# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes **CNC-MT, FFT**

Introduction

This hearing dealt with an application by the tenants pursuant to the Residential Tenancy Act ("Act") for orders as follows:

- cancellation of the landlord's One Month Notice to End Tenancy ("One Month Notice") pursuant to section 47;
- more time to make an application to cancel the One Month Notice pursuant to section 66; and
- 
- recovery of the filing fee pursuant to section 72.

At the beginning of the hearing all parties were affirmed, and hearing procedure was explained. All parties confirmed their understanding of the process.

Both parties attended the hearing with the landlord being represented by landlord JS and his agent NS, while the tenant was represented by tenant SK.

The tenant filed the application for dispute resolution on May 10, 2022, and sent it to the landlord along with some supporting materials by registered mail on May 19, 2022. The landlord personally served materials on the tenant on September 8, 2022. I find that the parties were properly served pursuant to sections 88 and 89 of the Act.

Issue(s) to be Decided

1. Did the tenant file her dispute notice within the legislated time frame? If not do exceptional circumstances apply to extend the filing deadline?
2. Is the One Month Notice valid and enforceable against the tenant?
3. Is the tenant entitled to recover the filing fee for this application?

Background and Evidence

The tenancy commenced on January 1, 2020. Rent is $2000.00 per month and the landlord holds a security deposit of $1000.00 in trust for the tenant.

The tenant confirmed receipt of the One Month Notice dated April 29, 2022, served in person on that date. Pursuant to section 89 of the Act the tenant is found to have been served with this notice in accordance with the Act. The grounds for the One Month Notice were that the tenant was in breach of a material term of the tenancy agreement.

The landlord and tenant agree on the following facts:

- On April 29, 2022, JS and NS attended at the residential property for the purpose of conducting an inspection of the premises. The tenant refused entry in to the residential property;
- NS asked the tenant to return the One Month Notice and the tenant refused to return the document, stating she wished to keep it as evidence of harassment for another hearing on May 10, 2022;
- The inspection of the residential property took place and was completed on May 2, 2022.
- The parties both participated in an RTB hearing on May 10, 2022, regarding a different notice to end the tenancy

The tenant first testified that NS gave her the One Month Notice on May 2, 2022. The NS testified that be gave it to her on April 29, 2021 when he attended the residential property. However, later in the hearing, the tenant admitted to having been served with the One Month Notice on April 29, 2022.

The landlord testified that written notice of an intention to enter was provided to the tenant on April 21, 2022, and three alternate dates for the entry were proposed. A subsequent exchange took place between the NS and SK on April 27, 2022, and he advised the tenant that they intended to enter on April 29, 2022. NS stated in the hearing that he believed that once the parties had agreed on the May 2, 2022, date for inspection, the One Month Notice was no longer necessary and that is why he requested that the tenant return it. He believed, however, that based on the tenant's

refusal to return the document that she wished to formally dispute the One Month Notice.

The tenant denied receiving the April 21, 2022 written notice to enter, and subsequently advised the landlord on April 27 that April 29, 2022 was not an acceptable time to enter. The tenant stated that she wanted to keep the One Month Notice as evidence for the May 10, 2022, hearing. She believed it would help support her position that the landlord was harassing her. She understood that based on her conversation with NS at the time he requested the return of the One Month Notice that the inspection issue had been resolved by agreement of the parties and that May 2, 2022, was an acceptable inspection date.

Once she realized that the One Month Notice was not formally before the arbitrator at the May 10, 2022 hearing and that the landlord was of the position that it had not been withdrawn, she filed her dispute notice that same day. The RTB processed her application and issued a notice of dispute resolution proceeding on May 19, 2022. The tenant served it on the landlord by registered mail that same date.

Analysis

Did the tenant file the dispute notice in time?

The tenant provided contradictory evidence as to when she was served with the One Month Notice. The landlord's testimony was consistent. Upon weighing the evidence, I find it more likely than not that the landlord served the tenant with the One Month Notice on April 29, 2022. I find that is supported by the preponderance of probabilities, as it would make little sense for the landlord to serve the tenant with the One Month Notice for refusal to enter the rental unit on the same day they gained entry.

Rather, I find it more likely that the landlord issued the One Month Notice on April 29, 2022, as this was the date the tenant refused the landlord entry onto the residential property. I understand the landlord's evidence to be that it issued the One Month Notice as a method by which it enforced his right of entry under the Act.

Section 47(4) states that the tenant who is served with a One Month Notice must file a dispute within ten days of receipt of that notice. The tenant received the One Month Notice on April 29, 2022, and she therefore had to file her dispute by May 9, 2022. She

was one day late according to the legislated time frame. However, section 66 states that:

> **66** (1)The director may extend a time limit established by this Act only in exceptional circumstances, other than as provided by section 59 (3) *[starting proceedings]* or 81 (4) *[decision on application for review]*.

