; and
- c) in 2022, the parties agreed that, as before, Ms. Zysman would look after the cat, water the plants and, in exchange, would be allowed to stay in the Sims' downstairs guest suite while they were away on vacation from August 24 to September 24, 2022.

[9] In her claim, Ms. Zysman alleged that Mr. Sims knew the cat to be unwell before she arrived. There was evidence before the CRT showing that the Sims had taken the cat to the veterinarian on August 17, 2022 because it had vomited a few days before. The cat was 17 years old at the time. In answer to that allegation, Mr. Sims produced a letter from the veterinarian, undated but apparently written shortly after that visit, advising the Sims that the cat's condition was stable and that they could head off on vacation and, upon their return, address the mild abnormalities that were noted.

[10] Early on in her stay, on August 23, 2022, Ms. Zysman emailed the Sims to advise that:

... Everything is fine here: [the cat] eats well in small more frequent portions, she waited for me this morning on the stairs with “a smile” while waiting for her breakfast. So don’t worry about anything and rest well ...

[11] However, soon after that, on August 26 or 28, 2022 (the parties’ evidence conflicted on the exact date when this occurred), Ms. Zysman reported that the cat was vomiting and not eating and should be taken to a veterinarian immediately.

[12] The Sims responded to the news about the cat’s condition by asking a friend, referred to in the Decision as “E.S.”, to check in on the cat. When she arrived at the house on August 29, 2022, she and Ms. Zysman had a video call with Ms. Sims, during which Ms. Sims became concerned that the cat appeared to be fearful of Ms. Zysman.

[13] In a subsequently prepared letter from E.S. submitted in evidence by Mr. Sims, E.S. stated that during that video call she witnessed Ms. Zysman telling Ms. Sims that Ms. Zysman:

... felt she wasn’t trusted and wanted to leave and go back home. She also told me she would no longer take care of the house or garden. Then [Ms. Sims] asked me if I could take over [Ms. Zysman]’s responsibilities, which I did ...

[14] That same day, E.S. took the cat to the veterinarian and it was examined. Ms. Sims reported the results of that examination to Ms. Zysman by email, stating that it revealed “pancreatitis and probably kidney disease” as well as an enlarged heart, (although no heart failure) and spondylosis. The veterinarian was also concerned about cancer because “many tests are normal or showing mild changes but the cat is much sicker than expected from those results.” The veterinarian advised the Sims to monitor the cat’s breathing and watch for signs of heart failure. The veterinarian expected the cat to “start perking up and eating by tomorrow” and if not, then the cat should be taken to a hospital or perhaps euthanized.

[15] On the following day, August 30, 2022, Ms. Zysman emailed Ms. Sims signalling her desire to leave. Her email sent at 10:01 am that morning stated that “I think it would be best if I take myself out of the situation, change my flight and

leave... I will let you know the costs involved when I arrange everything.” In a subsequent email sent at 11:10 am, she said she was “checking out flights as we speak” but could not afford to leave immediately. She stated that if the Sims wanted her to leave now and agree to pay for her added travel costs she would search for a flight and send them details. On the other hand, if they were unwilling to pay anything, she said, “I will have to stay put until my original flight on [September] 26.” She then stated as follows:

Sorry, but I'm not prepared to bear the costs of my ruined 'vacation' because of your mistaken opinion about [the cat]'s fear ...

[16] In a follow-up email sent six minutes later, she added the following:

Ps Regardless of my ruined plans, I don't feel comfortable staying here anymore so I think paying for my return asap is the least you can do.. [E.S.] said she could stay here from now on so you still save by not hiring a pro ... Please let me know asap what you decide and I'll start searching for a flight.

[17] In the days that followed, the parties exchanged emails containing their respective proposals for Mr. Sims to cover some of Ms. Zysman's return travel costs in exchange for her immediate departure. In the end, they were unable to agree on any such terms. In an email sent on September 8, 2022, Ms. Sims proposed that Ms. Zysman, rather than leave prematurely, simply resume her duties as before. Ms. Zysman refused.

