COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Li v. British Columbia (Residential Tenancy Director),* 2024 BCCA 202

Date: 20240530
Docket: CA49536

Between:

Jun Li

Appellant
(Petitioner)

And

Director, Residential Tenancy Branch

Respondent
(Respondent)

Before: The Honourable Mr. Justice Harris
The Honourable Justice Griffin
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated Nov. 8, 2023 (*Li v. British Columbia (Residential Tenancy Director)*, 2023 BCSC 1950, Kelowna Docket S138089).

The Appellant, appearing in person (via videoconference): J. Li

No one appearing on behalf of the Respondent

Place and Date of Hearing: Vancouver, British Columbia
May 8, 2024

Place and Date of Judgment: Vancouver, British Columbia
May 30, 2024

Written Reasons by:
The Honourable Justice Winteringham

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Justice Griffin

Summary:

The appellant is a tenant in a multi-unit building. She gave notice to the landlord that the fridge was not working and a persistent noise was coming from a bathroom vent or fan from a neighboring unit and that both were disrupting her quiet enjoyment of her home. Not satisfied with the landlord's response, the appellant sought orders requiring repairs and compensation under the Residential Tenancy Act. An arbitrator dismissed the appellant's request for repairs and claim for compensation. On judicial review, a chambers judge accepted the findings of the arbitrator. The appellant appealed the arbitrator's decision dismissing her claims and alleged the decisions of the arbitrator and chambers judge were procedurally unfair and discriminatory.

Held: Appeal dismissed. The decision of the arbitrator was not patently unreasonable. The hearing was procedurally fair and the appellant did not identify any instances of discriminatory conduct or practices on the part of the arbitrator.

Reasons for Judgment of the Honourable Justice Winteringham:

Overview

[1] The appellant, Jun Li, appeals the dismissal of her application for judicial review of a decision of the Director of the Residential Tenancy Branch (the "Director"). On June 26, 2023, an arbitrator, acting pursuant to delegated authority of the Director, dismissed Ms. Li's application to require her landlord to undertake repairs to her rental unit and to compensate her for the loss of quiet enjoyment of her home. The Arbitrator also dismissed Ms. Li's application for an order requiring her landlord to comply with the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [the "*Act*"].

[2] A notice of appearance was filed on behalf of the Director. However, counsel for the Director chose not to attend or make submissions at the hearing of this appeal. The appellant's landlord, the Jabs Group of Companies, did not file an appearance and did not appear or make submissions at the hearing of this appeal, nor did they participate in the underlying judicial review hearing.

[3] At the hearing of the appeal, the Court explained the parameters of an appellate court's review in a case such as hers. The Court explained to Ms. Li that the chambers judge was required, as are we, to determine the legal issues even without the attendance of the landlord or the Director. The Court explained to Ms. Li

that there is not a “default win” because the other side does not show up. Rather, the Court (and the chambers judge) must ensure that a litigant satisfies their burden, based on the materials presented, before the decision of an arbitrator can be overturned.

[4] After the appeal, Ms. Li delivered correspondence to the Court Registry, raising a number of points. First, Ms. Li informed the Court that the landlord replaced her fridge. As such, she no longer seeks an order compelling its replacement. However, her claim for compensatory reduction in rent is outstanding.

[5] Second, she wished to ensure that members of the division reviewed her written submission because she did not have time to read it at the hearing. I have reviewed Ms. Li’s written submission and have referred to it as I consider the legal issues raised.

[6] Third, Ms. Li wrote that she maintains her discrimination and bias complaints. She also maintains she has been defamed by the Residential Tenancy Branch’s publication of its decision. I address this point below.

[7] Ms. Li’s complaint about the fridge and fan noises have now been resolved. Her request for compensation, however, remains a live issue. As does her complaint about bias, discrimination, and procedural fairness. It is therefore necessary to set out the background and decisions in some detail.

Background

[8] From September 2012 until the present, Ms. Li has rented an apartment in a multi-unit complex located in Kelowna, BC. The Jabs Group of Companies is her landlord. In early 2023, Ms. Li notified the landlord about two complaints she had regarding her unit. Her first complaint related to the fridge. Ms. Li said that it was beyond its lifespan, did not preserve fresh produce, and it was emitting loud noises. Her second complaint related to a persistent noise coming from a bathroom vent or fan from a neighboring unit. Ms. Li complained that the noise was disrupting her quiet enjoyment of the home.

