IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Nikkel v. Atira Women's Resource Society,* 2023 BCSC 2331

Date: 20231130
Docket: S233570
Registry: Vancouver

Between:

Annaliese Amanda Nikkel

Petitioner

And

Atira Women's Resource Society

Respondent

Before: The Honourable Justice Jones

On judicial review from: An order of the Residential Tenancy Branch dated April 26, 2023 (RTB File No. 910099745)

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	M.F.P. Rozee
Counsel for the Respondent:	P.J. Dougan
Place and Date of Hearing:	Vancouver, B.C. November 17, 2023
Place and Date of Judgment:	Vancouver, B.C. November 30, 2023

Table of Contents

I. INTRODUCTION

[1] These are my oral reasons for judgment on the petitioner's application for judicial review of an order of the Residential Tenancy Branch ("RTB") dismissing the petitioner tenant's application to cancel a notice to end tenancy, and awarding the respondent landlord an order of possession and payment of rent in the amount of $375.

[2] If a transcript of these reasons is ordered, I reserve the right to edit the transcript for clarity and grammar, but the substance will not change.

II. BACKGROUND

[3] The petitioner is the tenant, Annaliese Amanda Nikkel ("Ms. Nikkel"), and the respondent is the landlord, Atira Women's Resource Society ("Atira").

[4] The events leading up to the arbitration, and the arbitration hearing itself, are of significance to the parties' positions in this matter, and for that reason I set them out in some detail, as follows.

[5] By Residential Tenancy Agreement dated September 28, 2022 between Atira and Ms. Nikkel, Ms. Nikkel rented a residential unit for $375 per month at an apartment building operated or administered by the Society. Rent was payable on the first day of the month, commencing October 1, 2022.

[6] Ms. Nikkel's rent was paid by the Ministry of Social Development and Poverty Reduction (the "Ministry"), but the October 1st rent was not paid.

[7] The unpaid rent issue does not appear to have been addressed by Atira in any formal way until February 1, 2023 when Atira served on Ms. Nikkel a "10 Day Notice to End Tenancy for Unpaid Rent" relating to the October 1st rent which was payable four months earlier (the "February 1 Notice").

[8] Ms. Nikkel's evidence is that she was unaware that the October rent had not been paid, as she understood the Ministry was paying her rent.

[9] Ms. Nikkel advised Atira staff that she considered the February 1 Notice invalid because it had the wrong suite number on it.

[10] Nevertheless, that same day, February 1, Ms. Nikkel filed an Application for Dispute Resolution with the RTB, with four issues summarized as follows:

1. Dispute February 1 Notice, referencing that it had the wrong address on it;
2. Reduction of rent for repairs, services or facilities agreed upon but not provided;
3. Repairs for intercoms not working;
4. Authorization to change the locks to the unit.

[11] Following Ms. Nikkel's receipt of the February 1 Notice, on February 3, 2023 Ms. Nikkel also took steps to cover the unpaid October rent by requesting a supplemental payment from the Ministry.

[12] On February 10, 2023, in response to Ms. Nikkel's assertion that the February 1 Notice was invalid because of the incorrect unit number, Atira served a "10 Day Notice to End Tenancy for Unpaid Rent" with the correct unit number, for the same failure to pay the $375 rent due on October 1, 2022 (the "February 10 Notice").

[13] On February 10, 2023, Ms. Nikkel also received a letter from Atira dated that day (the "February 10 Letter"), including the following paragraphs:

> On February 1, 2023, you were served with a 10 Day Notice to End Tenancy for Unpaid Rent. This is because you have rent owing for October 2022 in the total of $375. The original notice you were served with, contained an error which we have now remedied here. This means that you now have until **February 20th, 2023**, to provide payment for outstanding rent, and failure to do so, your tenancy will be terminated. [Emphasis in original.]
>
> …
>
> Kindly note that if you settle your arrears, we will not end your tenancy.
>
> Please see enclosed 10 Day Notice to End Tenancy for Unpaid Rent effective February 20, 2023. …

[14] On February 17, 2023, the Ministry paid to Atira the $375 unpaid October 1, 2022 rent.

