



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding PEMBERTON HOLMES LTD.  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      MNDCT, RP, OLC, FFT

### Introduction

This hearing was convened by way of conference call concerning an application made by the tenant seeking a monetary order for money owed or compensation for damage or loss under the *Residential Tenancy Act*, regulation or tenancy agreement; an order that the landlord make repairs to the rental unit or property; an order that the landlord comply with the *Act*, regulation or tenancy agreement; and to recover the filing fee from the landlord for the cost of the application.

The tenant and an agent for the landlord attended the hearing and each gave affirmed testimony. The landlord also called 1 witness who gave affirmed testimony. The parties were given the opportunity to question each other and the witness, and to give submissions.

The tenant submitted that all evidence has been exchanged. The landlord's agent did not dispute that and all evidence provided has been reviewed and is considered in this Decision.

### Issue(s) to be Decided

- Has the tenant established a monetary claim as against the landlord for money owed or compensation for damage or loss under the *Residential Tenancy Act*, regulation or tenancy agreement, and specifically for overpayment of utilities?

## Background and Evidence

**The tenant** testified that this fixed-term tenancy began on October 1, 2020 and reverted to a month-to-month tenancy after March 31, 2021, and the tenant still resides in the rental unit. Rent in the amount of \$1,344.00 is currently payable on the 1<sup>st</sup> day of each month and there are no rental arrears. On September 18, 2020 the landlord collected a security deposit from the tenant in the amount of \$662.50 as well as a pet damage deposit in the amount of \$662.50, both of which are still held in trust by the landlord. The rental unit is the bottom floor suite of a 3-suite heritage house, and a copy of the tenancy agreement has been provided as evidence for this hearing.

The tenant has provided a Monetary Order Worksheet setting out the following claims:

- \$1,559.91 for utilities overage in February, 2022;
- \$299.98 for overage of utilities in November, 2022;
- \$130.00 for an increased flat rate for utilities for each of the months of April, 2022 to November, 2022; and
- \$164.61 for appliance repair to the washer; which the tenant testified has been reduced to \$0.00.

The tenant has also provided a detailed Monetary Order Worksheet claiming \$1,259.93 be removed from the Tenant Ledger kept by the landlord, and \$130.00 per month from April, 2022 to November, 2022, \$1,040.00, be paid back to the tenant

The tenant further testified that the tenant wants the account with the landlord adjusted. The landlord had reduced it to \$1,229. (and change) because they incorrectly calculated it, and the tenant requests that the \$1,299.93 be removed from the ledger. That amount is grossly high to expect a tenant to pay.

The tenancy agreement was not clarified by the Property Manager until after the tenant signed it and during the walk-through. It states that rent is \$1,325.00 per month, in addition to a \$125.00 Flat Rate Utility, for a total of \$1,450.00. No utilities are included in the rent. There are numerous paragraphs in the tenancy agreement; one of which states:

### **46. OTHER.**

- \$125/monthly utility flat rate includes: hydro, water, sewer, and garbage/ recycling. Tenant is aware that the flat rate is based on the historical average of the property. Should the consumption exceed the average, the tenant will be held responsible for

the overage, payable within 30 days. Phone, Cable & Internet is at the Tenant's Expense (not included).

The paragraph is initialed by a landlord and the tenant, and the tenancy agreement was signed on September 15, 2020.

The tenant testified that the Property Manager explained there could be overages at end of the year depending on the utilities used by tenants, but talked about the person on the top floor not contributing due to the length of that person's tenancy and that the rest of house had to take on that portion. However, by that point, the tenant had no other options because the tenant had signed the tenancy agreement. The Property Manager didn't say whether or not it was legal, but that the tenant could dispute it but didn't say how to dispute it, and didn't want to answer whether or not it was legal. The language in the advertisement mentioned a flat rate, but no definition. To the tenant, it means unchanging, not fluctuating and nothing in the advertisement mentioned that. The way that the tenant read the contract when it was signed, \$125.00 was the historical average, not that it was possible to change over the years. The tenant claims \$1,559.91 for utilities over charged in February, 2022 by way of a ledger adjustment as well as \$299.98 for over payments of utilities in November, 2022, which included an amount for the repair of a washer, and \$130.00 for the increased flat rate for utilities for each of the months of April, 2022 to November, 2022.