[9] Ms. Li says she spoke with her building manager about the refrigerator noise, but the manager declined to replace the appliance unless it was broken. With respect to the fan noise, Ms. Li says she has been aware of the noise since the spring of 2022, but does not remember whether the noise existed before then due to difficulty with her memory. Ms. Li spoke to many of her neighbours and eventually discovered the noise was coming from a neighbouring unit. She says her neighbour moved out in February 2023 and she has not heard any fan noises since March 1, 2023.

Residential Tenancy Branch Proceedings

[10] In March 2023, unsatisfied with the steps purportedly taken by the landlord to address her complaints, Ms. Li applied to the Residential Tenancy Branch for the following orders pursuant to the *Act:*

a) an order allowing the tenant to reduce rent for repairs, services, or facilities agreed upon but not provided, pursuant to s. 65 of the *Act*;

b) an order that the landlord make repairs to the rental unit pursuant to s. 32 of the *Act*; and

c) an order requiring the landlord to comply with the *Act*, regulations, or tenancy agreement pursuant to s. 62 of the *Act*.

[11] Specifically, Ms. Li sought orders requiring the landlord to replace her refrigerator and pay compensation for her loss of quiet enjoyment of the unit, as well as stress she experienced as a result of the fan noise and the landlord's "mishandling" and "mismanagement" of the issue.

[12] A telephone hearing was held on June 26, 2023. Both Ms. Li and her landlord attended. In her petition to the Court, Ms. Li described the circumstances of the hearing. She says the virtual hearing lasted 45 minutes, but the official proceeding was only 35 minutes. She says she was permitted to present her evidence for about 20 minutes, then the landlord presented its evidence in about 10 minutes.

[13] The Arbitrator started the decision by setting out Ms. Li's complaints and then summarized the parties' evidence with respect to the complaints. At page two of the decision, the Arbitrator wrote:

> The tenant claims the fridge is old, dysfunctional and beyond its lifespan. The tenant submitted videos of the fridge making loud noise and allegedly causing fresh lettuce to become wilted.
>
> The tenant also submitted a short video of noise coming from a bathroom vent or fan. The tenant claims the landlord has not done enough to investigate the cause of the loud noise. The tenant is seeking compensation of $150/month rent reduction dating back to November 2022. For February 2023 the tenant is seeking rent reduction for the entire month due to various health problems she suffered as a result of trying to have the landlord deal with the issue. The tenant also claims the negative energy in the unit has caused some of her plants not to grow.
>
> The landlord submits that they received no complaints from the tenant in regards to the fridge or fan noise prior to February 2023. They received a letter from the tenant on February 21, 2023 in regards to the fan and fridge noise. They immediately investigated setting up an inspection on February 24, 2023. They found no issues with her fridge. They investigated the neighboring suites as well and found no issues with excessive fan noise. The landlord points to the tenant's own evidence submission in which she acknowledges that the neighboring tenant did not have his fan on, but she still was hearing loud fan noises in her suite and she refers to the noise potentially being from ghosts of past tenants. The landlord submits the tenant began knocking on neighboring tenants' doors harassing them about finding the cause of the noise. The landlord submits they have not received any other complaints from other tenants in regard to excessive fan noise. The landlord submits the neighboring tenant has been in his unit for 3 years and there were no issues reported previously with excessive fan use or noise. The landlord even replaced the neighboring tenants' fan in a hope that would appease the tenant even though that fan was not excessively noisy.
>
> In regard to the fridge, the landlord submits they even had a professional repair person do a follow-up inspection. The repair person found the fridge to be in good working condition and the noise level to be normal operating noise. An invoice of the technician visit and report of findings was submitted as evidence.
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> The landlord submits the tenant is extremely sensitive to noise and that at her request they also previously disconnect the oven timer on the stove. The landlord submits they replaced the stove for the tenant last year which shows they have no issues replacing appliances if there is a reason to do so.
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> In reply, the tenant submits that while the landlord did an inspection of her fan and neighboring fans, the landlord did not do a cross-check to see the issue in her unit while neighboring fans are tested.

[14] The Arbitrator considered Ms. Li's video evidence and agreed that it did "… seem to reflect abnormal fridge noise …" (page three). However, the video was recorded "up close", with the fridge door open, which could have made the noise seem louder than it was. Ultimately, the Arbitrator accepted the landlord's evidence that the refrigerator was professionally inspected, and was found to be operating normally. The Arbitrator dismissed Ms. Li's application respecting the refrigerator, without leave to reapply.