[15] That payment was two days after the five-day period following the February 10 Notice, but before the deadline of February 20 referenced in Atira's February 10 Letter to Ms. Nikkel.

III. DISPUTE RESOLUTION HEARING

[16] The dispute resolution hearing in response to Ms. Nikkel's application was heard on April 21, 2023 by telephone conference call. The participants on the call were the arbitrator, two Atira representatives and Ms. Nikkel.

[17] Atira's evidence and materials that were submitted to the RTB in advance of the hearing included a two-page document titled "Evidence for file number 910099745", which set out Atira's written response to each of the four allegations raised by Ms. Nikkel: (1) unpaid rent; (2) "issue unclear" – reduced rent for services not rendered; (3) intercoms; (4) seeking authorization to change the locks.

[18] Regarding Atira's written "Response to Allegation 1 – Unpaid rent", that document provides some of the background to that issue, then concludes by stating that the issue was resolved, as follows:

> The applicant was served a 10-day notice with the wrong unit number on February 1st, this was remedied on February 10th. The applicant did not dispute the 10-day notice as set out in the notice instructions. Instead, they requested staff's support with the Ministry to have the arrears paid. This support was provided and the applicant's account has been settled. We consider this issue to be resolved as of February since the applicant was never evicted. We ask for this to be dismissed.
>
> [Emphasis added.]

[19] Atira also responded in writing to the three other allegations made by Ms. Nikkel, referring to them as allegations 2 (issue unclear), 3 (intercoms), and 4 (seeking authorization to change the locks).

[20] Atira's evidence submitted to the RTB in advance of the hearing also included the February 10 Letter from Atira to Ms. Nikkel in which the time for payment of the

unpaid October rent was extended to February 20, 2023, and stating that if the arrears were settled, Atira would not end the tenancy.

[21] The hearing was recorded. A transcript of a portion of the recording was prepared by counsel for Ms. Nikkel, and referred to by counsel for both parties at the hearing of this petition without objection.

IV. ARBITRATOR'S DECISION

[22] The date of the arbitrator's decision was April 26, 2023 (the "Decision").

[23] The full extent of the arbitrator's consideration of the issues and evidence, and his analysis on the issues before him is as follows:

> Issues
>
> 1. Is the tenant entitled to an order cancelling the Notice?
> 2. If not, is the landlord entitled to an order of possession?
> 3. Is the tenant entitled to an order to reduce rent?
> 4. Is the tenant entitled to an order for repairs to be made?
> 5. Is the tenant entitled to an order to change the locks to the rental unit?
>
> Background and Evidence
>
> In reaching this decision, I have considered all relevant evidence that complied with the *Rules of Procedure*. Only the necessary oral and documentary evidence that helped resolve the issues of the dispute and explain the decision is included below.
>
> The tenancy began September 28, 2022. Rent is $375.00 due on the first day of the month. There is a copy of the written tenancy agreement in evidence.
>
> The landlord served the Notice on February 10, 2023 by delivering to the tenant in person, who was there to receive it. Page two of the Notice indicates that the tenant did not pay rent in the amount of $375.00 that was due on October 1, 2022. All pages of the Notice were served and submitted into evidence.
>
> The landlord affirmed receiving money from the tenant for the unpaid rent on February 17, 2023 which was after the 5 day dispute deadline. The landlord affirmed that the tenant is currently $375.00 in arrears for April 2023.
>
> The tenant affirmed their rent is paid directly by income support and the tenant only realised there were issues with the rental payment when the tenant received the Notice.

