



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes: FF MNSD

Introduction

This is an application by the tenants for a review of a decision rendered by a Dispute Resolution Officer (DRO) on January 10, 2012, with respect to applications for dispute resolution by both the landlord and the tenant.

A DRO 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.

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.

In this application, the tenant applied for a review because she claimed to have new and relevant evidence not available at the original hearing and because she maintained that the January 10, 2012 decision (the original decision) was obtained by fraud.

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 dispute resolution hearing;
- the evidence is new;
- the evidence is relevant to the matter which is before the DRO;
- the evidence is credible, and
- the evidence would have had a material effect on the decision of the DRO.

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 he or 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 DRO” 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.

The Application for Review Form asks an applicant to list each item of new and relevant evidence and to state why it was not available at the time of the hearing and how it would have been relevant to the matters in dispute. In response, the applicant provided a copy of a signed fixed term tenancy agreement and addendum covering the period from September 1, 2010 until August 31, 2011. This agreement, initialled by both parties, stated that at the end of the tenancy the tenant must vacate the rental unit. The tenant also attached a series of emails which she maintained supported her assertion that there was a signed fixed term tenancy agreement for this period. The tenant provided the following explanation for why this agreement was not available at the time of the original hearing.

...It was not available at time due to the eviction, boxes rushed to storage, shipment was lost, then recovered after evidence dated expired. This was copy I made – Landlord did not give me a copy as required in RTA...

Although I have given the tenant's application for review on this ground careful consideration, I find that the tenant has not provided an adequate explanation as to why, with an exercise of due diligence, she could not have made this evidence available at the original hearing. Since she should have known that documents pertaining to her tenancy were critical to a consideration of the hearing of the two applications for dispute resolution, I find that she should have exercised more care in ensuring that this document was available and entered into written evidence. A lack of care and exercise of due diligence on the tenant's part does not entitle her to a new hearing because she could not locate documents that were relevant to the matters under consideration at the original hearing. For these reasons, I find the tenant's application fails to meet the first of the five criteria outlined above, as the new and relevant evidence should have been available to the tenant at the time of the original dispute resolution hearing. I dismiss the tenant's application for a review on the basis of new and relevant evidence because the application discloses insufficient evidence of this ground for review.

Facts and Analysis - Fraud

This ground applies where a party has evidence that the DRO's decision was obtained by fraud. Fraud must be intended. A negligent act or omission is not fraudulent.

A party who is applying for review on the basis that the DRO's decision was obtained by fraud must provide sufficient evidence to show that false evidence on a material matter was provided to the DRO, and that the evidence was a significant factor in making the decision. The party alleging fraud must allege and prove new and material facts, or newly discovered and material facts, which were not known to the applicant at the time of the hearing. The party must prove that these new and material facts were not before the DRO, and from which the DRO conducting the review can reasonably conclude that the new evidence, standing alone and unexplained, would support the allegation that the decision or order was obtained by fraud. The burden of proving this issue is on the person applying for the review. If the DRO finds that the applicant has met this burden, then the review will be granted.

A review hearing will likely not be granted where a DRO prefers the evidence of the other side over the evidence of the party applying. 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 DRO.

In this case, the tenant maintained that the landlord's failure to include his copy of the signed fixed term tenancy agreement covering the period from September 1, 2010 until August 31, 2011 in his evidence constituted fraud for the purposes of the review process. She stated that the landlord received her written evidence package weeks before the original hearing and should have recognized from her submission that the most recent signed tenancy agreement between the parties for which he had a copy had not been entered into written evidence by either party. She alleged that the landlord knew that the absence of this document could result in a favourable outcome for him based on incomplete and false information before the DRO.

Residential Tenancy Branch Policy Guideline 24 provides the following useful guidance regarding the interpretation of fraud as a ground for obtaining a review of a DRO's decision.

...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"... Fraud may arise where a witness has deliberately mislead the arbitrator by the concealment of a material matter that is not known by the other party beforehand and is only discovered afterwards.

Guideline 24 adds that "a negligent act or omission is not fraudulent."

In the DRO's decision, she made the following finding with respect to the tenancy agreements entered into written evidence by the parties.

Upon review of the tenancy agreements include in the evidence I find that the only fully executed agreement between the parties was the agreement for a fixed term that expired August 31, 2010 with the provision that the tenancy would end at that time. I was not provided evidence that the tenant signed a written tenancy agreement other than the one that expired August 31, 2010...

I find the parties had either a verbal or implied tenancy agreement after August 31, 2010. Without a signed written agreement providing for the necessary information that must accompany a fixed term tenancy then by default I find the tenancy was on a month to month basis as that is the consistent with the timing of the rent payments. Therefore, I find the provisions of the Act that deal with ending a month-to-month tenancy apply...

I find that the executed fixed term tenancy agreement for the period from September 1, 2010 until August 31, 2011 attached to the tenant's application for review would have been relevant to the DRO's consideration of this critical portion of the matters before her.

The question then narrows to whether the landlord's failure to reveal the signed fixed term tenancy agreement ending on August 31, 2011 was a negligent act or omission or whether it was a matter that the landlord concealed and which he should have disclosed.

Given the nature of the oral and written evidence presented by the parties, I find that the landlord should have known that the existence of a fixed term tenancy agreement signed by the tenant on September 18, 2010 for the period from September 1, 2010 until August 31, 2011 was of critical importance to the matters before the DRO. I find that the landlord's failure to provide either oral or written evidence with respect to the most recent signed tenancy agreement between the parties meets the test of fraud as set out in Residential Tenancy Branch Policy Guideline 24 and as stated above. The landlord knew that there was a fixed term tenancy agreement between the parties that was signed and applied to a tenancy period after that entered into written evidence by the tenant. I find that the landlord's failure to bring the existence of this tenancy agreement to the attention of the DRO constituted concealment of a material matter that should have been disclosed at the hearing, and, the effect of not doing so, deceived the DRO into believing that no such signed tenancy agreement existed after August 31, 2010. I find that the concealment of this material matter by the landlord meets the technical definition of fraud and, as such, I allow the tenant's application for review on the basis that the decision was obtained by fraud.

Under the circumstances, I suspend the original decision and order. I order a reconvened hearing to be considered by the original DRO who heard this matter on December 28, 2011 and who issued the January 10, 2012. This order enables the DRO to consider the fixed term tenancy agreement for the period from September 1, 2010 to August 31, 2011 provided by the tenant with her application for review in the context of her original decision.

Decision

The decision and Order made on January 10, 2012 are suspended. I order that the original hearing is reconvened to the DRO who heard this matter on December 28, 2011. I will be sending copies of this decision to both parties.

The Residential Tenancy Branch will send copies of the notice of this reconvened hearing to the tenant. The tenant must serve the landlord with a copy of this decision,

the evidence relied on in her application for review, and the notice of hearing either personally or by registered mail pursuant to section 89 (1) of the *Residential Tenancy Act*. The tenant will be required to demonstrate service of these documents to the landlord at the reconvened hearing.

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: January 26, 2012

Residential Tenancy Branch