The landlord provided the tenant with an amended tenancy agreement on March 28, 2022, which the tenant did not agree to. A copy has been provided for this hearing, as well as a notice that the property management company was using to increase the flat rate to \$130.00 per month. The amended tenancy agreement had an increase of \$130.00 per month to \$255.00 per month. The tenant received the letter in February or early March, but that was the only notice the tenant received before the email and revised tenancy agreement were sent to the tenant. The changes would take effect on April 1, 2022, so the tenant only got 3 days notice and no other information was given about how the utilities were broken down and split up among other residents. The letter divides \$1,559.91 by 2 and was off by about \$300.00, so the tenant asked for the bills and the calculations. Overages are not in any documentation.

The tenant badgered the property management company to explain it and was told that they are given to each resident depending on the number of occupants in the suite; and since there are 3 people in the tenant's suite, that was used in the calculations. If the tenant had known that, the tenant would have told the landlord about 2 occupants leaving the tenant's suite. During the year, it was very apparent to the previous Property Manager

that 3 tenants did not live there from January, 2021 to roughly mid-May, 2021. For about 4.5 months the tenant lived there alone and for 4 months there were 3 occupants, and 3 occupants for about 3 months, and the Property Manager was aware. It was documented by email, but the Property Manager didn't reply to the tenant's emails. So for the landlord to calculate overages based on 3 people in a year is criminal, not ethical. Since the beginning of the tenancy, the tenant felt taken advantage of.

The tenant also testified that the tenancy agreement sent to the tenant on September 11, 2020 showed a higher amount of rent than the advertisement posted. When the tenant questioned the Property Manager, her response is that was the amount it was primarily rented for.

Also, the tenant has never been late with rent, however in July the tenant was sent a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities by email. The tenant contacted the property management company and was told that the tenant's cheque was not received. The tenant kept following up on it, and the landlord eventually found it.

The tenant's Monetary Order Worksheet also states that utility overages of \$1,259.93 are requested to be removed from the landlord's ledger, and the total amount owed to the tenant for the flat rate increase from April through November, 2022 is \$1,040.00. The tenant testified that the ledger now has utility overage on it \$1,299.93, likely because the tenant cancelled the December rent cheque to remove the \$130.00 and the landlord will want to add that to the Ledger. The tenant cancelled the rent cheque because that would prevent the tenant from making a claim on the ledger for anything; the tenant didn't think she could request money back for anything after the date that the tenant had to submit evidence by. Instead of including utilities each month, the tenant reduced it to the \$130.00 that she had been paying. The tenant seeks that the overage be removed from the Tenant Ledger and that the flat rate of utilities be reimbursed from April 1, 2022 to November 1, 2022, which amounts to \$1,040.00.

**The landlord's agent** (RR) testified that Section 3 of the tenancy agreement shows what's included in the rent and Section 6 shows the monthly rent and flat rate utilities. The landlord has also provided a copy of an email string starting with an issue with heat raised by the tenant dated November 7, 2022 and the landlord's response dated November 15, 2022. The message to the tenant outlines Section 46 based on historical usage and consumption which can be charged back to a tenant.

A copy of the advertisement has also been provided by the landlord for this hearing, which the landlord's agent testified was posted online with a flat rate of \$125.00 for utilities and what it included, which is what the tenancy agreement was based on.

A cash flow document was also mailed to the tenant which contained an explanation and a copy has been provided for this hearing. The landlord's agent testified that tenants are provided with copies of the bills, and the amounts are based on the number of people living in the building equally distributed. It is not profit based, but strictly usage and expense based. Each rental unit has equal square footage and the amount is based on occupants rather than square footage. The amounts are divided by the number of occupants residing on the property. The tenant upstairs does not pay for it due to the length of that tenancy, but the owner pays that portion.

