Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute codes: CNR MNDC

Introduction

This is an application by the tenant for a review of a decision rendered by an Arbitrator on April 17, 2013 (the most recent decision). The April 17, 2013 hearing was convened after the tenant submitted a successful application to review the original March 6, 2013 decision (the original decision) issued with respect to the tenant's application for an order disputing a rent increase, an order to set aside a notice to end tenancy for unpaid rent and a monetary Order. In a review decision of March 19, 2013, another Arbitrator found that the tenant had established that he was unable to access the original conference call hearing on March 6, 2013, because of technical difficulties in accessing the teleconference line. She found that the tenant had been unable to attend the original hearing for reasons that were both beyond his control and could not have been anticipated.

Although the Arbitrator waited 15 minutes to permit the tenant to participate in the teleconference call, the tenant did not connect with her April 17, 2013 teleconference hearing. The most recent decision confirmed the original decision and order allowing the landlord to proceed to enforce the Order of Possession issued on March 6, 2013.

An Arbitrator may dismiss or refuse to consider an application for review for one or more of the following reasons:

- the application does not give full particulars of the issues submitted for review or of the evidence on which the applicant intends to rely;
- the application does not disclose sufficient evidence of a ground for review;
- the application discloses no basis on which, even if the submission in the application were accepted, the decision or order of the arbitrator should be set aside or varied;
- the applicant fails to pursue the application diligently or does not follow an order made in the course of the review.

Issues

Division 2, Section 79(2) under the *Residential Tenancy Act* (the *Act*) says a party to the dispute may apply for a review of the decision. The application must contain reasons to support one or more of the grounds for review:

1. A party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control.
2. A party has new and relevant evidence that was not available at the time of the original hearing.
3. A party has evidence that the director's decision or order was obtained by fraud.

The tenant applied for review on the basis of all three of the grounds outlined above.

Facts and Analysis – Unable to Attend

In order to meet this test, the application must establish that the circumstances which led to the inability to attend the hearing were both:

- beyond the control of the applicant, and
- could not be anticipated.

A hearing is a formal, legal process and parties should take reasonable steps to ensure that they will be in attendance at the hearing.

In the Application for Review Form, the tenant was asked to explain what happened that was beyond his control or that could not have been anticipated that prevented him from attending the original hearing. He provided the following explanation.

> *I have a nervous disorder called Fibromyalgia. It manifests itself in many unexpected ways. I did not anticipate a panic attack. Please see doctor's note and attachment for details...*

Although the tenant did attach a note from a doctor, this note was from November 2004 and simply stated that the tenant was being treated for fibromyalgia.

The tenant also attached a detailed description of what transpired when he attempted to call into the teleconference hearing at the time and date scheduled for the most recent hearing. In this description, the tenant stated that he tried several times to call into the teleconference hearing but made mistakes and could not manipulate the keyboard on the phone he was using accurately or quickly enough to connect with the hearing. He attempted to seek help through the Telus operator who was unable to assist him and then decided to get dressed and travel to the local RTB office where he asked a staff member to assist him. By the time he was able to successfully call into the teleconference number, twenty minutes had elapsed and the hearing had been conducted and concluded without his participation.

In his submission, he noted the following.

> *...I am not familiar with this technology. I do not have a phone. I never use them. My neighbour bought this phone so that I could make the call...*

In the portion of the application for review form requesting that an applicant identify the additional evidence he would have provided had he been able to attend the hearing, he noted the following.

> *All rents plus additional money demanded by the landlord have been paid and accepted*…

While the tenant also attached an explanation of this additional evidence, I find his references and the documents referred to unclear and confusing. A number of these references are to cheques that were issued or documents sent by registered mail after the original hearing was conducted, the relevance of which is unclear.

Although I am sympathetic to the difficulties the tenant encountered in his efforts to connect with the April 17, 2013 teleconference, I can only order another hearing under this ground if I am satisfied that the tenant's application demonstrates that the circumstances leading to his failure to participate in the hearing were both beyond his control and could not have been anticipated.