> Analysis
>
> Section 26 of the Act requires tenants to pay rent the day it is due unless they have a legal right to withhold rent. Section 46(1) of the Act allows landlords to end a tenancy with a *10 Day Notice to End Tenancy for Unpaid Rent* on any day after the day rent is due.
>
> The tenant acknowledges receiving the Notice from the landlord on February 10, 2023. I've reviewed the Notice and it complies with the form and content requirements of section 52 of the Act.
>
> The landlord's evidence shows that the tenant did not pay the October 2022 rent until February 17, 2023, 7 days after receiving the Notice. The tenant did not dispute this timeline.
>
> To cancel the Notice, the tenant had to pay the overdue rent within 5 days of receiving the Notice. Since the tenant did not do this, the tenant's claim to cancel the Notice is dismissed and the tenancy has ended. Under section 55(1) of the Act, the landlord is granted an order of possession which is attached to this decision and must be served on the tenant.
>
> Since the application relates to a section 46 notice to end tenancy, the landlord is entitled to an order for unpaid rent under section 55(1.1) of the Act. Therefore, the landlord is granted a monetary order for $375.00 which is attached to this decision and must be served on the tenant.
>
> The tenant's other claims relate to their ongoing possession of the rental unit. I dismiss these remaining claims because the tenancy has ended.
>
> Conclusion
>
> The landlord is awarded an order of possession and a monetary order for unpaid rent in the amount of $375.00.

V. REVIEW of the RTB DECISION

[24] On April 27, 2023, Ms. Nikkel applied to the RTB for a review of the RTB Decision.

[25] Ms. Nikkel based her application for review on two grounds: (1) the existence of new and relevant evidence; and (2) the Director's decision or order was obtained by fraud.

[26] On May 2, 2023, an RTB adjudicator issued a review consideration decision (the "Review Decision"). The adjudicator found that the new documentary evidence was not relevant to the dispute and an audio recording was not reliable evidence; and, Ms. Nikkel had not proven fraud as she had not submitted any evidence that Atira had intentionally provided false information. As a result, the adjudicator

dismissed Ms. Nikkel's application for review and confirmed the RTB Decision and orders issued on April 26, 2023.

[27] The Order of Possession dated April 26, 2023 was stayed by Order of this Court dated May 12, 2023, pending determination of this judicial review.

VI. WHAT DECISION SHOULD BE REVIEWED?

[28] As a preliminary issue, I must decide whether the subject of this judicial review is the RTB Decision or the Review Decision.

[29] In *Najaripour v. Brightside Community Homes,* 2023 BCSC 2032, Justice McNaughton reviewed this issue as follows:

> [50] There has been some controversy about whether, when a statutory scheme provides for an internal review procedure, it is the original or the review decision that is the proper subject of the judicial review.
>
> [51] In Sereda v. Ni, 2014 BCCA 248, the Court followed United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung, 2011 BCCA 527, and determined that the review decision was the subject of the judicial review but that the original decision should form part of the record and "inform" the inquiry on judicial review: at para. 26.
>
> [52] In *Martin v. Barnett*, 2015 BCSC 426, Justice Burke reviewed the law in this area and concluded that in two subsequent decisions, being *Yellow Cab Co. v. British Columbia (Passenger Transportation Board)*, 2014 BCCA 329 and *Fraser Health Authority v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2014 BCCA 499, the Court of Appeal clarified the law and concluded that when an internal review decision does not address the merits of the underlying decision, the original decision should be the subject of the judicial review: at para. 44. Justice Sewell followed Burke J.'s reasoning in *Ndachena v. Nguyen*, 2018 BCSC 1468: at paras. 34–37.

[30] In *Najaripour,* McNaughton J. concluded that the RTB's review decision in that case did not review the merits of the RTB decision. The scope of the review was whether new evidence should be admitted and whether fraud occurred.

[31] The same reasoning applies here as the scope of the Review was whether new evidence should be admitted and whether fraud occurred, not a review of the merits of the RTB Decision. As a result, it is the RTB Decision that is the subject of this judicial review. This is what Ms. Nikkel seeks in her petition.

VII. PARTIES' POSITIONS

Director of the Residential Tenancy Branch

[32] The Director of the Residential Tenancy Branch filed a Response to Petition taking no position on the orders sought by Ms. Nikkel, and filed an affidavit attaching a record of the proceeding.

Petitioner's position

[33] Ms. Nikkel's brings this judicial review on the grounds of procedural unfairness and patent unreasonableness.

[34] The grounds for challenging the Decision on the basis of procedural unfairness are that the arbitrator proceeded with the hearing on the issue of whether Ms. Nikkel was entitled to an order cancelling the Notice of Unpaid Rent despite Ms. Nikkel's evidence that at the time of the hearing she did not expect to have the issue considered before the arbitrator because Atira had granted her an extension of time to pay the rent, and the rent had been paid within that time.

