



# Dispute Resolution Services

Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

**Dispute Codes**      OPR-DR

### **Introduction**

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the "**Act**") for an order of possession for non-payment of rent pursuant to section 55.

This matter was reconvened from an *ex parte*, direct request proceeding by way of an interim decision issued August 23, 2021 (the "**Interim Decision**").

The tenant attended the hearing. The landlord was represented at the hearing by its senior manager ("**JLV**") and its property manager ("**BH**"). All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The JLV testified the landlord served the tenant with the Interim Decision, the notice of reconvened hearing, the supporting documentary evidence, and all other required documents via registered mail on August 26, 2021. The tenant testified that this mailing was delivered to the building in which she lives (which is operated by the landlord) on August 28, 2021. However, she testified that she did not sign for it and that the package was not provided to her by the residential property's staff (who work for the landlord) until September 16, 2021. She testified that she used the tracking number on the envelope containing the documents to trace back when the package was delivered and to view the signature of the individual who signed for it. She testified that it was not her signature. She stated that this was troubling, and that she did not like that the landlord's staff were delaying her mail.

In any event, she testified that she had sufficient time to review the documents sent to her in advance of the hearing. As such, I deem that the tenant has been served with the required documents in accordance with the Act.

The tenant did not submit any documentary evidence in response to the landlord's application.

### **Issues to be Decided**

Is the landlord entitled to an order of possession?

## **Background and Evidence**

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a written agreement starting August 13, 2016. Monthly rent is \$375.00 and is payable on the first of each month. The tenant paid the landlord a security deposit of \$187.50, which the landlord continues to hold in trust for the tenant.

BH testified that the tenant failed to make rent payments when they were due for the months of January, February, March and April, 2021. The landlord issued a 10-day notice to end tenancy for non-payment of rent (the "**First 10-Day Notice**"). After receiving this notice, the tenant paid the outstanding arrears. BH testified that, following this payment, she "trusted that rent would be paid" on time and that the landlord was not going to attempt to end the tenancy on the basis of the First 10-Day Notice. She understood that the arrears were partially due to the tenant having trouble securing funding from various government programs.

The tenant testified that she turned 65 in November 2020 and that she was on provincial disability. She testified that once she turned 65, she was no longer eligible for provincial disability, but rather would qualify for federal funding instead. She testified that she understood she would automatically be enrolled in the appropriate federal program. She did not receive any benefits for December 2020 or January 2021. She contacted the appropriate federal office in January 2021 and discovered that she had to apply for the federal funding. She testified that she applied on February 1, 2021. The tenant testified that, due to COVID-19, these applications were processed very slowly and that she did not receive her first federal payment until July 2021.

The tenant testified that she used what little income she had during January to April 2021 to purchase groceries. She testified that, after the First 10-Day Notice was served, she had to borrow money from friends (some of whom lived in the residential property) to pay the rent arrears. During May, June, and July, the tenant prioritized paying these individuals back rather than paying her rent. She testified that she thought this was appropriate, as they needed the money to eat.

The tenant did not pay rent when it was due in May, June or July 2021. On July 6, 2021, the landlord served the tenant with a 10-day notice to end tenancy for non-payment of rent (the "**Second 10-Day Notice**") by posting it on the door of the rental unit. It specified an effective date of July 23, 2021 and arrears owing on \$1,125 as of July 1, 2021. The tenant confirmed she received the Second 10-Day Notice on July 6, 2021.

The tenant did not apply to dispute the Second 10-Day Notice. She did not pay August 2021 rent when it was due. She testified that in late July 2021, she was approved for federal funding, and received a cheque for \$1,200 from the federal government. She did

not pay the arrears owed to the landlord immediately, however. She testified that she needed to borrow money from her daughter to pay August 2021 rent. She was not able to get this money until August 5, 2021. She testified that she was not able to see BH until August 9, 2021 to pay her money owed for May, June, July, and August rent.

On July 21, 2021, the landlord made this application seeking an order of possession. The landlord did not apply for a monetary order for monthly rent. BH testified that the landlord wanted the tenant to use the money owed as arrears to secure a new place to live, which is why the landlord did not apply for a monetary order.