The landlord's agent also referred to evidence showing the utilities that are sent to the tenants to review and the amounts paid for the year 2021 for the entire house, then it's broken down to a flat rate. Each tenant is charged the flat rate, which is based on historical usage and subject to change with a charge back to the tenancy.

Paragraph 19 of the tenancy agreement deals with additional occupants. It is not clear on exact dates of when and how many people were occupying the rental unit, which is why the calculation is based on 3 occupants.

The letter sent to the tenant which states that the flat rate is increased to \$130.00 was a type-o. A follow-up email was sent to the tenant. The flat rate increased by \$130.00, not to \$130.00.

The ledger currently shows \$1,259.93 outstanding, which is the rest of the flat rate owing after the \$299.98 was deducted; the landlord went back to figure out what happened and noted that there was an error and the amount of \$1,559.91 was incorrect. The landlord's agent let the tenant know that the charge for the washer was removed and that the flat rate utilities was recalculated. The landlord's agent does not know what happened with another Property Manager, but the landlord's agent made it as clear as possible and tried to resolve the issue by showing a breakdown. The landlord also testified that the landlord's agents have never had to bring it to the attention of the tenants, but moving forward they will.

**The landlord's witness** (MW) was the previous Property Manager from November, 2019 until September, 2022.

The flat rate for utilities includes sewer, garbage, water and hydro. Since it is a single family dwelling it can't be sent to individual suites and the amounts are based on the number of occupants in a suite or on the tenancy agreement. If there are 3 people living in a unit, they would pay 3 times more than a single person occupying because the square footage is the same in each unit. The tenant was provided with a breakdown in an email on November 7, 2022. The cash flow statement shows what was expensed, and was divided by 6 occupants, being 1 upstairs, and 2 above this rental unit, and 3 in the tenant's rental unit.

#### SUBMISSIONS OF THE TENANT:

The tenant that lived in top floor, who paid less, told the tenant that during her tenancy, there were cracks in walls large enough for light to shine through, and example of heat blasting out by someone who doesn't pay hydro, and there are inconsistencies. Nothing is energy efficient and nothing done by the landlord, other than the washer. Baseboard heaters are located under old windows.

The tenant has also provided multiple dictionary definitions of "flat rate," which suggests that a flat rate does not change. The tenant submits that the rental advertisement and the tenancy agreement is misleading and the terms requiring the flat rate for utilities is not included in either, and do not comply with the *Act*.

The tenant is moving out of the rental unit in a few days.

#### SUBMISSIONS OF THE LANDLORD:

None

#### Analysis

Where a party makes a monetary claim as against another party, the onus is on the claiming party to satisfy the 4-part test:

1. that the damage or loss exists;
2. that the damage or loss exists as a result of the other party's failure to comply with the *Residential Tenancy Act* or the tenancy agreement;
3. the amount of such damage or loss; and
4. what efforts the claiming party made to mitigate any damage or loss suffered.

In this case, the tenant seeks to have the Tenant Ledger adjusted which currently shows that the tenant is in arrears, which would amount to monetary compensation for the tenant, and for recovery of overpayments.

The regulations state that a landlord must ensure that a tenancy agreement is written so as to be easily read and understood by a reasonable person, and that the terms are set out in a manner that makes them clearly distinguishable from terms that are required under Section 13 (the standard terms) from terms that are not required under Section 13.

Paragraph 46 of the tenancy agreement states: "\$125/monthly utility flat rate includes: hydro, water, sewer, and garbage/recycling. Tenant is aware that the flat rate is based on the historical average of the property. Should the consumption exceed the average, the tenant will be held responsible for the overage, payable within 30 days." It does not specify what the historical average is. I find that to be confusing and not at all what the landlord has done according to the Tenant Ledger. The Addendum states: "2. Tenants are responsible for the following utilities and must have accounts set up for start of tenancy;" and specifies OTHER – Phone, Internet & Cable.