[18] On September 10, 2022, Mr. Sims emailed Ms. Zysman to advise that he had spoken to the police and that she must now leave immediately (according to Mr. Sims, he sent that email on September 10, 2022 while in France, but due to the time difference it would have arrived in Victoria on September 9, 2022). He also hired a mediator to attend at the house and give Ms. Zysman \$720.

[19] At the request of Mr. Sims, the police attended on September 10, 2022. According to the redacted police report that Mr. Sims adduced in evidence before the CRT, Ms. Zysman refused to leave until she was threatened with arrest. She left for the airport in a taxi after the police were satisfied that she had a valid credit card

in her possession. She stayed at the airport overnight and was able to arrange a flight to San Francisco on the following day.

B. Procedural History

[20] On October 26, 2022, Ms. Zysman applied to the CRT, through its online portal, for dispute resolution in relation to the incident. In that submission, she alleged that Mr. Sims had breached the contract between them by having:

- a) failed to disclose the cat’s infirmed condition in advance;
- b) sent a “supervisor” (E.S.) to watch over her;
- c) booked her return flight home using a false name; and
- d) wrongfully engaged the police to evict her.

[21] To remedy those alleged breaches, she sought \$5,000 in damages, comprised of the following:

- a) \$1,423, for her wasted travel costs and property she left at Mr. Sims’ house and never retrieved;
- b) \$2,176, for the services she performed;
- c) \$1,400, for “unrealized accommodation” during the period from September 10–24, 2022; and
- d) \$1 in punitive damages.

[22] On January 20, 2023, the CRT issued a Dispute Notice in respect of Ms. Zysman’s claim.

[23] On February 1, 2023, Mr. Sims responded to the Dispute Notice by denying liability. On February 6, 2023, he submitted his own claim against Ms. Zysman, which the CRT treated as a counterclaim. In it, he alleged that it was Ms. Zysman who had breached the contract by refusing to fulfill its terms and demanding more

money before she would leave. He sought damages in the amount of \$3,270, comprised of the following:

- a) \$1,600, for the cost he had incurred to hire a replacement for Ms. Zysman;
- b) \$150, for long-distance telephone charges;
- c) \$300, for having to replace the locks to the house;
- d) \$720, for the money that Mr. Sims was forced to pay Ms. Zysman in order to get her to leave; and
- e) \$500, for the cost of the mediator he hired to deliver those funds to Ms. Zysman.

[24] Ms. Zysman responded to Mr. Sims' counterclaim on February 11, 2022.

[25] Under the CRT's rules, disputes of this kind proceed in four phases:

- a) negotiation;
- b) facilitation;
- c) preparation of a Tribunal Decision Plan ("TDP"); and
- d) decision.

[26] On March 14, 2022, the case manager assigned by the CRT emailed the parties to welcome them to the facilitation phase. While the parties were in that phase, Ms. Zysman sought an order from the CRT to compel production of Saanich police records that she considered relevant to the dispute. Mr. Sims had already provided copies of some of those records in redacted form. On April 13, 2023, CRT staff emailed the parties to inform them of the process to be followed in obtaining an order for the production of police records of that kind.

[27] Ms. Zysman proceeded with the application for the police records, which was assigned to a CRT adjudicator for a preliminary decision. On May 31, 2023, the

adjudicator dismissed the application on the basis that Ms. Zysman had not shown that the unredacted records would be likely to contain any information relevant to the matter that was not already available in the redacted records.

[28] On June 8, 2023, with no resolution having been achieved during the facilitation phase, the CRT emailed the parties to advise them that the facilitation phase was completed and the dispute would now move to the TDP phase, during which the parties would be asked to exchange evidence and argument. The exchange did not begin immediately because Mr. Sims asked the CRT to delay that process until after Labour Day and the CRT agreed to do so. Ms. Zysman objected to the delay.