RTB Policy Guideline 36 give guidance as to what may constitute exceptional circumstances, and gives specific examples of what should not be considered exceptional circumstances:

> The word "exceptional" implies that the reason for failing to do something at the time required is very strong and compelling. Furthermore, as one Court noted, a "reason" without any force of persuasion is merely an excuse Thus, the party putting forward said "reason" must have some persuasive evidence to support the truthfulness of what is said.
>
> Some examples of what might not be considered "exceptional" circumstances include:
>
> - the party who applied late for arbitration was not feeling well
> - the party did not know the applicable law or procedure
> - the party was not paying attention to the correct procedure
> - the party changed his or her mind about filing an application for arbitration
> - the party relied on incorrect information from a friend or relative

I find that the circumstances in this case constitute exceptional circumstances that would allow me to extend the time frame in which the tenant could dispute the One Month Notice. On April 29, 2022, the parties had a misunderstanding of the factual situation. The landlord believed that the tenant, by her request to retain the One Month Notice was intending to file a dispute. The tenant believed that by agreeing to the May 2, 2022 inspection, she had resolved the issue that gave rise to the landlord serving the One Month Notice. The tenant's response to the request of NS to have the One Month Notice returned to him is very helpful in understanding why she wanted to retain the notice. She did not say that she wished to dispute the One Month Notice. She said that

she wanted to keep it as evidence for another hearing. She did not realize that the landlord's agent interpreted her refusal as an intention to dispute this notice.

Once that fact that there was a misunderstanding about the One Month Notice still being effective and in place according to the landlord was clarified for the tenant in the May 10, 2022, hearing, she immediately filed her application to dispute the notice. The mutual misunderstanding of the facts resulted in a failure by the tenant to file the notice within the time frame, and this failure was rectified immediately after she gained a correct understanding of the facts.

At the May 10, 2022 hearing, it is likely that the tenant and the landlord realized that each had misunderstood the other's intentions regarding the One Month Notice. I find that the tenant, out of an abundance of caution, filed this application to dispute the One Month Notice immediately after the May 10, 2022 Hearing.

However, I do not find that it was necessary for her to do so, as, based on the evidence presented, I find it more likely than not that the parties agreed that the One Month Notice would be withdrawn when the tenant agreed to the May 2, 2022 inspection. I accept the tenant's evidence that she wanted to keep the One Month Notice as evidence of the landlord's harassment. I do not find the landlord's position that, despite agreeing to the inspection, the tenant wanted the One Month Notice to remain valid so that she would have to dispute it, to be reasonable.

Therefore, I find that exceptional circumstances exist in this case that justify me exercising my discretion to extend the time limit for filing the application for dispute and I extend the filing deadline to May 10, 2022.

Is the One Month Notice Valid and Enforceable?

I have found above that the parties agreed that the landlord had withdrawn the One Month Notice. In the event I am incorrect, I will address its merits.

The grounds on which the One Month Notice was issued was for breach of a material term of the tenancy agreement, that is, refusing entry to the residential property upon a request and notice by the landlord.

The tenant refused entry to the JS and NS on April 29, 2022, after having received notice of their intention to enter for the purposes of an inspection. The landlord did not

make submissions as to why this amounted to a breach of a *material* term of the tenancy agreement. Not all terms of a tenancy agreement are material to the agreement. RTB Policy Guideline 8 states:

> 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.
>
> To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.
>
> The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

Accordingly, in the absence of evidence relating to the right of entry term being material, I find that it is not, and would cancel the One Month Notice on that basis.

Alternately, if the term is a material one, the landlord was required to comply with certain steps before it could issue a One Month Notice. RTB Policy Guideline 8 states in part:

> To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – 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.

> Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

If the tenant's refusal to allow the landlord to enter the residential property on April 29, 2022 amounted to a breach of a material term of the tenancy agreement, the landlord did not give the tenant written notice of the breach and allow her a reasonable period to correct it.

It is not disputed that the issue of entry onto the residential property was resolved verbally between the parties on April 29, 2022, and NS agreed in the hearing that the One Month Notice was no longer necessary once the agreement had been made. The parties quickly agreed that May 2, 2022, was an acceptable date for the inspection, and the inspection was carried out on that date. The breach was quickly rectified by the tenant upon being given the opportunity to do so and therefore, the One Month Notice is not valid.

Per section 72(1) of the Act, as the tenant has been successful in her application, I order that the landlord reimburse them her filing fee ($100). Per section 72(2) of the Act, I order that the tenant may withhold $100 from one future month's rent, in satisfaction of this amount.

Conclusion

The One Month Notice is cancelled. The tenancy shall continue. And the tenant is entitled to reimbursement of the filing fee of $100 which she can withhold from one future month's rent.

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 28, 2022

Residential Tenancy Branch