[15] With respect to the fan noise, the Arbitrator concluded that Ms. Li had not provided any evidence that she informed the landlord about the fan noise before February 21, 2023, but was seeking compensation dating back to November 2022. The Arbitrator also found that once it was notified, the landlord took reasonable steps to investigate, and even replaced the neighbour's fan. Finally, Ms. Li provided no medical evidence supporting her claim that she was suffering from health issues as a result of the fan noise. The Arbitrator dismissed Ms. Li's claim for compensation without leave to reapply.

[16] Finally, the Arbitrator considered Ms. Li's video evidence relating to the fan noise and agreed that there seemed to be "… abnormal noise coming from the fan while it is turned off". The Arbitrator found that further investigation was warranted, and ordered the landlord to re-inspect the fan in Ms. Li's unit "… while simultaneously taking turns to run any fans in directly neighbouring units" (page four). This aspect of Ms. Li's application was dismissed <u>with</u> leave to reapply.

[17] During the appeal, Ms. Li raised a concern about a letter she received from the landlord. Ms. Li sincerely believes that the landlord wrongly accused her of harassing her neighbours. Ms. Li says this accusation of harassment is evident in a letter dated February 22, 2023 and which formed part of the evidentiary record before the Arbitrator. Ms. Li made clear that she is a good tenant. It was clear during the hearing that Ms. Li believes she has done everything expected of a good tenant and that to suggest otherwise is unfair, and in Ms. Li's words, defamatory. I accept that this letter was upsetting for Ms. Li to receive. I accept her submission that she

has been a good tenant since September 2012 and that she found the letter to be disrespectful. The tone of the letter may well explain what followed. That said, the Arbitrator was required to consider the evidence tendered. In the decision, the Arbitrator did not suggest Ms. Li harassed her neighbours. The Arbitrator showed restraint in how the dispute was characterized, and in particular, said little about the contents of the February 22, 2023 letter. It is clear from the decision that the Arbitrator did not find that Ms. Li's conduct constituted harassment.

[18] Related to this point, Ms. Li raised concerns about the publications of the decisions of the Arbitrator and the Court because they were posted online. Ms. Li takes the position that the decisions are defamatory and should be removed.

[19] The court has a formal process to address issues surrounding publication of its decisions, such as issuing anonymity orders and publication bans. This Court is not able to address Ms. Li's concerns about publication absent adherence to those formal requirements.

Judicial Review Proceeding

[20] On August 31, 2023, Ms. Li filed a petition for judicial review seeking orders setting aside the decision as well as an order on "… defamation and racial prejudice embedded [within the] RTB tribunal …". The petition was heard on October 23, 2023, and reasons for judgment were released on November 8, 2023 (indexed as 2023 BCSC 1950).

[21] The chambers judge reviewed the background, the applicable standard of review, and the parties' positions. She concluded the Arbitrator's decision was procedurally fair and was not patently unreasonable. The judge also concluded that there was no evidence of bias. The judge dismissed Ms. Li's petition in its entirety, without costs.

[22] With respect to Ms. Li's complaints about the fridge and fan noise, the chambers judge applied the standard of patent unreasonableness in reviewing the Arbitrator's decision pursuant to s. 5.1 of the *Act* and s. 58 of the *Administrative*

Tribunals Act, S.B.C. 2004, c. 45. The chambers judge also noted the privative clause at s. 84.1 of the *Act*.

[23] The chambers judge found that the Arbitrator considered "the material evidence…led" and that the Arbitrator's decision was not patently unreasonable "… as that term is expressly defined at law": at para. 25.

[24] Questions of procedural fairness are reviewed on a standard of correctness. The chambers judge did not find that Ms. Li was denied her right to procedural fairness by the Arbitrator. She noted that the appellant's evidence was received by the Arbitrator and she was given a right to be heard: at para. 26.