On August 6, 2021, the Residential Tenancy Branch (the “**RTB**”) issued a Notice of Dispute Resolution Proceeding - Direct Request (the “**Notice of Direct Request**”), which the landlord served on the tenant on August 8, 2021 by posting in on her door. The tenant acknowledged receiving an envelope posted on her door on August 8, 2021, but stated that she did not open it, as she thought it was another 10-day notice to end tenancy for non-payment of rent. The tenant testified that she thought if she paid the rental arrears it would have the effect of cancelling whatever was contained in the envelope.

The parties agree that the tenant met with HB on August 9, 2021 and that the tenant gave her \$1,500 in cash but was not issued a receipt. The tenant testified that after meeting with HB, she left to go grocery shopping and that shortly after leaving, a woman chased her down on the street with the envelope of money she gave to HB and returned it to the tenant. The tenant was unsure as to the significance this money being returned. She testified that she accepted it and “held onto it” for a few days and then met with HB a second time on August 10, 11 or 12, 2021 (she could not recall exactly when). She testified that she gave the money to HB again and that HB accepted it (again not providing her with a receipt). The tenant testified that HB did not explain why she returned the money to her at first. HB testified that she told the tenant that she returned it to her because she “was thinking of [the tenant’s] future” and wanted her to use it to find a new place to live. HB testified that the tenant insisted that she take the money. In any event, the parties agree that HB ultimately accepted the money.

The tenant testified that the one and a half to two weeks later, she was near the front desk of the building, and JLV emerged from the back office with her rent money paid to HB in hand. She testified that he put it on the counter and did not give any reason why he was returning it. The tenant testified she was confused as to why the landlord would not accept her rent payment. She called the police and asked that they attend the residential property to hold the money, as she didn’t want to accept its return for fear of adverse consequences regarding her tenancy. She testified that they told her the do not get involved in such things and would not be coming. The tenant then testified that she pulled her shirt-sleeve down over he hand, picked up the envelope containing the rent money (being careful that the envelope did not touch her skin) and threw the envelope behind the front desk (which is an area used exclusively by the landlord). She said that JVL made no further attempts to return the money.

JVL agreed that he attempted to return the tenant's rent money. However, he disagreed that he did not give the tenant a reason for so doing. He testified that when he first attempted to return the money, he told her that the landlord had not applied for a monetary order in the direct request proceeding and that it was only seeking an order of possession. He testified that he told the tenant that it was the landlord's "goal for her to use the money to pay for other housing because [the landlord] would continue with the order of possession". He testified that the tenant insisted that the landlord keep her rent money, and, after she threw it behind the counter, resigned himself to accepting the rent, at it was apparent that "she really wanted to pay". JVL did not testify that he made any representations to the tenant regarding the status of this application if the landlord accepted the rent money (indeed, as stated above, he testified he told the tenant that the landlord intended to proceed with its application for an order of possession).

The landlord did not issue a receipt for the tenant's payment of rent for May, June, July, or August 2021 until August 30, 2021. A copy of this receipt was submitted into evidence and was dated August 30, 2021. The tenant testified that only a few days prior to the hearing, she received a revised copy of this receipt which was dated August 9, 2021. HB confirmed that the correct date on the receipt should be August 9, 2021, this being the date that the landlord first accepted the money from the tenant.

The tenant paid September and October rent on time and was issued receipts after each payment (in September she paid rent to HB and in October she paid to another of the landlord's staff). JVL testified that the landlord had not given any instructions to its staff to refuse future rent payments from the tenant.

The tenant did not pay November 2021 rent when it was due. She testified that her son's birthday was in November and that, even though he is an adult, she still buys him a present. I gather that she used some or all of her rent money to do this. She did not pay November rent until December 2, 2021. The landlord issued her a receipt for this payment. The tenant has yet to pay December 2021 rent.

At the end of the hearing, JVL indicated that, in the event I issue an order of possession, the landlord would like it effective three or four weeks after it is served on the tenant, so she has enough time to secure new housing and to move out. When I asked if the tenant had any position as to when an appropriate move-out date would be in the event I issued an order of possession, the tenant stated that she would not entertain the idea and indicated that she would not comply with such an order because she would appeal it to the Supreme Court of British Columbia. I advised her that this is her right, and that, in the absence of submissions from her on the issue of when an appropriate end of tenancy date would be, I would make an order consistent with what landlord asked for, in the event I order the tenancy terminated. She indicated that she understood.

## **Analysis**

Based on the tenancy agreement submitted into evidence, I find that monthly rent is \$375 and is payable on the first of each month.