[35] Further, Atira had submitted evidence to the RTB before the hearing including the February 10 letter, and Atira had also made a written submission to the RTB before the hearing, stating that the issue had been resolved.

[36] Ms. Nikkel's grounds for challenging the Decision on the basis of patent unreasonableness are as follows:

1. The arbitrator failed to consider the evidence that Atira had granted Ms. Nikkel an extension of time to pay the rent, the rent was paid within that time, and Atira had provided written submissions to the RTB in advance of the hearing that the rent issue had been resolved.

2. The arbitrator did not inquire as to whether it was appropriate to exercise his discretion to allow Ms. Nikkel's application in the circumstances of the Ministry's payment of the rent, Ms. Nikkel not being aware of the unpaid rent until Atira's demand for payment four months after the rent was

unpaid, Ms. Nikkel's action to have the Ministry pay the unpaid rent, payment confirmation within the five-day deadline period, and payment being made two days after the deadline.

3. The arbitrator made a monetary order that Ms. Nikkel pay $375 for unpaid rent, despite the evidence the October 1, 2022 unpaid rent had been paid; and the allegation of Atira that April 2023 rent was unpaid was not an issue before the hearing until Atira raised it at the hearing. There had been no notice to Ms. Nikkel that an issue of unpaid April 2023 rent would be raised at the hearing.

Respondent's position

[37] The respondent, Atira, in its Response to Petition, and in oral submissions, did not address the petitioner's submissions alleging procedural unfairness and a patently unreasonable decision, other than, in an apparent concession, that "the whole procedure was undoubtedly a mess."

[38] Rather, what Atira submits is that the hearing was a nullity because the first February 1 Notice, declared by Ms. Nikkel to be invalid because of an incorrect address, was followed by the February 10 Notice, addressing the same issue as the February 1 Notice.

[39] Atira submits that Ms. Nikkel did not separately apply to cancel the February 10 Notice and failed to pay the unpaid rent within 5 days of that notice, and, as a result, Atira submits that by operation of law under the RTA, Ms. Nikkel was presumed to accept the end of the tenancy, and, with no new dispute notice from Ms. Nikkel addressing the February 10 Notice, when it came to the hearing, the hearing was moot.

[40] Atira relies on *Ganitano v. Metro Vancouver Housing Corporation*, 2014 BCCA 10.

[41] Atira draws parallels between the facts in the *Ganitano* case in which the petitioner tenant, Ms. Ganitano, failed to pay her rent on February 1, 2009, apparently because a government cheque she was expecting arrived late. Five days later her landlord served a 10 Day Notice to End Tenancy for unpaid rent, and Ms. Ganitano paid a portion of the arrears on February 11, 2009, and the balance on February 18, 2009. The landlord accepted the payments for use and occupation of the townhouse, but not as rent.

[42] Ms. Nikkel's case is distinguished from that case on the facts because Atira accepted the payment for the October rent as satisfying the arrears of the unpaid October rent, not as payment for use and occupation of the unit.

[43] Further, in *Ganitano*, the sole issue on appeal was whether s. 24 of the *Law and Equity Act,* R.S.B.C. 1996, c. 253, s. 36 empowers a court to grant equitable relief against forfeiture of a residential tenancy. What was not in issue on the appeal was the decision of the RTB dispute resolution officer to grant the order of possession. Here, there is no issue relating to equitable relief against forfeiture pursuant to s. 24 of the *Law and Equity Act*.

[44] Most significantly, the issue raised by Atira relying on *Ganitano* was not raised at the RTB hearing on April 21, 2023, so the question arises whether I should exercise my discretion to consider this new issue on this judicial review.

[45] I agree with Ms. Nikkel's submissions that the issue was not raised before the RTB and is not addressed by the Decision.

[46] Atira has not sought judicial review on the basis of that issue.

[47] A judge's discretion to entertain a new issue not raised at the hearing will generally not be exercised where the issue could have been, but was not raised before the tribunal.