The Cashflow Statement provided by the landlord shows that it reflects the 12 months ending December 31, 2021, and that utility income was \$344.00 and year to date actual was \$4,128.00. The expenses for hydro was \$4,826.84 and \$1,901.02 for water and sewer.

The landlord's agent and witness testified that the flat rate amount of \$125.00 as written in the tenancy agreement is based on history. The landlord also provided the tenant with a new tenancy agreement, raising the "flat rate" for utilities to \$255.00 per month, but wrote to the tenant saying that the "flat rate" will raise to \$130.00 per month. The landlord's agent testified that was a "type-o."

A landlord may not create a new tenancy agreement changing any terms, including the amount of rent or utilities payable, and I accept that the tenant refused to sign it.

The landlord's agent provided an email to the tenant indicating that the "flat rate utility" is usage based and the calculation is based on occupants, and that in January the property's usage will be recalculated and there could be a credit, and that all 3 units contribute. It also states that the usage won't be reconciled until either 2023 or even potentially 2024. There is nothing in the tenancy agreement, specifically paragraph 46 that speaks to the flat rate being calculated based on the number of occupants in a rental unit.

The "Paid Invoices" ledger provided by the landlord shows that \$4,826.84 was paid by the owner for hydro from March, 2021 to September, 2021; and \$1,901.02 was paid from January, 2021 to September, 2021. If there were 3 people residing in the rental unit and 3 total in the other units, that would mean that the amounts should be split by 6 people, and the tenant would be responsible for 3 parts. Doing the math,  $\$4,826.84 + \$1,901.02 = \$6,727.86 / 6 = \$1,121.31 \times 3 \text{ occupants} = \$3,363.93$ , and the tenant paid \$125.00 per month for that same time period, being 9 months  $\times \$125.00 = \$1,125.00$ . The difference is \$2,238.93 for that time period, or \$248.77 per month, not \$255.00 per month.

The tenant ledger provided by the landlord shows that the tenant paid the "flat rate" of \$125.00 for each of the months of October, 2020 to and including March, 2022, and that the landlord added an appliance repair amount, presumably for the washer of \$164.61 which was removed from the ledger on September 29, 2022. It also shows that the amount of \$299.98 was removed from the ledger as a reduction in utilities.

Considering the evidence and the testimony, I find that the paragraph 46 in the tenancy agreement does not comply with the regulations, in that it is not written in language that can be understood by a reasonable person. Further, if a landlord were permitted to charge a flat rate for utilities and change that amount without any or with little notice, landlords could continually do so instead of increasing rent in accordance with the law. I find that the term is unconscionable.

The tenant's evidentiary material includes a Monetary Order Worksheet which explains that the tenant is claiming that the sum of \$1,259.93 should be removed from the Tenant Ledger. It also claims recovery of \$130.00 per month for the months of April through November, 2022, totaling \$1,040.00.

I order that the landlord make the adjustments to the Tenant Ledger as claimed, and I grant a monetary order in favour of the tenant as against the landlord in the amount of \$1,040.00.

Since the tenancy is ending, I decline to order the landlord to comply with the *Act*, regulation or tenancy agreement.

No evidence was led with respect to repairs required, and I dismiss that portion of the application with leave to reapply.

Since the tenant has been successful with the application the tenant is also entitled to recover the \$100.00 filing fee from the landlord.



Conclusion

For the reasons set out above, I hereby order the landlord to make adjustments to the Tenant Ledger removing the overages of utilities in the amount of \$1,259.93.

I hereby grant a monetary order in favour of the tenant as against the landlord pursuant to Section 67 of the *Residential Tenancy Act* in the amount of \$1,140.00.

The tenant's application for an order that the landlord comply with the Act, regulation or tenancy agreement is hereby dismissed.

The tenant's application for an order that the landlord make repairs to the rental unit or property is hereby dismissed with leave to reapply.

This order is final and binding and may be enforced.

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 15, 2022

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Residential Tenancy Branch