In this case, the review decision granted a new hearing of this matter on April 17, 2013 because the tenant was unable to connect with the teleconference hearing on March 6, 2013. Given the difficulties that required him to apply for a review of the original hearing, his admitted unfamiliarity with the use of the telephone and his health issues, I find it unlikely that the tenant could not have foreseen that he might encounter problems in trying to connect with the April 17, 2013 hearing. While the tenant describes himself as elderly, I cannot help but note that telephones have been in use for many years. In his application, he noted that he does not own a telephone and was unfamiliar with its usage as it had been purchased for him by one of his neighbours. Under these circumstances and with his knowledge that he has periodic health problems that might impact his manual dexterity, I do not find that the problems the tenant encountered on April 17, 2013 were either beyond his control or could not have been anticipated. There are many measures the tenant could have taken beforehand, either through adequate practice on this new piece of equipment, through asking a friend, neighbour, relative or advocate to assist him at the pre-arranged time for this hearing, or by requesting a face-to-face hearing at the RTB's Burnaby Office.

For the reasons outlined above, I find that the tenant's application has not identified sufficient evidence to enable me to order a review of this decision on the basis of his being unable to attend the hearing for reasons that were beyond his control and could

not have been anticipated. I dismiss the tenant's application for review on the basis that his application discloses insufficient evidence of this ground for review. I also find that the evidence the tenant stated he would have relied on had he been able to participate in the hearing is unclear and does not give full particulars of the evidence on which he intended to rely.

Facts and Analysis – New and Relevant Evidence

Leave may be granted on this basis if the applicant can prove that:

- he or she has evidence that was not available at the time of the original arbitration hearing;
- the evidence is new;
- the evidence is relevant to the matter which is before the Arbitrator;
- the evidence is credible, and
- the evidence would have had a material effect on the decision of the Arbitrator.

Only when the applicant has evidence which meets **all** five criteria will a review be granted on this ground.

It is up to a party to prepare for a dispute resolution hearing as fully as possible. Parties should collect and supply all relevant evidence at the dispute resolution hearing. "Evidence" refers to any oral statement, document or thing that is introduced to prove or disprove a fact in a hearing. Letters, affidavits, receipts, records, videotapes, and photographs are examples of documents or things that can be entered into evidence. Evidence which was in existence at the time of the original hearing, and which was not presented by the party, will not be accepted on this ground unless the applicant can show that she was not aware of the existence of the evidence and could not, through taking reasonable steps, have become aware of the evidence.

"New" evidence includes evidence that has come into existence since the dispute resolution hearing. It also includes evidence which the applicant could not have discovered with due diligence before the hearing. New evidence does not include evidence that could have been obtained before the hearing took place. Evidence that "would have had a material effect upon the decision of the Arbitrator" is such that if believed it could reasonably, when taken with the other evidence introduced at the hearing, be expected to have affected the result.

I find the information provided by the tenant in support of his application for review on the basis of new and relevant evidence confusing, incomplete and unclear. Although the tenant has made some statements in this portion of the application for review form,

his evidence is confusing, save for his references to receipts and “Ministry” cheques that became available after the original hearing. In his attachment to his application for review form, he provided additional references, most of which seem to focus on his mistaken belief that the landlord’s acceptance of cheques from the Ministry for periods following February 2013 have some bearing on the issue that was considered by the Arbitrator in the original decision.

I also note that some of the evidence submitted as new and relevant by the tenant was clearly in existence prior to the original hearing and was before the Arbitrator who made the original decision. However, as the tenant did not attend either the original hearing or the reconvened one on April 17, 2013, he was not able to describe the relevance of his evidence to the Arbitrators. An application for review on the basis of new and relevant evidence is not designed to afford an individual who did not make adequate steps to participate in the original hearing an opportunity to introduce arguments that he was not able to make at the original hearing because he did not participate in that hearing.