[48] Where, as here, the Legislature has entrusted the determination of residential tenancy issues to the RTB, the court may be denied an adequate evidentiary record

to consider the issue, and, raising an issue for the first time on judicial review may unfairly prejudice the opposing party. Any determination of Atira's position should be made at first instance by the RTB, and the RTB has exclusive jurisdiction over the matter which must be submitted to the director for dispute resolution under the RTA.

[49] This issue raised by Atira, which was not raised at the hearing, conflicts with the position taken by Atira at the hearing, where Atira took the position that the purpose of the hearing was to address the February 10, 2023 notice, and in written submissions prior to the hearing had responded to the issue of unpaid rent by submitting that the rent had been paid and the issue had been resolved by payment of the rent, in effect rendering that issue moot for the purpose of the hearing, which had Atira not then unexpectedly pursued the issue at the hearing, would have left the hearing to consider the other issues raised by Ms. Nikkel as the subject of the hearing.

[50] As stated in *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387:

> [34] The function of a court on judicial review is supervisory. The court must ensure that a tribunal has operated within legal norms. Courts are, in a very strict sense, reviewing what went on before the tribunal. They are not undertaking a fresh examination of the substantive issues.
>
> …
>
> [48] It is a well-established principle that issues in litigation ought to be thrashed out at first instance, both to ensure that all evidence relevant to those issues is included in the record, and to ensure that the expertise of the tribunal of first instance is brought to bear on the issues.

[51] See also *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 22.

[52] This issue raised for the first time by Atira on this judicial review, could have been, but was not raised before the tribunal. The legislature has entrusted the determination of residential tenancy issues and the interpretation or the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*] to the RTB, particularly where the issues relate to the RTB's specialized functions and expertise.

[53] The issues on this judicial review are those that arise from the Decision. To paraphrase the *Air Canada* case, the function of this court on judicial review is supervisory. This court must ensure that the RTB operated within legal norms. This court is, in a very strict sense, reviewing what went on before the tribunal. It is not undertaking a fresh examination of the substantive issues and issues raised for the first time on judicial review, and not raised before the tribunal.

[54] For these reasons, I exercise my discretion to not consider the issue raised by Atira for the first time on this judicial review, and not at the RTB hearing.

VIII. STANDARD OF REVIEW

[55] Returning to the issues raised by Ms. Nikkel on this judicial review, the standard of review applicable to RTB decisions is set out in *Hollyburn Properties Limited v. Staehli*, 2022 BCSC 28 as follows:

> [23] A comprehensive consideration of the standard of review that applies to decisions rendered by RTB arbitrators pursuant to the *RTA* can be found in the Court's recent decision in *Kong v. Lee,* 2021 BCSC 606, at paras. 54-66.
>
> [24] In this judgment, Madam Justice MacDonald explained first that the standard is prescribed by provincial legislation. Accordingly, the presumption that the standard is reasonableness established by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 does not apply. That legislation is s. 58 of the *Administrative Tribunals Act,* S.B.C. 2004, c. 45 ("*ATA*"), which applies by operation of ss. 5.1 and 84.1 of the *RTA*. Section 58(2) of the *ATA* provides that findings of fact and law made within a tribunal's exclusive jurisdiction and protected by a privative clause can only be set aside if they are patently unreasonable. Therefore, the standard of patent unreasonableness applies to all substantive aspects of the Arbitrator's decision.
>
> [25] As the *ATA* does not define patent unreasonableness as it applies to a tribunal's factual or legal findings, however, guidance regarding its meaning must be sought from the case law. In *Kong* at paras. 58-65, Madam Justice MacDonald set out a number of jurisprudential holdings which provide content to the notion of patent unreasonableness, including:
>
> > (a) as expert tribunals are entitled to significant deference, the standard is an onerous one and their decisions can only be quashed if there is no rational or tenable line of analysis supporting them (*Victoria Times Colonist v. Communications, Energy and Paperworkers,* 2008 BCSC 109 at para. 65; aff'd 2009 BCCA 229);