[29] On September 8, 2023, CRT staff wrote to the parties to welcome them to the TDP phase and to invite them to exchange evidence and arguments in preparation for the adjudication. During this last phase, Ms. Zysman complained to CRT staff about being unable to upload evidence and submissions on the CRT’s online portal. After numerous email exchanges, during which CRT staff sent her instructions including screenshots, Ms. Zysman responded on October 11, 2023 that she had found Mr. Sims’ argument and had responded to it. She reiterated her request that her evidence be produced “unscrambled and readable” for the adjudicator.

[30] After the TDP phase was completed with the exchange of evidence and arguments, the matter was assigned to an adjudicator, who ultimately released the Decision on December 5, 2023.

[31] In the Decision, the adjudicator found that the parties had entered into a verbal agreement with the following terms:

- a) Ms. Zysman would fly to Victoria to look after Mr. Sims’ house and the cat from August 22 to September 24, 2022;
- b) During that time, Ms. Zysman would:
 - i. feed the cat and water the houseplants and the garden; and

- ii. reside downstairs in the guest suite.

[32] The adjudicator rejected Ms. Zysman's contention that she was hired by Mr. Sims as an employee and found her instead to be an independent contractor, applying the test set out in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 and *Kirby v. Amalgamated Income Limited Partnership*, 2009 BCSC 1044. He also rejected Ms. Zysman's contention that she was a tenant, on the basis that her agreement with Mr. Sims was not a tenancy agreement, but rather an agreement that called for temporary house and pet sitting.

[33] Next, the adjudicator rejected Ms. Zysman's contention that the cat was sick before Ms. Zysman arrived, and that Mr. Sims had known as much and misrepresented the true state of affairs. Instead, he found that Mr. Sims had taken "reasonable precautions to ensure the cat would be relatively healthy for the duration of the trip". In doing so, he referred to the evidence of E.S. and the letter from the veterinarian.

[34] The adjudicator then found that Ms. Zysman had repudiated the contract by refusing to continue with her duties during the video call with E.S. and Ms. Sims on August 29, 2022 (at para. 27 of the Decision, the adjudicator erroneously stated that it was Mr. Sims, rather than Ms. Sims, who took part in that video call). He rejected Ms. Zysman's version of those events in favour of E.S.'s, relying in part on Ms. Zysman's emails of August 30, 2022 (the Decision refers erroneously at para. 28 to emails dated August 30, 2023, but this appears to be a typographical error).

[35] The adjudicator concluded next that Ms. Zysman could have continued with the contract but chose not to do so, thereby repudiating it. Mr. Sims, he found, accepted that repudiation and hired E.S. to replace her, thereby terminating the agreement, allowing him to sue for damages and to require Ms. Zysman to leave the house, which she refused to do unless her additional demands were met.

[36] Ultimately, the adjudicator dismissed Ms. Zysman’s claims in their entirety and found in favour of Mr. Sims on his counterclaim, awarding him damages of \$3,134, as well as CRT fees and interest, comprised as follows:

- a) \$1,600 to hire E.S. to replace Ms. Zysman;
- b) \$720 delivered to Ms. Zysman via the mediator;
- c) \$300 for the costs of installing new locks;
- d) \$500 for cost of the mediator; and
- e) \$14, or one day, of the \$150 claimed for long-distance telephone charges.

[37] Ms. Zysman commenced this proceeding on February 7, 2024.

III. Grounds of Review

[38] The grounds of review fall into three categories.

[39] First, Ms. Zysman alleges that the process before the CRT was unfair, for the following reasons:

- a) there was excessive delay between the time that she first filed her claim on October 26, 2022 and when the Decision was rendered on December 5, 2023;
- b) the CRT improperly refused to order production of the unredacted police records or a recording of the video call that took place on August 29, 2022;
- c) she was unable to present her case properly due to technical problems with the CRT website portal;
- d) the adjudicator failed to address her chief complaint, which she describes as the “wrongful eviction of a senior”; and

- e) the adjudicator ignored some of her evidence and argument and accepted Mr. Sims' statements although unsupported by evidence.

[40] Second, Ms. Zysman alleges that the adjudicator made a number of legal errors, as follows:

- a) finding that she was an independent contractor when she was really an employee and a tenant; and
- b) refusing to find Mr. Sims in breach of contract, including by:
 - i. failing to inform her in advance of the cat's illness;
 - ii. imposing a supervisor on her; and
 - iii. asking her to leave the house prematurely.