[25] The chambers judge next considered the allegation of bias. The chambers judge assessed the allegation on the basis of "… whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator", pursuant to *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities),* [1992] 1 S.C.R. 623, 1992 CanLII 84 at 636 [*Newfoundland Telephone Co.*]. The chambers judge also considered "… what … an informed person, viewing the matter realistically and practically — and having thought the matter through…" would conclude pursuant to *R. v. M.M.,* 2022 ONCA 63 at para. 18 [*M.M.*]. The chambers judge continued, citing para. 19 of *M.M*.:

> [19] The inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific. Further, a presumption of impartiality, not easily displaced, imposes a high burden on the party alleging bias: *Yukon Francophone School Board, Education Area #23 v. Yukon (AG)*, 2015 SCC 25, [2015] 2 S.C.R. 282, at paras. 25-26.

[26] Having considered the authorities, the chambers judge found that the appellant had not overcome her onus to provide actual evidence in support of a finding of bias on the part of the Arbitrator. Specifically, the judge was not satisfied that "… a reasonably informed bystander could reasonably perceive bias on the part of the Arbitrator". The chambers judge concluded the appellant's submission on this point amounted to a "bald assertion", unsubstantiated by actual evidence: at para. 27.

On Appeal

[27] On appeal, Ms. Li advances many of the same arguments made at the hearing below. She submits the hearing was procedurally unfair, and the decision patently unreasonable, because the Arbitrator ignored her evidence and submissions. Ms. Li submits that the judge below similarly ignored her evidence.

[28] Ms. Li also submits that the Arbitrator and the judge below were biased against her and/or discriminated against her on the basis of race.

Standard of Review

[29] In reviewing the decision of a chambers judge on a judicial review application, the role of this Court is to determine whether the chambers judge identified the correct standard of review and applied it correctly. For that purpose, the appellate court is to "… '[step] into the shoes' of the lower court' such that the 'appellate court's focus is, in effect, on the administrative decision' …": *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45–46, quoting *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 247.

[30] In *Holojuch v. Residential Tenancy Branch*, 2021 BCCA 133, Justice Hunter succinctly described the role of this Court as follows:

> [16] In this case, the Legislature has conferred exclusive jurisdiction on the Director of the Residential Tenancy Branch to determine whether compensation is payable pursuant to s. 67 of the *Residential Tenancy Act*. The Director's decision is reviewable on judicial review, but only on the standard of review that is established by the operation of ss. 5.1 and 84.1 of the *Residential Tenancy Act* and s. 58(2)(a) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45. In *Metro Vancouver (Regional District) v. Belcarra South Preservation Society*, 2021 BCCA 121, this Court described that standard of review in these terms:
>
> > [30] The standard of review of the Arbitrator's decision is determined by the *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Arbitrators of the RTB have delegated authority to make decisions pursuant to various provisions of the *RTA* that pertain to applications for dispute resolution. Matters within an arbitrator's exclusive jurisdiction are subject to the patent unreasonableness standard of review that is set out in s. 58 of the *Administrative Tribunals Act*: *Ahmad v. Merriman*, 2019 BCCA 82 at para. 37.

[31] Justice Hunter held that the meaning to be given to patent unreasonableness under this legislative scheme depends on the nature of the decision under review (*Holojuch*: at para. 17). If it is a discretionary decision, the *Administrative Tribunals Act* explains how this standard is to be applied:

> **58** …
>
> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
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> (b) is exercised for an improper purpose,
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> (c) is based entirely or predominantly on irrelevant factors, or
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> (d) fails to take statutory requirements into account.

[32] If the decision contains a finding of fact that is disputed, the standard of review is still patent unreasonableness, but the content of that standard is defined by the common law rather than a statutory provision (*Holojuch*: at para 18). This Court explained that standard in *Ahmad v. Merriman*, 2019 BCCA 82:

> [37] Section 58(2)(a) of the *ATA* requires that a decision of an expert tribunal, such as the RTB, may not be interfered with unless it is patently unreasonable. The standard of patent unreasonableness requires the decision under review be accorded "curial deference, absent a finding of fact or law that is patently unreasonable": *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 at para. 29. Stated otherwise, it must be "clearly irrational" or "evidently not in accordance with reason": *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 963–64. A patently unreasonable decision is one that is "so flawed that no amount of curial def[er]ence can justify letting it stand": *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20 at paras. 52–53.

[33] The appellant also raises issues of procedural fairness and bias. Where procedural fairness is invoked, s. 58(2)(b) of the *Administrative Tribunals Act* provides that all questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly: *Campbell v. The Bloom Group*, 2023 BCCA 84, at para. 14. In *Athwal v. Johnson*, 2023 BCCA 460, this Court considered the applicable standard of review for issues of procedural fairness.

