



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

**Dispute Codes:** CNC FFT

### Introduction

This hearing dealt with the tenant's application pursuant to to the *Residential Tenancy Act* (the "Act") for:

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*.

YN ("landlord") appeared as Power of Attorney for the landlord in this hearing. Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

The landlord confirmed receipt of the tenant's application for dispute resolution hearing package ("Application"). In accordance with section 89 of the *Act*, I find the landlord duly served with the tenant's Application. Both parties confirmed receipt of each other's evidentiary materials, which were duly served in accordance with section 88 of the *Act*.

The tenant acknowledged receipt of the 1 Month Notice to End Tenancy for Cause, with an effective date of January 31 2019 (the 1 Month Notice), which was posted on his door on December 27, 2018. Accordingly, I find that the 1 Month Notice was served to the tenant in accordance with section 88 of the *Act*.

**Issue(s) to be Decided**

Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Is the tenant entitled to recover the filing fee for this application from the landlord?

**Background and Evidence**

This month-to-month tenancy began in May of 2011. Monthly rent is currently set at \$1,476.00, payable on the first of the month. The landlord collected, and still holds, a security deposit in the amount of \$720.00. The tenant currently still resides in the suite.

The landlord served the notice to end tenancy dated December 27, 2018 providing the following grounds:

1. The tenant is repeatedly late paying rent
2. Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The Power of Attorney for the landlord provided the following submissions in the hearing about why the 1 Month Notice was issued. The tenant was late 11 out of the 12 months in 2018. The only month the tenant month the tenant was on time was October 2018. The Power of Attorney stated that the tenant paid her rent on time only 5 out of the 12 months in 2017. The Power of Attorney confirmed that since the 1 Month Notice was issued in December of 2018, the tenant has paid her January and February 2019 rent on time. The Power of Attorney stated that the tenant was given several warnings about her late payments but continued to pay her rent late.

The tenant did not dispute that she had previously paid rent late, or deducted money, but that was never an issue with the landlord, and that payments were made with the first week of the month. The tenant referenced a previous decision made by an Arbitrator dated November 26, 2018 about this tenancy and a 10 Day Notice, which was cancelled by the Arbitrator. The tenant testified that the landlord communicated with her by way of reply to her electronic transfers, which she never received. The Arbitrator, in their decision, stated "There is insufficient evidence that the tenant ever received the landlord's messages sent through the e-transfer platform". The landlord was adamant the tenant should have received the replies, which the tenant disputes.

## **Analysis**

Section 47(1) of the *Act* allows a landlord to end a tenancy for cause for any of the reasons cited in the landlord's 1 Month Notice.

A party may end a tenancy for the breach of a material term of the tenancy but the standard of proof is high. To determine the materiality of a term, an Arbitrator will focus upon the importance of the term in the overall scheme of the Agreement, as opposed to the consequences of the breach. It falls to the person relying on the term, in this case the landlord, to present evidence and argument supporting the proposition that the term was a material term. As noted in RTB Policy Guideline #8, a material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the Agreement. The question of whether or not a term is material and goes to the root of the contract must be determined in every case in respect of the facts and circumstances surrounding the creation of the Agreement in question. It is entirely possible that the same term may be material in one agreement and not material in another. Simply because the parties have stated in the agreement that one or more terms are material is not decisive. The Arbitrator will look at the true intention of the parties in determining whether or not the clause is material.

Policy Guideline #8 reads in part as follows:

*To end a tenancy agreement for breach of a material term the party alleging a breach...must inform the other party in writing:*

- *that there is a problem;*
- *that they believe the problem is a breach of a material term of the tenancy agreement;*
- *that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and*
- *that if the problem is not fixed by the deadline, the party will end the tenancy...*

In regards to the landlord's allegation that there has been a breach of a material term of the tenancy agreement, I find that it is undisputed that the tenant had paid her rent late. The tenant, however, disputes the fact that she was given the opportunity to remedy the breach as she had always been allowed to make deductions or pay her rent late, and

the landlord had never given her written notice that the tenancy may end of she continued to do so.

I am not satisfied that the landlord provided the tenant with an opportunity to correct the breach. The *Act* requires that the landlord give written notice to the tenant that this breach could result in the end of this tenancy, and the tenant denies having received any communication from the landlord in regards to this issue. I find that this form of communication was addressed at a previous hearing, and referenced in a decision dated November 26, 2018. I am not satisfied that the landlord has provided sufficient evidence to support that the tenant had received these written notices from the landlord. Since the previous November 26, 2018 decision was sent to both parties, I find the tenant has become aware of the landlord's concerns, and it was confirmed in the hearing that the tenant has paid her January and February 2019 rent on time.

I find that the landlord has not met their burden of proof to show that the tenant has breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so, and I decline to uphold the 1 Month Notice on these grounds.

The landlord is also requesting an Order of Possession on the grounds of repeated late rent payments, which the tenant did not dispute, but stated was done so with the permission of the landlord.

I note the wording of RTB Policy Guideline #38, which provides the following guidance regarding the circumstances whereby a landlord may end a tenancy where the tenant is repeatedly late paying rent.

*Three late payments are the minimum number sufficient to justify a notice under these provisions...*

*However, if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be "repeatedly" late...*

The tenant expressed concern that this tenancy should not end on the grounds of repeated late rent payments when it has been implied by the landlord that late payments would be accepted. Although the landlord's testimony in the previous hearing, as well as this one, is that the tenant was issued written notices by way of replies to her money transfers, both the previous Arbitrator and I have made a finding

that the landlord has failed to provide sufficient proof that the tenant had received these notices or warnings. I find that the lack of warnings received by the tenant, and the continued acceptance of these late rent payments, raises the issue of implied waiver. Although rent may be payable on the first of the month, the acceptance or implied acceptance of late payments, may contribute to ambiguity.

Residential Tenancy Policy Guideline #11 states the following about express and implied waivers:

*“There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel....*

*In order to be effective, a notice ending a tenancy must be clear, unambiguous and unconditional.”*

As noted above, a notice to end tenancy must be clear, unambiguous and unconditional. This extends to the terms of a tenancy, including how and when payments must be made. By accepting late rent payments on multiple occasions without properly informing the tenant in writing that these payments were considered late, and could possibly be considered a breach of the tenancy agreement and the *Act*, the terms of the tenancy become ambiguous. As stated above, the landlord has not provided sufficient evidence to support that the tenant had received any notices or warnings. Accordingly, I find that the landlord had implied that the late payments were acceptable, and I find that the landlord has not established that this tenancy should end on the grounds of repeated late rent payments. I allow the tenant's application to cancel the 1 Month Notice dated December 27, 2018, and this tenancy is to continue until ended in accordance with the *Act*.

I find that the tenant is entitled to recover the filing fee for this application.

### **Conclusion**

The landlord's 1 Month Notice to End the Tenancy dated December 27, 2018 is cancelled and of no continuing force, with the effect that this tenancy continues until ended in accordance with the *Act*.

I allow the tenant to implement a monetary award of \$100.00, by reducing a future monthly rent payment by that amount. In the event that this is not a feasible way to implement this award, the tenant is provided with a Monetary Order in the amount of \$100.00, and the landlord must be served with **this Order** as soon as possible. Should the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

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: March 1, 2019

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Residential Tenancy Branch