[41] Third, Ms. Zysman alleges that the Decision was patently unreasonable because it rested on number of erroneous findings of fact, including the following:

- a) Mr. Sims exercised a high level of control over her, having left her detailed instructions to follow, which is inconsistent with the adjudicator's finding that she was an independent contractor;
- b) the adjudicator incorrectly assumed that she received no wage in exchange for her services, when in fact she received accommodation;
- c) contrary to the adjudicator's statement, she never reported initially that the cat was fine;
- d) the adjudicator had no basis to believe Mr. Sims' assertion that he understood the cat to be healthy before leaving on holiday;
- e) the video call was with Ms. Sims, not Mr. Sims; and
- f) the adjudicator quoted from Ms. Zysman's emails of August 30, 2022 selectively and out of context.

IV. Standard of Review

[42] The standard of review applicable to decisions of the CRT, such as the one in issue here, is set out in s. 56.8 of the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 [CRTA], which states as follows:

Standard of review — other tribunal decisions

56.8 (1) This section applies to an application for judicial review of a decision of the tribunal other than a decision for which the tribunal must be considered to be an expert tribunal under section 56.7.

(2) The standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting

- (a) a finding of fact,
- (b) the exercise of discretion, or
- (c) the application of common law rules of natural justice and procedural fairness.

(3) The Supreme Court must not set aside a finding of fact by the tribunal unless

- (a) there is no evidence to support the finding, or
- (b) in light of all the evidence, the finding is otherwise unreasonable.

(4) The Supreme Court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

V. Discussion

A. Alleged Lack of Procedural Fairness

[43] The nature and extent of the duty of fairness owed by administrative tribunals varies with the context. In the case of the CRT, it has been held that the level of procedural fairness owed is relatively high, given its mandate to resolve civil disputes. In *Downing v. Strata Plan VR2356*, 2023 BCCA 100, aff'g 2022 BCSC 590, Willcock J.A., writing for the Court, summarised the applicable principles as follows:

[36] Here, the function of the decision-making body, the CRT, is to resolve civil disputes. Given that the tribunal's determinations resemble judicial decision making, procedural protections closer to the trial model will be required by the duty of fairness ... The reviewing judge recognized that fact

when she concluded that a relatively high level of procedural fairness was required.

[Citations omitted.]

[44] The reviewing judge in that case had concluded that although the duty of fairness owed by the CRT was “fairly high”, the court must also consider the need for proportionality, particularly in small claims matters.

[45] Ms. Zysman complains that the CRT’s process was unfair to her in the following ways:

- a) it took too long and there were too many delays;
- b) the CRT should have ordered production of additional evidence;
- c) the CRT’s website portal did not function properly, making it difficult for her to upload and access materials;
- d) the adjudicator never addressed her main claim about wrongful eviction;
and
- e) the adjudicator failed to consider her evidence and accepted Mr. Sims’ position even though it was unsupported by evidence.

[46] With respect to delay, the process took just over 13 months to resolve. This was longer than Ms. Zysman expected but I am not persuaded that it was inordinate in the circumstances. Some of the extra time can be attributed to Ms. Zysman’s failed application to compel production of unredacted police records. Some of it flowed from the CRT’s decision to agree to Mr. Sims’ request to delay the initiation of the TDP phase. I am not persuaded that the decision to accommodate Mr. Sims’ in that regard was an unreasonable one. This was a matter on which the CRT is entitled to deference. In any event, Ms. Zysman has not shown that any of the delay caused her prejudice of any kind. In summary, Ms. Zysman has not demonstrated that the CRT’s process was unfair for that reason.

[47] Nor do I see any merit in Ms. Zysman's complaint about the CRT's refusal to order production of additional evidence. Her application to compel production of the unredacted police records was dismissed on grounds that have not been shown to have been unreasonable. There is no foundation for her contention that the compelled production of such evidence could reasonably be expected to have affected the final result. Ms. Zysman's complaint about the CRT's failure to order production of the Sims' recording of the video call that took place on August 29, 2022 assumes that there was such a recording, when there is no basis in the evidence to believe that there was, or that Ms. Zysman took steps to compel its production.