> (b) a decision is patently unreasonable if it is openly, evidently, and clearly irrational, or unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures (*Gichuru v. Palmar Properties Inc.,* 2001 BCSC 827 at para. 34, citing *Lavender Co-Operative Housing Association v. Ford,* 2011 BCCA 114);
>
> (c) a patently unreasonable decision is one that almost borders on the absurd (*Voice Construction Ltd. v. Construction & General Workers' Union, Local 92,* 2004 SCC 23 at para. 18 and *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal),* 2018 SCC 22 at para. 28);
>
> (d) it is possible that a great deal of reading and thinking will be required before the problem in a patently unreasonable decision is apparent, but once its defect is identified, it can be explained simply and easily, leaving no real possibility of doubting that the decision is defective (*Yee v. Montie,* 2016 BCCA 256 at para. 22);
>
> (e) the standard of patent unreasonableness also applies to the consideration of adequacy of reasons, which involves an assessment of the justification, transparency and intelligibility of the decision-making process (*Vavilov*); and
>
> (f) under the *RTA* regime, the overriding test for adequacy of reasons is whether a reviewing court is able to understand how and why the decision was made (*Ganitano v. Yeung,* 2016 BCSC 2227 at para. 24).

[26] In sum, the standard of review that applies to the substance of the Arbitrator's decision in the case at bar is patent unreasonableness. It is an onerous standard, and her decision will not be set aside unless the Arbitrator's reasons are so defective that it is not possible for the reviewing court to understand why the Arbitrator concluded as she did.

[27] With respect to procedural fairness, the *ATA* provides at s. 58(2)(b) that the standard of review is whether, in all of the circumstances, the tribunal acted fairly. The factors that inform the content of a tribunal's duty to provide procedural fairness are contextual and include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the affected individuals; (4) the legitimate expectations of the person challenging the decision; and (5) the choice of procedure made by the administrative decision-maker: *Vavilov* at para. 77.

[56] See also *LaBrie v. Liu*, 2021 BCSC 2486:

> [8] Procedural fairness requires that a party to an administrative proceeding has the right to be heard, the right to know the case they are required to meet, and the right to a hearing before an impartial decision maker: *McDonald v. Creekside Campgrounds and RV Park*, 2020 BCSC 2095 at para. 28. The content of procedural fairness goes to the manner in

> which the decision-maker went about making the decision: *Therrien (Re)*, , [2001] 2 S.C.R. 3 at para. 82; and *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at para. 102.
>
> [9] A decision that was reached in an unfair process cannot stand: *Ndachena v. Nguyen*, 2018 BCSC 1468 at para. 55, citing *Baker v. Canada (Minister of Citizenship and Immigration)* 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817.

IX. ANALYSIS

[57] The issues on this petition are those referenced above as Ms. Nikkel's position relating to procedural fairness and patent unreasonableness.

Issue 1 - Was the hearing procedurally fair?

[58] As stated in *LaBrie* cited above, procedural fairness requires that a party to an administrative proceeding has the right to be heard, and the right to know the case they are required to meet.

[59] Here, the arbitrator proceeded with the hearing on the issue of the effect of the February 10 Notice, against the protest of Ms. Nikkel that the issue had been resolved and the rent paid, and despite Atira's written evidence and written submissions on the record that the October 1, 2022 rent issue had been resolved before the hearing and would not be addressed at the hearing.

[60] Atira's representative at the hearing appears from the transcript to have directly referred to Atira's evidence submitted to the arbitrator by reference to "Response to the allegation 1, is unpaid rent", without apparent further detail, but that written submission submitted by Atira to the RTB before the hearing included the acknowledgment that the arrears had been paid, Ms. Nikkel's account had been settled, and the issue resolved.

[61] The transcript includes evidence that Ms. Nikkel advised the arbitrator that the eviction notice had been dealt with; she expressed confusion that the unpaid rent issue was being addressed because the rent had been paid; and she sought an opportunity to call further evidence from Atira staff about her outstanding rent

balance; however, the arbitrator stated the hearing was being held now, and the Atira representative could attest to the issue.

[62] The Atira representative then referenced hearsay evidence that Atira's "finance team" had confirmed that morning, that the current April 2023 rent was outstanding. The arbitrator did not appear to question why the April 2023 was being addressed in the absence of any evidence of any notice to Ms. Nikkel relating to that month's rent.