The only actual new substantive evidence attached to the tenant’s application for review were three receipts for B.C. Employment and Assistance cheques issued in March and April 2013. While these may demonstrate that cheques have been sent to the landlord and cashed by the landlord, the issue in dispute considered in the original decision was the rent payments identified as owing as of the date of the 10 Day Notice to End Tenancy for Unpaid Rent issued on February 12, 2013. Whether or not B.C. Employment and Assistance has issued cheques on behalf of the tenant since the original decision was issued has little bearing on the matters before the Arbitrator when he made his original decision.

Although I have reviewed the documents referred to in the tenant’s application, I note that most of these refer to rent payments made since the original decision was issued. I am at somewhat of a loss to understand how the original decision should be reconvened because of payments that the tenant maintains were made **after** the Arbitrator issued his original decision. While this evidence is clearly new, I find that it meets none of the other four required criteria outlined above. Statements made or incidents that occurred following the hearing have no bearing on the evidence that was before the Arbitrator when he made his original decision.

I find that the tenant has not met most of the five criteria outlined above with respect to the issues considered in the original decision, which was confirmed in the most recent hearing of the tenant’s application. I find little if any of the tenant’s new evidence

relevant and find it very unlikely that this evidence would have affected the most recent decision to confirm the original decision.

Under these circumstances, I dismiss the tenant's application for a review on the basis of new and relevant evidence because I find that the application discloses insufficient evidence of this ground for review. I also dismiss this portion of the tenant's application because I find that it does not give full particulars of the evidence on which the tenant intended to rely.

Facts and Analysis - Fraud

This ground applies where a party has evidence that the Arbitrator's decision was obtained by fraud. Fraud is the intentional "false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive." Intentionally false testimony would constitute fraud, as would making changes to a document either to add false information, or to remove information that would tend to disprove one's case. It is not enough to allege that someone giving evidence for the other side made false statements at the hearing, which were met by a counter-statement by the party applying, and the whole evidence adjudicated upon by the Arbitrator. Fraud must be intended. A negligent act or omission is not fraudulent.

In this case, the tenant provided most of his allegations with respect to fraud in his attachment to the application for review form. The tenant provided three typewritten pages in his attached letter that he claimed demonstrated that the landlord had acted fraudulently. He alleged that the landlord refused rent money when the tenant offered it and claimed that the landlord waited until the tenant was unlikely to have money to pay his rent before the landlord requested payment.

While I understand that the tenant feels strongly that many of the landlord's actions and practices are questionable, I find very little of his submission has any relevance to the determination reached by the Arbitrators in either the most recent decision or the original decision. Much of the tenant's letter addresses issues such as the size of his rental unit, the amenities provided, the landlord's failure to provide an acceptable standard of service as a landlord and similar observations. He even included a suggestion that the landlord pay the tenant $600.00 per year for the rodent removal service the tenant's cat has provided during this tenancy. He also maintained that the landlord should be faulted for the selection of the date in the month to issue the 10 Day Notice, when his funds would be exhausted for that month. It also appears that the tenant holds the landlord responsible for collecting rent from him that was owing, as

opposed to accepting responsibility for ensuring his rent was paid for the periods in question.

I dismiss the tenant's application for review on the basis that his application discloses insufficient evidence that the most recent decision confirming the original decision was based on fraud.

Overall, the tenant's application does not disclose any basis upon which, even if the submissions in the application were accepted, the most recent decision confirming the original decision and order should be set aside or varied. The most recent decision is therefore confirmed.

Decision

The April 17, 2013 decision to confirm the original decision and Order issued on March 6, 2013 stands. As was stated in the most recent decision, the landlord may proceed to enforce the Order of Possession issued on March 6, 2013.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: April 30, 2013

Residential Tenancy Branch