Section 46 of the Act, in part, states:

### **Landlord's notice: non-payment of rent**

46(1) A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

(2) A notice under this section must comply with section 52 [form and content of notice to end tenancy].

(3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.

(4) Within 5 days after receiving a notice under this section, the tenant may

- (a) pay the overdue rent, in which case the notice has no effect, or
- (b) dispute the notice by making an application for dispute resolution.

(5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant

- (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
- (b) must vacate the rental unit to which the notice relates by that date.

The parties do not dispute the tenant did not pay May, June, or July 2021 rent when it was due, nor that, as of the date the Second 10-Day Notice was deemed served, the rental arrears were \$1,125 (as indicated on the Second 10-Day Notice). The tenant did not dispute the Second 10-Day Notice nor did she pay the arrears within five days of being deemed served with a copy of it (July 9, 2021, three days after it was posted, per section 90 of the Act). On the tenant's own evidence, the soonest she could be considered to have paid the arrears was on August 9, 2021, 30 days after she is deemed to have been served with the Second 10-Day Notice.

As such, section 46(5) of the Act applies, and the tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the Notice (July 23, 2021).

I note that the tenant's payment of \$1,500 on August 9, 2021 does not have the effect of cancelling the Second 10-Day Notice. This notice can only be cancelled if the arrears are paid within five days of it being served. I also note that there is no mechanism in the

Act whereby the tenant could cancel the Notice of Direct Request; such notices are not documents that form the evidentiary basis for ending a tenancy. Rather, they are documents generated by the RTB to advise landlords and tenants of a dispute resolution proceeding.

However, I must consider whether the conduct of the parties after the Second 10-Day Notice was served had the effect of reinstating the tenancy or demonstrated an implied intention of the landlord to waive its right to apply for an order of possession based on the Second 10-Day Notice.

RTB Policy Guideline 11 states:

**D. WAIVER OF NOTICE AND NEW OR CONTINUED TENANCY**

Express waiver happens when a landlord and tenant explicitly agree to waive a right or claim. With express waiver, the intent of the parties is clear and unequivocal. For example, the landlord and tenant agree in writing that the notice is waived and the tenancy will be continued.

Implied waiver happens when a landlord and tenant agree to continue a tenancy, but without a clear and unequivocal expression of intent. Instead, the waiver is implied through the actions or behaviour of the landlord or tenant.

For example, if a landlord gives a notice to end tenancy, a landlord may accept rent from the tenant for the period up to the effective date of the notice to end tenancy without waiving the notice. However, if the landlord continues accepting rent for the period after the effective date but fails to issue rent receipts indicating the rent is for “use and occupancy only,” it could be implied that the landlord and tenant intend for the tenancy to continue.

Intent may also be established by evidence as to:

- whether the landlord specifically informed the tenant that the money would be for use and occupancy only;
- whether the landlord has withdrawn their application for dispute resolution to enforce the notice to end tenancy or has cancelled the dispute resolution hearing; and
- the conduct of the parties.

Based on the testimony of the parties, I do not find that the landlord *expressly* waived their right or claim. Neither side gave any evidence that any representative of the landlord told the tenant that they would withdraw the Second 10-Day Notice or would not seek an order of possession. The tenant testified that the landlord’s agents were silent, whereas HB and JLV testified that they explicitly told the tenant that they were pursuing an order of possession or that she should look for alternate housing.

However, I must consider whether the conduct of the landlord's agents amounts to an *implied* waiver of the landlord's right to obtain an order of possession based on the Second 10-Day Notice. Policy Guideline 11 sets out how a landlord might accept payments from a tenant while reserving their right to seek an order of possession for non-payment of rent: by issuing a rent receipt "indicating the rent is for 'use and occupancy only'". The landlord did not do this. The absence of such language does not mean that any acceptance of rent automatically reinstates the tenancy. Policy Guideline 11 states that the failure to use such language "could" imply a waiver.

