



# Dispute Resolution Services

Residential Tenancy Branch  
Ministry of Housing and Social Development

## DECISION

### Dispute Codes:

*OPR, MNR, CNR, FF.*

### Introduction

This hearing dealt with applications by both the landlord and the tenant, pursuant to the *Residential Tenancy Act*. The tenant has applied for an order to cancel the notice to end tenancy for rent, issued on February 10, 2009 pursuant to Section 46 and effective February 21, 2009. The landlord has made a cross application for an order of possession pursuant to Section 55; a monetary order for rent owed, pursuant to Section 67; and a monetary order for the recovery of the filing fee, pursuant to Section 72, all based on the Ten-Day Notice to End Tenancy dated February 10, 2009.

Both parties attended the hearing and were given an opportunity to present evidence and make submissions. On the basis of the solemnly affirmed evidence presented at the hearing, a decision has been reached.

### Issues to be decided: Landlord's Application

- Is the landlord entitled to an order of possession for unpaid rent? In order to answer this question it must be determined:
  - Was a valid 10-Day notice to End Tenancy properly served on the tenant?
  - Was there outstanding rent owed to the landlord by the tenant at the time the Ten-Day Notice to End Tenancy was issued?
  - Did the tenant fail to pay the rental arrears within 5 days of receiving the Notice to End Tenancy?

- Has the Landlord established monetary entitlement to compensation for rent still outstanding?
- Is the Landlord entitled to a claim of late fees under the tenancy agreement?

### **Issues to be decided: Tenant's Application**

- Has the tenant proven that the Notice to End Tenancy for Unpaid Rent should be cancelled?

The burden of proof is on the landlord to establish that the Ten-Day Notice was justified and supportable under the Act and to prove that the monetary amounts being claimed are validly owed.

### **Background and Evidence**

Based on the testimony of both parties, the background was as follows: The tenant was originally employed as a manager with remuneration of \$1,800.00 per month. The tenant was not required to pay rent. There was no written employment agreement. The job was terminated on January 26, 2009 and although the job duties had ended and the tenant was asked by the landlord to vacate, the tenant remained living in the unit. The tenant did not perform manager duties nor did the tenant subsequently pay rent for the month of February 2009 and the month of March 2009 to live in the unit. No written tenancy agreement existed during the employment, nor at any time after the employment ceased. On February 10, 2009, the landlord posted a Ten-Day Notice to End Tenancy for Unpaid Rent based on rent of \$950.00.

According to the landlord, during the tenant's employment, \$467.50 for the residency was considered to be a taxable allowable benefit for the purpose of the tenant's record of employment and insurable earnings. However, the market rate for the unit was \$950.00. The landlord stated that on January 26, 2009, the tenant's employment was terminated and the tenant was told to vacate the unit on January 26, 2009. When the tenant did not leave, as of February 1, 2009, the

landlord took the position that the tenant was in arrears for the value of the unit, that being \$950.00. The landlord stated that, although specific terms of a new tenancy agreement were not negotiated, the tenant should have been well aware that the market rent of \$950.00 would have to be paid to occupy the unit. After the tenant failed to pay the expected rent, nor any rent at all for that matter, the landlord felt it necessary to issue a Ten-Day Notice to End Tenancy for Unpaid Rent on February 10, 2009 with an effective date of February 21, 2009. The landlord was now seeking rent owed of \$950.00 for the month of February and \$950.00 rent owed for the month of March, \$25.00 late fees for each month and an Order of Possession based on the Ten-Day Notice.

The tenant testified that, despite the ending of the employment, the tenant was not in agreement with the landlord's demand that he vacate the unit. The tenant testified that, at no time did he agree to pay rent of \$950.00. The tenant testified that he felt that the landlord/employer, in terminating his employment, had some obligation to permit him to remain in the unit while he looked for another job and accommodation. The tenant seeks to have the Ten-Day Notice cancelled.

### **Analysis Landlord's Application**

A landlord can issue a Notice to End Tenancy for Unpaid Rent or Utilities under section 46 of the Act when rent or utilities are in arrears. The determination to be made is whether the Notice was validly issued under the Act. If so the notice would be found to be warranted, would not be set aside and the landlord's application for an order of possession and possibly a monetary claim could be granted. If not, the tenant's request that the Notice be cancelled would have merit and the Notice would be set aside.

Section 48 (1) permits a landlord to end the tenancy of a person employed as a caretaker, manager or superintendent of the residential property of which the rental unit is a part by giving notice to end the tenancy if:

- (a) the rental unit was rented or provided to the tenant for the term of his or her employment,

(b) the tenant's employment as a caretaker, manager or superintendent is ended, and

(c) the landlord intends in good faith to rent or provide the rental unit to a new caretaker, manager or superintendent.

In ending the employment, an employer may also end the tenancy of an employee in respect of a rental unit rented or provided by the employer to the employee to occupy during the term of employment by giving notice to end the tenancy if the employment is ended.

