



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Introduction

This is an application by the tenant for a review of a decision rendered by an Arbitrator on August 28, 2013 (the original decision), with respect to an application for dispute resolution from the tenant.

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.

Issues

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.

In this case, the tenant requested a review of the original decision on the basis of new and relevant evidence and on the basis of fraud, the second and third grounds outlined above.

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 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 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.

In response to the instruction “List each piece of new and relevant evidence and state why it was not available at the time of the hearing and how it is relevant”, the applicant explained that the landlord had claimed at the original hearing that he had returned her postdated cheques to her by registered mail. The tenant noted that the Arbitrator suggested that she use the Canada Post Tracking system to locate the status of the registered mail the landlord had sent to her containing the postdated cheques for the remainder of her tenancy. After checking the tracking number provided by the landlord at the hearing, the tenant discovered that the registered mail cited by the landlord at the hearing was the landlord’s dispute resolution hearing package. She maintained that her postdated cheques were not included in that registered mailing by the landlord. She maintained that this was new and relevant evidence that was not taken into account in the original hearing. She asserted that this new evidence affected the following finding by the Arbitrator:

...Given the Landlord’s postal evidence of return of the post dated cheques, I find that the Tenant has failed on a balance of probabilities to show that he Landlord failed to return the cheques and I dismiss this claim...

The tenant attached evidence that when her postdated cheques were not returned to her, she checked with her bank to find out the cost of cancelling her postdated cheques. She learned that her bank would charge her \$18.00 per cheque to cancel her postdated cheques provided to the landlord. Rather than incur this cost, the tenant followed the advice of her bank and closed her existing chequing account, replacing it with a different account. She provided evidence that she incurred an extra charge of \$52.11 to order new cheques for this new account. She maintained that the costs associated with an NSF she incurred as a result of having to close her account and the other costs related to the landlord’s failure to return her postdated cheques were part of her \$2,500.00 claim for damages and losses, for which she received \$100.00 in the original decision.

In addition to her concerns about the landlord’s failure to return her postdated cheques, the tenant provided notes in the margins and under the text of a copy of the original decision she submitted as part of her application for review. She attached the following note to the front of the copy of the original decision:

Since these are legal documents I needed to correct a few items in the section titled “The following are agreed facts:” Note: I am not correcting the false statements the landlord made. I understand these documents are only stating what was stated, and not whether it is true or not.

I should first note that I have no mandate to correct the wording of a decision issued by another Arbitrator appointed under the *Act*. There is a process whereby a party to a decision can request a correction or clarification of a decision by the original Arbitrator. If this is the tenant's objective, I suggest that she contact the Residential Tenancy Branch to obtain the appropriate form for seeking a correction or clarification. Based on my review of the tenant's comments, it is unclear if she is truly seeking a correction or if her request is that more of her version of events were included in the original decision. Her frequent notes in the copy of the original decision that certain statements included in the Arbitrator's original decision were "untrue" suggests that the tenant wanted a different account of the Background and Evidence included in this decision. I find that many of these items represent an attempt by the tenant to have her statements accepted and those of the landlord rejected. The review process is not intended as a mechanism to re-argue the facts that were presented to the Arbitrator at the original hearing. It is also very unclear as to whether any of the tenant's "notes" or attachments to the original decision have any bearing whatsoever in the Arbitrator's original decision.

Turning to the tenant's claim regarding the postdated cheques, I find that the tenant's application claims that her postdated cheques were not included in the registered mail package sent to her by the landlord and the landlord's claim that they were. Although the tenant may have subsequently incurred additional expenses resulting from the landlord's alleged failure to return her postdated cheques, I do not find that the losses she claims to have incurred were in existence when she submitted her original application for a monetary award, nor were they incurred until well after the Arbitrator issued her original decision. Under these circumstances, I find that the new evidence resulting in additional losses relates to a potential separate application for losses that the tenant could consider making rather than any losses that were properly quantified and before the original Arbitrator. I dismiss the tenant's claim that the additional losses she has incurred with respect to her banking were included in her original claim for losses and damages. I do so as she had not approached her bank, learned of her options and decided to incur extra costs by changing bank accounts at the time of the original hearing. I find this to be a separate issue and involves a choice made by the tenant to incur extra costs to prevent the landlords' potential cashing of cheques that she maintains remain in their possession. In the event that the landlords were to have cashed any of the tenant's postdated cheques, the tenant would certainly have been entitled to apply for a monetary award against the landlords. At this point, the tenant's actions have apparently prevented the possibility of the landlords cashing these cheques. I am in no position to speculate on whether an Arbitrator appointed under the *Act* would find the tenant eligible to obtain the recovery of her costs associated with changing bank accounts and ordering new cheques from the landlord. I find that these

issues were not before the original Arbitrator and as such the new evidence provided by the tenant would not have had a material effect on the original decision.

I dismiss the tenant's application for review on the basis of new and relevant evidence because her application has not met the five criteria outlined above that would enable me to grant her request for a review of the original decision. I also find, in part, that portions of her application appears more in the nature of an attempt to re-argue the matters that were before the Arbitrator at the original hearing. I dismiss the application for review for new and relevant evidence on the basis that the application discloses insufficient evidence of any ground for review.

Facts and Analysis – Fraud

This ground applies where a party has evidence that the Arbitrator'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 Arbitrator's decision was obtained by fraud must provide sufficient evidence to show that false evidence on a material matter was provided to the Arbitrator, 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, and which were not before the Arbitrator, and from which the Arbitrator 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 Arbitrator finds that the applicant has met this burden, then the review will be granted.

A review hearing will likely not be granted where an Arbitrator 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 Arbitrator.

In this case, although the tenant obtained additional evidence after the hearing which she maintained revealed fraud, the issue fundamentally reduces to the tenant's claim that her postdated cheques were not returned to her in the registered mailing which the landlord claimed included those cheques. At the hearing, the original Arbitrator accepted the landlord's sworn testimony that he included the cheques in his registered mailing to the tenant. The Arbitrator's decision in this regard is final and binding. As

noted above, if the tenant has new evidence to demonstrate that she had to incur additional costs as a result of events that transpired after the original hearing, she can submit a new application to attempt to recover those costs. Whether or not such costs would be awarded or whether an Arbitrator would consider those costs is a matter that would need to be addressed at a future hearing should the tenant apply for recovery of these costs.

I find that much of the tenant's application for review on the basis of fraud is an assertion that the landlord lied to the Arbitrator about placing the postdated cheques in a registered letter package to the tenant. As noted above, an application for review for fraud will not be granted if the applicant claims that the other party made false statements at the hearing and that her testimony should have been accepted instead.

Neither the information now submitted, nor the tenant's description of the issues demonstrates fraud as outlined above. The tenant's allegation that the Arbitrator based her decision on fraudulent evidence submitted by the landlord relies on a request to accept that the postdated cheques were not included in the registered mail package as claimed by the tenant. While it would be unlikely that the tenant would go to such lengths to prevent the landlords from cashing her postdated cheques if she already had received them, this is not sufficient to obtain a review of a final and binding decision made on essentially the same evidence as that which is presently before me. I find that the tenant has not submitted sufficient evidence to demonstrate that the original decision was obtained by fraud. I dismiss the application for review on the basis that the application discloses insufficient evidence of any ground for review.

The original decision and Order is therefore confirmed.

Decision

The decision and Orders made on August 28, 2013 stand. 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: September 27, 2013

Residential Tenancy Branch