Referring to the jurisprudence, Justice Stromberg-Stein summarized the standard of review this way:

> [22] The standard of review for questions of procedural fairness was the subject of discussion in *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission*), 2021 BCCA 67 [*R.N.L.*], and *Brar v. British Columbia (Securities Commission)*, 2023 BCCA 432. An appellate court will review questions of procedural fairness on the basis of "correctness, sometimes termed 'fairness'": *R.N.L.* at para. 57.

[34] As stated in *Athwal*, an administrative decision resulting from an unfair process cannot stand (at para. 23). Determining what constitutes "an unfair process" requires a contextual approach that looks to the decision being made and its statutory, institutional, and social context: *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, 1999 CanLII 699 at para. 22; *Cariboo Gur Sikh Temple Society (1979) v. British Columbia (Employment Standards Tribunal),* 2019 BCCA 131 at para. 13.

Discussion

[35] The appellant submits the Arbitrator and the chambers judge made a number of errors. I have reviewed the errors identified in the appellant's factum and have organized them as follows:

a) Was the decision of the Arbitrator patently unreasonable?

b) Was the hearing unfair?

c) Did the chambers judge and/or the Arbitrator err when deciding the issue of bias and applying the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*]?

(1) Was the decision of the Arbitrator patently unreasonable?

[36] The Arbitrator considered each of the issues raised by the appellant. The Arbitrator described the evidence that had been tendered on each issue, including the video evidence. The reasons indicate the Arbitrator considered the video evidence but found it equivocal in some respects. The Arbitrator also considered the landlord's evidence about the fridge inspection and accepted the evidence that the

fridge had been found to be operating normally. This was a finding that was open to the Arbitrator based on the evidence reviewed and accepted. The appellant has not pointed to any evidence that was ignored by the Arbitrator. In the circumstances, the Arbitrator accepted that the fridge had been professionally inspected. This was a finding that was open to the Arbitrator and was not "clearly irrational".

[37] The Arbitrator undertook the same analysis with respect to the fan noise. The Arbitrator found that the video evidence was inconclusive with respect to the sound. The Arbitrator found that the landlord had taken steps to address the appellant's concerns about the noise and even replaced a fan out of an abundance of caution. However, even with that finding, the Arbitrator directed the landlord to do more. The landlord was required to broaden its investigation and examine other units that may be the cause of the noise. The Arbitrator granted leave to the appellant to reapply after this further investigation was completed. On this point, however, the appellant says she is no longer disturbed by the fan noise. The appellant asserts that the Arbitrator would have known this had they reviewed the appellant's evidence. The appellant points to the appeal book (page 14) where she stated "[o]n March 1, the fan noise disappeared. Since then I have not heard a single fan noise in my bathroom". It is clear from the Arbitrator's reasons that they reviewed the evidence about the bathroom fan noise. In their reasons, the Arbitrator refers to the appellant's evidence about her efforts to locate the source of the noise. The appellant described at length a noise that had, according to her, persisted for many months. In my view, the Arbitrator's direction for the landlord to conduct a broader inspection does not reflect, as the appellant suggests, a failure to consider the appellant's evidence. Rather, the direction reflected an attempt to address what the appellant had described as a months-long disturbance. The direction was not clearly irrational based on the evidentiary record.

[38] As for the compensation request, the Arbitrator was not satisfied on the evidence that compensation should be awarded. The Arbitrator concluded that the evidence was deficient because the appellant had not provided any medical evidence supporting her claim that the noise had caused the health issues

complained of. In this case, the Arbitrator was presented with somewhat generic health complaints. For example, Ms. Li wrote that the "[Arbitrator's] mishandling and mistreatment of the management [caused] harmful consequences of the dispute on my physical and mental health." Medical evidence may not always be required at such a hearing. However, in this case, the Arbitrator stated it was. In the circumstances, and considering how the issue unfolded, this was a finding that the Arbitrator was entitled to make based on the failure of the appellant to prove her claim.

[39] In sum, the Arbitrator examined the evidence tendered for each of the complaints and accepted the evidence of the landlord after examining and considering the position of both. The Arbitrator even directed the landlord to do more—to conduct a broader investigation in an attempt to ameliorate what was believed to be noise coming from a fan from a neighboring unit.