However, a notice under this section must end the tenancy effective on a date that is (a) not earlier than one month after the date the tenant receives the notice; (b) not earlier than the last day the tenant is employed by the landlord, and; (c) the day before the day in the month, or in the other period on which the tenancy is based, that rent, if any, is payable under the tenancy agreement.

A notice under this section must also comply with section 52 [*form and content of notice to end tenancy*].

In this instance I find that the landlord did terminate the employment but violated the Act in regards of properly terminating the tenancy of this employee. I find that, in fact, the landlord did not give adequate notice and did not issue the notice on the required form to validly end the tenancy under section 48 of the Act.

There is no provision in the Act that permits a landlord to unilaterally end a tenancy without notice, regardless of the employment status issues.

### Change Terms of Tenancy

In any case, I find that while the job may have ended, a tenancy relationship may well have survived. It appears that the landlord/employer, if not the tenant/employee, considered that the terms of the tenancy had undergone a significant change. However, section 14 of the Act does not permit any tenancy agreement to be amended to change or remove a standard term. I must point out that the rental rate qualifies as a standard term under the Act. In fact, even in

dealing with a matter that is not considered to be a standard term, the Act states that a tenancy agreement may only be amended to add, remove or change a term, other than a standard term, if both the landlord and tenant agree to the amendment. I find that if the landlord was attempting to impose any changes to the existing tenancy, it would be in clear violation of the Act by doing so.

#### Tenancy Ended and New Tenancy Established?

It also appears that the landlord's position may have been that the original tenancy had ended and that a new tenancy agreement was then created by the parties because of the tenant's actions in remaining and refusing to vacate the unit. As noted earlier in this decision, the tenant's original refusal to vacate was not in contravention of the Act. Rather the landlord had violated the Act by not ending the tenancy with a proper section 48 Notice.

However, If I did accept that a new tenancy had started after the tenant was fired, the Act requires that a written tenancy agreement be prepared by the landlord and a copy be given to the tenant. That being said, section 1 of the Act, *Definitions*, does not exclude verbal terms. In fact it defines "tenancy agreement" as follows:

*"tenancy agreement"* means an agreement, **whether written or oral**, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities....." (my emphasis)

If I was able to find that the parties did create a new tenancy relationship as of the end of January 2009, then I must also find that section 12 of the Act still would require that each tenancy agreement, whether in writing or not, must contain the standard terms, one of which is the amount of rent mutually agreed to by both parties. In this instance, I find that there was no mutual agreement on a critical material term of the alleged tenancy contract. At best, the term was not clear. On the subject of whether or not terms of a tenancy agreement can be

enforced, Section 6(3) of the Act states: A term of a tenancy agreement is not enforceable if:

- the term is inconsistent with this Act or the regulations,
- the term is unconscionable, or
- **the term is not expressed in a manner that clearly communicates the rights and obligations under it.**  
(my emphasis)

By their nature, disputed verbal terms are impossible for a third party to interpret when challenged by one party. I am not able to determine what the rental rate was nor what other terms of the tenancy were mutually agreed upon, even if I adopted the presumption that there was an agreement of some sort and that a new tenancy had been created.

For this reason, I find that the landlord has not met the burden of proof to sufficiently establish the portion of the landlord's application relating to the monetary claim and this portion of the landlord's application must be dismissed.

In regards to the Order of Possession, I find that this tenancy must end based on the Ten-Day Notice because it is clear that, whether under the original tenancy agreement or any new tenancy agreement, there must exist some tangible exchange of value for the right to occupy the unit in order for a contract and tenancy to be enforced. For the months of February 2009 and March 2009, the tenant has not contributed work-for-rent nor has the tenant paid rent. I find that, while this development was not created by the tenant, I also find that it cannot go on any further. Therefore I find that an Order of Possession in favour of the landlord is warranted.

Given the above, I find that due to the landlord's multiple violations of the Act, the landlord must assume some responsibility for what has transpired. I find it necessary to grant the tenant appropriate compensation representing the equivalent of the one-month notice that the tenant was validly entitled to and

would have otherwise received had the landlord complied with section 48 of the Act. I set this at \$950.00 which is the market rental rate for the unit that was being occupied by the tenant, as put forward in the landlord's testimony and I grant a monetary order in favour of the tenant for \$950.00

### **Analysis: Tenant's Application**

In light of the above, I find that the tenant's request to cancel the Ten-Day Notice must be dismissed.

### **Conclusion**

I hereby issue an Order of Possession in favour of the landlord effective two days after service on the tenant. This order must be served on the Respondent and may be filed in the Supreme Court and enforced as an order of that Court.

I find that the tenant is entitled to be reimbursed in the amount of \$950.00 representing the equivalent of one-month notice that the tenant would have received if the tenancy had been properly ended in compliance with the Act under section 48. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

The remainder of the landlord's application is dismissed without leave to reapply.

The tenant's application is dismissed in its entirety, without leave to reapply.

Dated: April 2009

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Dispute Resolution Officer