In the absence of the "use and occupancy" written on the rent receipts, I must look to the landlord's agents' conduct to determine if there is an implied waiver. The parties give differing accounts as to what the landlord's agents told the tenant when she attempted to give them her late rent. JVL stated he was clear with the tenant that notwithstanding the payment, the landlord would seek an order of possession. HB testified that she told the tenant that the landlord was not seeking a monetary order so as to ensure that the tenant had funds available to relocate. I do not understand either of these statements to amount to an implied waiver of the landlord's right to seek an order of possession. The parties agree that the landlord on two occasions tried to return the rent money to the tenant; such conduct is not consistent with an implied intention to waive a right to an order of possession. I accept that it was only after the tenant forcibly threw the rent money into an area restricted for the use of the landlord, that the landlord relented, and ceased efforts to return or decline to accept the tenant's payment.

I also note that the landlord's repeated refusal of the rent money and HB and JVL statements about wanting the tenant to use that money to secure a new place to live is consistent with the fact that they did not apply for a monetary order for rental arrears as part of this application, even though at the time this application was made the tenant as \$1,125 in arrears.

The tenant testified that both HB and JVL did not provide any explanation as to why her rent payments were being returned to her. This is markedly different from what JVL and HB testified to. Of these differing explanations, I find JVL and HB's testimony to be more in accordance with the preponderance of probabilities. I do not find it likely that agents of the landlord, when returning four months' worth of rent to the tenant, would offer no explanation as to why they were doing so. It strains credulity that senior employees of the landlord would stand mute while they handed \$1,500 back to the tenant and not offer any explanation whatsoever as to its significance or whether the tenancy would continue. As such, where the tenant and JVL or HB's testimony differs, I prefer the testimony of the JVL or HB.

I do not find that the landlord could be considered to have waived its right to apply for an order of possession by initially accepting the tenant's payment on August 9, 2021. I find that the landlord's immediate return of the money left with HB within minutes of receiving it indicates that it had no such intention to waive its rights.

I find it more likely than not that, upon receiving the Notice of Direct Request on August 8, 2021, the tenant attempted to negate it by paying the landlord \$1,500. It may be that she thought the document on her door was a notice to end tenancy for non-payment of rent, and that she could cancel it by paying the arrears specified, or it may be that she knew it was a Notice of Direct Request, and attempted (either intentionally or inadvertently) to reinstate the tenancy by forcing the late rent payment on the landlord in hopes such a payment would be found to amount to an implied waiver on the part of the landlord. I make no finding as to which of these two options occurred, as it is not necessary to do so. I have already found that the landlord did not make an implied waiver, and I have already stated that the Act does not allow a Notice of Direct Request to be negated by a payment of arrears.

In the event that I am incorrect, and neither HB nor JVL offered any explanation as to why the landlord was returning the rent money, I would still find that the landlord did not waive its right to apply for an order of possession. I find that the repeated attempted return of the tenant's late rent payment (which included payment for August 2021 rent which became due after the Second 10-Day Notice was issued) demonstrates the landlord's intention to not to re-instate the tenancy after it had ended. If the landlord intended for the tenancy to be reinstated, it would not have refused rent that it was rightful due. I find that the acceptance of the tenant's rent payments only came about after the tenant clearly and repeatedly demonstrated that she would not accept *not paying rent*. In such circumstances, it is unreasonable for the landlord to assume the money that was literally thrown at it. I do not find that the tenant can cause the landlord to be considered to have waived its right to seek an order of possession through sheer persistence. In light of the fact that the tenant escalated the conflict to the point where she tried to get the police involved, I find it was not unreasonable for the landlord to acquiesce from its position in order to de-escalate the situation. I do not find that such a tactic amounts to an implied waiver.

As such, I find that by not disputing the Second 10-Day Notice and by not paying the full amount of arrears specified on it within five days of being deemed served with it, the tenant must be conclusively presumed to have accepted that the tenancy ended on the effective date of the Second 10-Day Notice. As such, I find that the landlord is entitled to an order of possession effective four weeks after the landlord serves it on the tenant. Per the tenant's request, and with the landlord's consent, the landlord must affect this service by placing a copy of the order of possession and this decision in the tenant's mailbox. The landlord does not need to notify the tenant of when they have done this. Tenants are expected to regularly check her mailbox.

The landlord must deal with the security deposit in accordance with section 38 of the Act.

## **Conclusion**



Pursuant to section 55 of the Act, I order that the tenant deliver vacant possession of the rental unit to the landlord within four weeks of being served with a copy of this decision and attached order(s) by the landlord.

The landlord must serve the tenant with a copy of this decision and attached order of possession as soon as possible after receiving it from the RTB.

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: December 10, 2021

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Residential Tenancy Branch