[40] In my view, there is nothing in the record before us to support the conclusion that this decision was patently unreasonable within the meaning of s. 58(3) of the *Administrative Tribunals Act*. The decision was not "clearly irrational" and thus not patently unreasonable on that basis. The fact that the appellant was granted leave to reapply on the issue of the fan noise is indicative of the Arbitrator's close consideration of the evidence tendered. The Arbitrator did not ignore evidence or submissions.

[41] At this point, I wish to address an issue that arose at the appeal. Ms. Li described problems related to her camera and recording device. She submitted that she tried to explain to the Arbitrator (after the hearing) that her camera did not accurately capture the noise because it had a feature used typically to remove unwanted noise from the recording. At the appeal, Ms. Li showed the division her camera and explained the filtering issues with her recordings. In her written submissions, Ms. Li stated that she contacted the Arbitrator in July to inform them of the issues relating to the camera. She stated that she had better evidence depicting the noise but that her request "was dismissed by the reviewer". I accept that Ms. Li

was doing her best to record the noises she heard. However, the decision for reconsideration, if there was one, was not before us and I am unable to say anything more about it.

[42] In sum, as the decision of the Arbitrator was not patently unreasonable, I agree with the chambers judge that there is no basis for a reviewing court to interfere.

(2) Was the hearing unfair?

[43] In her factum, the appellant submitted the Arbitrator did not conduct a fair hearing. The appellant takes the position that where the Arbitrator accepts the evidence of the landlord (and rejects her evidence) then the hearing is unfair.

[44] Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself: *Ndachena v. Nguyen*, 2018 BCSC 1468, at para. 57, cited by Justice Stromberg-Stein in *Athwal*: at para. 24.

[45] In the decision, the Arbitrator set out the evidence relevant to each issue and explained why the evidence of the landlord was preferred. The appellant takes issue with the Arbitrator's resolution of the fan issue because she says the issue regarding the fan is now resolved. The appellant characterized several of the Arbitrator's findings as unfair. However, a negative finding, in and of itself, is not evidence of unfairness. Rather, on this evidentiary record, the Arbitrator set out why they preferred the evidence of the landlord over the appellant on the material issues. The Arbitrator was entitled to make the findings they did.

[46] Based on the record presented, I am unable to identify instances of procedural flaws impacting the fairness of the proceeding. The Arbitrator appears to have paid careful attention to the appellant's evidence and submissions and

conducted a hearing responsive to her complaints. The Arbitrator was tasked with reviewing the evidence of the appellant and the landlord. They were open, on the evidence, to make the findings they did. I agree with the chambers judge that there was no basis for a reviewing court to interfere. I would dismiss this ground of appeal.

(3) Did the chambers judge and/or the Arbitrator err in their consideration of bias, including their consideration of the submissions relating to the Charter?

[47] In her factum, the appellant submits that "… this case evolved from loss of quiet enjoyment to human right[s] abuse." As I understand the submission, the appellant alleges the Arbitrator and chambers judge demonstrated bias on the basis of race. Additionally, the appellant alleges the landlord, Arbitrator, and chambers judge discriminated against her on the basis of race. In her factum, the appellant explains in detail how individual and institutional racism impacts society. She referred as well to the Canadian Human Rights Commission's Discussion Paper on Systemic Racism (2023). However, the appellant does not identify—anywhere in the evidentiary record or in the reasons—how it is that discriminatory views or bias impacted the decision of the Arbitrator or the chambers judge.

[48] The appellant raised serious issues of systemic and individual discrimination. However, the appellant must be able to point to some evidence of bias or discrimination in the record to support this position. Though the appellant may disagree with the findings of the Arbitrator and chambers judge, that disagreement (on its own) is not evidence of bias or discrimination.

[49] To explain the importance of evidence in claims of discrimination, I turn to the decision in *British Columbia v. Crockford*, 2006 BCCA 360[1]. In *Crockford*, Justice Levine explained:

> [49] A complaint of systemic discrimination is distinct from an individual claim of discrimination. Establishing systemic discrimination depends on showing that practices, attitudes, policies or procedures

[1] Recently cited with approval in *K.O. v. British Columbia (Ministry of Health),* 2023 BCCA 289 at para. 96.