[63] Referring to the content of the duty of fairness, the first consideration is the nature of the decision being made and the process followed in making it. Here, the issue of Ms. Nikkel's tenancy and the circumstances of why the rent had not been paid until February 17 were issues that the arbitrator should have considered with reference to the evidence that had been submitted by the Landlord; however, the process that was followed was that the arbitrator allowed Atira to raise the unpaid rent issue anew at the hearing, and heard new evidence from Atira about unpaid April rent, while not providing Ms. Nikkel the opportunity to present evidence of the rent having been paid, and without considering the evidence that Atira had granted an extension of time to pay the rent, the rent had been paid, and Atira had made written submissions, in advance of the hearing, that they considered the issue resolved.

[64] The second consideration is the nature of the statutory scheme and the terms of the statute pursuant to which the body operates. This factor is neutral. The statutory scheme is the RTA which comprehensively governs the relationship between landlords and tenants, and the resolution of disputes that arise in residential tenancies.

[65] The third consideration is the importance of the decision to the individual or individuals affected. The decision relating to Ms. Nikkel's tenancy in what she considered long-term supportive housing was very important to her, and she expressed that importance to the arbitrator.

[66] The fourth consideration is the legitimate expectations of the person challenging the decision. Here, Ms. Nikkel legitimately expected that the process would be fair and that she would know the case she had to meet, and that she would be heard; however, the arbitrator agreed to hear Atira's resurrection of the October 1 unpaid rent issue, despite Atira having extended the time to pay and accepted the payment of that rent, and confirmed to the RTB before the hearing that the issue had been resolved.

[67] The arbitrator was also willing to accept Atira's oral evidence that there was April 2023 rent owing, against Ms. Nikkel's protests that she had no notice of existing unpaid rent, and her request to seek evidence of her rental account. The arbitrator allowed Atira to raise the April 2023 rent as a new issue of allegedly unpaid rent, despite there being no evidence of any notice having been given to Ms. Nikkel that the April 2023 rent was an issue, or that it would be an issue at the hearing.

[68] The fifth consideration is the choice of procedure made by the agency itself. This factor is relatively neutral as the choice of procedure was a hearing before a dispute resolution officer, conducted by telephone, which is common for RTB hearings; however, as noted above, the arbitrator was willing to accept oral hearsay evidence from the Atira representative regarding the state of Ms. Nikkel's rental payment account, without affording Ms. Nikkel an opportunity to adjourn and potentially lead further evidence of that same issue, which was unfair to Ms. Nikkel.

[69] Based on this consideration of the factors relating to the content of a tribunal's duty to provide procedural fairness, and the way in which the hearing proceeded, I find that in the context of the RTB's hearing on April 21, 2023, in all the circumstances the tribunal did not act fairly and there was a breach of the duty of fairness.

Issue 2 - Whether the decision of the arbitrator is patently unreasonable

Payment of the October 1st rent

[70] Ms. Nikkel submits that the Decision is patently unreasonable because the arbitrator failed to consider the evidence on the record that Atira had granted Ms. Nikkel an extension of time to pay the rent, the rent was paid within that time, and Atira had confirmed to Ms. Nikkel in writing that if the rent arrears were settled Atira would not end the tenancy.

[71] I agree with Ms. Nikkel that the Decision is patently unreasonable on those grounds. Ms. Nikkel clearly stated at the hearing that the "10 day eviction" issue had been settled and she was confused that the issue was being addressed because the unpaid rent had been paid.

[72] The evidence submitted by the Landlord for the hearing included the Landlord's February 10 Letter to the Tenant which clearly stated that Atira had granted Ms. Nikkel an extension of time to pay the rent until February 20 and Atira had confirmed to Ms. Nikkel in that February 10 Letter that if the rent arrears were settled Atira would not end the tenancy.

[73] The Decision clearly states that the unpaid rent was paid on February 17, 7 days after receiving the notice, but does not refer to the Landlord's evidence of the extension of time to February 20, nor to the February 10 Letter's statement that if the rent arrears were settled Atira would not end the tenancy.

[74] This evidence also raises the issue of whether equitable estoppel should have been considered by the arbitrator given Atira had accepted the late payment of rent from Ms. Nikkel in February.