[48] Turning to the technical difficulties she encountered when attempting to upload evidence and argument, the email exchanges between her and CRT staff reveal that she was provided with technical support and sent screenshots to assist her in completing the necessary steps. Although the adjudicator stated that she presented no evidence on the counterclaim, he had her evidence on the main claim and Ms. Zysman has not indicated what other evidence, if any, she intended to submit on the counterclaim but was unable to, and that she had not already submitted in connection with the main claim. Her emails with CRT staff about the technical difficulties ended on October 11, 2023, when she advised that she had finally found Mr. Sims' argument and was able to reply to it.

[49] Ms. Zysman has attached as exhibits to her affidavit an incomplete or only partially legible version of her evidence that she believes to have been placed before the adjudicator, suggesting that her case was not properly considered in its entirety. However, the record of the proceeding attached to the CRT's affidavit shows that the adjudicator had complete and fully legible materials before him. Ms. Zysman has failed to demonstrate that the adjudicator did not receive and consider all of her evidence.

[50] In summary, I am not persuaded that the technical difficulties that Ms. Zysman encountered made the process unfair.

[51] The remainder of Ms. Zysman's complaints about the fairness of the process are really about how the adjudicator dealt with the evidence. I disagree with her contention that the adjudicator failed to consider her main complaint that she had been wrongfully evicted. In fact, the adjudicator did consider it, but rejected it on the basis of his finding that she was not a tenant. I will address her other complaints about the adjudicator's treatment of the evidence below.

[52] In summary, I am not persuaded that the CRT's process was unfair in any of the ways that Ms. Zysman has alleged.

B. Alleged Legal Errors

[53] Questions of law attract a standard of review of correctness (*CRTA* s. 56.8(2)). However, Ms. Zyman alleges that the adjudicator erred on two questions of mixed fact and law, namely, as to her status as employee or tenant, and as to whether it was Mr. Sims, rather than her, who was in breach of contract.

[54] It has been held that if there is an extricable question of fact involved in a question of mixed fact and law, the court should defer to the tribunal on the factual issue: *J.J. v. School District 43 (Coquitlam)*, 2013 BCCA 67.

[55] Ms. Zysman alleges that the adjudicator erred in refusing to find that she was an employee or a tenant of Mr. Sims. I disagree that the adjudicator committed any legal error in arriving at that conclusion, or in finding her to have been, instead, an independent contractor. The adjudicator applied the correct legal test and there was ample evidence to support his conclusion.

[56] Similarly, the adjudicator's finding that it was Ms. Zysman, rather than Mr. Sims, who was in breach of contract was supported by the evidence and is entitled to deference. I see no reason to interfere.

[57] I am therefore rejecting this ground of review.

C. Alleged Factual Errors

[58] It has been held that an adjudicator need not refer to every piece of evidence adduced in the case and that it is not the task of this court on review to substitute its own view of the evidence for that of the adjudicator: *Parmar v. TransLink Security Management Limited*, 2020 BCSC 1625.

[59] I agree with Ms. Zysman that the adjudicator appears to have misapprehended the evidence in stating that it was Mr. Sims, rather than Ms. Sims, who took part in the video call with E.S. and Ms. Zysman on August 29, 2022. However, the error was inconsequential and played no apparent role in the adjudicator's analysis.

[60] The remainder of Ms. Zysman's complaints in this category are without merit, inasmuch as there was ample evidence to support the adjudicator's impugned findings. In summary, those findings were supported by the evidence and were reasonable. Ms. Zysman's arguments to the contrary amount to nothing more than an improper attempt to relitigate the dispute.

[61] I am therefore rejecting this ground of review.

VI. Summary and Conclusion

[62] I have rejected all of the grounds of review that Ms. Zysman has advanced. I am therefore dismissing the petition.

[63] As the successful party, Mr. Sims is entitled to his costs.

"Milman J."