> impact disproportionately on certain statutorily protected groups: see *Radek* at § 523. A claim that there has been discrimination against an individual requires that an action alleged to be discriminatory be proven to have occurred and to have constituted discrimination contrary to the *Code*. The types of evidence required for each kind of claim are not necessarily the same. Whereas a systemic claim will require proof of patterns, showing trends of discrimination against a group, an individual claim will require proof of an instance or instances of discriminatory conduct.

[50] In its response to petition, the Director refers to *Newfoundland Telephone Co.*, stating that an essential component of procedural fairness is a lack of apparent bias. The Director submits that the standard to be applied to an administrative decision-maker is whether their conduct supports a reasonable apprehension of bias. The Director takes the position that allegations of bias should be raised in the first instance before the administrative decision-maker or tribunal and should not be raised in the first instance on judicial review. In *Eckervogt v. British Columbia*, 2004 BCCA 398 at paras. 46–48, this Court stated that in order for a reviewing court to entertain an argument of bias in the first instance, the allegation must be so clear and strong that it overrides the compelling concerns regarding the reputation of the tribunal and the ability of the tribunal to set out its position.

[51] The appellant made a number of submissions to the chambers judge about bias and impartiality. At times, she submitted that the Arbitrator's findings were based on racist or discriminatory beliefs. In her written submission presented at the petition hearing, the appellant stated her position as follows:

> … The arbitrator working on my case is landlord-centered. His conclusion is unfairly based on landlord views with selective omission of my data and evidence. His analysis is full of bias, errors, and misinterpretations.

[52] As I review the litany of errors advanced by the appellant, I do not agree that the Arbitrator's decision reveals bias or impartiality as suggested, nor do I agree that the Arbitrator's decision reveals discrimination.

[53] The appellant takes the position that the evidentiary record before the Arbitrator (and later before the chambers judge) had examples of bias. She advanced submissions stating, “I don’t know why the arbitrator sets his mind against me, but I do know that one of the racist behaviors is to silence minority voice ….”. In my view, based on a review of the evidentiary record and the reasons of the Arbitrator, the appellant has not established that the Arbitrator’s conduct constituted an instance or instances of discriminatory conduct. I agree with the appellant’s submission that discrimination on the basis of race can be subtle. However, in this case, the examples of discriminatory conduct identified by the appellant do not constitute proof of “an instance of discrimination”.

[54] Nor has the appellant established the decision of the Arbitrator (and later the chambers judge) was based on systemic discrimination. The appellant belongs to a racialized community. However, the appellant has not shown that “… practices, attitudes, policies or procedures [of the RTB or the Arbitrator] [have] impact[ed] disproportionately on … [a] statutorily protected [group].” Based on a review of the evidentiary record and the reasons of the Arbitrator, the appellant has not provided any proof of systemic discriminatory practices, policies, or procedures.

[55] The appellant’s assertions of bias come down to the suggestion that the Arbitrator failed to accept her submissions on particular points. As I have stated, to the extent that this gives rise to allegations that the decision should be set aside because the appellant was denied procedural fairness, the applicable standard of review is whether, in all of the circumstances, the decision maker acted fairly: *Administrative Tribunals Act*, s. 58(2)(b); *Kong v. Lee,* 2021 BCSC 606 at para. 66. The Arbitrator reached conclusions and made findings based on the evidence they accepted. As I review the evidentiary record and decision of the Arbitrator, I accept the chambers judge’s conclusion that the Arbitrator acted fairly in considering and rendering the decision.

Conclusion

[56] In summary, the chambers judge considered and applied the appropriate standard of review for the issues raised in the appellant's petition. After referring to sections of the *Residential Tenancy Act* and the *Administrative Tribunals Act*, the chambers judge concluded that by virtue of the privative clause in the *Residential Tenancy Act*, the Residential Tenancy Branch Dispute Resolution Service is an expert tribunal. As such, its findings of fact are entitled to deference and may only be reviewed according to the standard stipulated in s. 58 of the *Administrative Tribunals Act*: patent unreasonableness for questions of fact, law, or the exercise of discretion and fairness for questions of procedural fairness.

[57] The decision of the Arbitrator was fair. Further, the appellant has not demonstrated bias or impartiality on the part of the Arbitrator. Having identified the correct standard of review, I agree with the chambers judge that there is no basis for a reviewing court to interfere with that decision.

[58] For the foregoing reasons, I would dismiss the appeal.

"The Honourable Justice Winteringham"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Justice Griffin"