[75] In *LaBrie*, at paras. 52–57, it was concluded that it was patently unreasonable for the arbitrator to not have addressed the principle of equitable estoppel in circumstances where the rent paid was only one dollar short. *LaBrie* cites *Guevara v. Louie*, 2020 BCSC 380, where the same conclusion was reached where the

landlord had occasionally acquiesced to late rent payments, and so could not rely on those late payments to justify termination of the tenancy.

[76] Here, the Decision makes no reference to the evidence of Atira's acceptance of the late payment in February, and Atira's written submissions in advance of the hearing that the matter had been resolved. In these circumstances, this evidence and the issue of equitable estoppel should have been considered by the arbitrator. The failure to do so was patently unreasonable.

[77] As stated above, expert tribunals are entitled to significant deference, the standard is an onerous one and their decisions can only be quashed if there is no rational or tenable line of analysis supporting them. A decision is patently unreasonable if it is openly, evidently, and clearly irrational, or unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures.

[78] Here, the arbitrator is entitled to significant deference, but the Decision is openly and evidently unreasonable on its face because of the arbitrator's failure to consider the evidence on record of the Landlord's extension of time to pay, the payment, and the Landlords' evidence that they would not pursue the eviction, and the Landlord's written submissions to the RTB before the hearing that the issue had been resolved.

Arbitrator's discretion

[79] Ms. Nikkel submits that the arbitrator had an obligation to consider his discretion to extend the time to pay the unpaid rent under s. 66(2)(a). Although on the evidence it appears that the arbitrator could have considered that discretion, for the same reasoning as in *Jadavji v. Yin*, 2023 BCCA 355 at paras. 31–34, it appears that specific provision of the RTA was not referenced at the hearing, and although arguable, it has not been established that the failure to address that provision of the RTA in the arbitrator's reasons rendered the Decision procedurally unfair or patently unreasonable.

Monetary award for unpaid April rent

[80] Ms. Nikkel also submits that the Decision of the arbitrator to award to the Landlord an unpaid rent of $375 was patently unreasonable because of the evidence that the October 1, 2022 unpaid rent had been paid. Atira's allegation that the April 2023 rent was unpaid was not an issue before the hearing until Atira raised it at the hearing. There had been no notice to Ms. Nikkel that an issue of unpaid April 2023 rent would be raised at the hearing.

[81] Atira's representative gave apparently contradictory evidence about the October rent having been paid, first stating that "… this debt has been recurring since October. However, in our records it reflects as April." He then confirmed in answer to the arbitrator's question that the tenant was "up to date with rent in March, and then, $375 is from the arrears in April." However, the October rent could not be considered debt if it had been paid in February, and if the October rent had somehow been "recurring," despite having been paid, the tenant could not have been up to date with rent the following March.

[82] Clearly the Decision was patently unreasonable in awarding unpaid rent of $375 to Atira, based on Atira's evidence that the April 2023 rent was unpaid. The Decision clearly refers to the finding that the October 2023 rent, the basis for the Notice, was paid on February 17, 2023. That was the only issue of unpaid rent which the arbitrator should have considered.

[83] As a result, the arbitrator's issuance of a monetary order for unpaid rent for April 2023 was openly, evidently, and clearly unreasonable on its face when the parties had agreed the overdue rent had been paid, and the issue of unpaid April 2023 rent arose for the first time at the hearing without notice to Ms. Nikkel.

X. CONCLUSION

[84] As a result of the procedural unfairness and the patently unreasonableness of the Decision dismissing Ms. Nikkel's application to cancel the Landlord's Notice and awarding $375 for unpaid rent, I allow the application for judicial review to set aside

the Decision dated April 26, 2023,the Order of Possession dated April 26, 2023, and the monetary order for $375.

[85] Given the issues addressed in these reasons, I consider it most appropriate as a remedy to remit the whole of the matter to the RTB for reconsideration and redetermination in accordance with these reasons.

[86] I stay the order of possession until the matter is resolved.

[87] The petitioner has succeeded in having the petition granted and is therefore entitled to her costs of this proceeding.

"Jones J."