



# Dispute Resolution Services

Residential Tenancy Branch  
Office of Housing and Construction Standards

## REVIEW CONSIDERATION DECISION

**Dispute Codes:** FF MND MNR OPR

### **Introduction**

On November 08, 2012, a hearing was conducted to resolve a dispute between these two parties. The landlord had applied for an order of possession and for a monetary order for unpaid rent. The tenant did not attend the hearing. The Arbitrator granted the landlord's application. The tenant has applied for a review of this decision.

Division 2, Section 79(2) under the *Residential Tenancy 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 applicant relies on sections 79(2)(a) and (b) of the *Residential Tenancy Act* (the "Act"). Section 79(2)(a) provides that the director may grant leave for review if a party was unable to attend the hearing because of circumstances that could not be anticipated and were beyond the party's control. Section 79(2)(b) provides that the director may grant leave for review if a party has new and relevant evidence that was not available at the time of the original hearing.

### **Issues**

Was the tenant unable to attend the hearing because of circumstances that could not be anticipated and were beyond his control? Does the tenant have new and relevant evidence that could change the decision?

### **Facts and Analysis**

#### **Unable to Attend**

In order to meet this test, the applicant 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.

In his application for review on the grounds that he was unable to attend, the tenant states that his common law partner was arrested and he was unsure of the release date. He also adds that the arrest was for driving without a license which is unrelated to the rental situation.

Based on the tenant's application for review, I find that the tenant was notified of the date and time of the hearing. Even if his partner was arrested, the tenant still had the option of calling into the hearing by conference call to participate in the hearing or request an adjournment. The tenant also had the option of having a representative call in on his behalf. The tenant chose neither option.

In reply to the question regarding what testimony would the tenant have provided if he had attended the hearing, the tenant states that there was no hot water for three months and that the landlord accepts cash only for rent and will not provide receipts. He also adds that he has rented the unit for two years and if there was a debt, he would have been evicted a long time ago. The tenant does not explain what effect if any this testimony would have had on the decision.

The Arbitrator made a decision based on the fact that the tenant was served with a notice to end tenancy and did not apply to dispute the notice within five days of receipt of the notice. In addition the tenant did not pay the outstanding rent and was therefore conclusively presumed to have accepted that the tenancy would end on the effective date of the notice. Even if I accept the tenant's evidence, I find that it would not have changed the decision.

I find that the tenant did not take reasonable steps to ensure that he would be in attendance at the hearing or request an adjournment and has not proven that he had circumstances that were unanticipated and beyond his control which prevented him from doing so. Accordingly, I find that the application for review on this ground must fail.

### **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 hearing;
- the evidence is new,
- the evidence is relevant to the matter before the Dispute Resolution Officer,
- the evidence is credible, and
- the evidence would have had a material effect on the decision.

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 an arbitration hearing as fully as possible. Parties should collect and supply all relevant evidence to the arbitration hearing. 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 arbitration hearing. It also includes evidence which the applicant could not have discovered with due diligence before the arbitration hearing. New evidence does not include evidence that could have been obtained before the hearing took place.

I note that in his application for review, the applicant states that the landlord falsely claimed that the tenant had not paid his bills and he has proof of having done so. The tenant has filed a copy of a paid utility bill.

On the ground for review, that the applicant has new and relevant evidence that was not available at the time of the original hearing, I find that the applicant has not provided any new evidence. The evidence listed above was in existence at the time of the hearing. In addition, the Arbitrator made a decision based on s46 of the *Residential Tenancy Act* and even if I accept the proof of payment of a utility bill as new evidence it will have no effect on the final outcome.

I find that the tenant has not submitted any new evidence and therefore has failed to meet the criteria of the test to establish grounds for review in this tribunal and accordingly, I find that the application for review on this ground must fail.

This ground for review is not designed to provide parties a forum in which to rebut findings by the Arbitrator or to allege an error of fact or law, but to provide evidence which could not have been presented at the time of the hearing because it was not in existence at that time. The applicants are free to apply for judicial review in the Supreme Court, which is the proper forum for bringing allegations of error.

**Decision**

The applicant has failed to establish grounds for review in this tribunal and accordingly, I find that the application for review must fail. For the above reasons I dismiss the application for leave for review.

**The original decision made on November 08, 2012 stands.**

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: November 21, 2012.

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Residential Tenancy Branch