IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Leung v. Alam,*
2024 BCSC 1188

Date: 20240704
Docket: S240638
Registry: Vancouver

Between:

Sophie Leung and William Lien

Petitioners

And

**Akm Matiul Alam also known as Matiul Alam also known as Akm Alam,
Residential Tenancy Branch, Deputy Attorney General,
Ministry of Attorney General**

Respondent

Before: The Honourable Madam Justice W.A. Baker

On judicial review from: Orders of the Residential Tenancy Branch, dated January 7, 2024 and January 19, 2024

Reasons for Judgment

The Petitioners, appearing in person: S. Leung
W. Lien

The Respondent, Akm Matiul Alam, appearing in person: A. Alam

Place and Date of Hearing: Vancouver, B.C.
April 10, 2024

Place and Date of Judgment: Vancouver, B.C.
July 4, 2024

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[1] This is a petition brought by two landlords, Ms. Leung and Mr. Lien, seeking to set aside an order of Arbitrator Wang of the Residential Tenancy Branch (“RTB”), dated January 7, 2024 (the “Merits Decision”). In addition, it is clear from the petition as a whole, and as confirmed on the hearing of the petition, that the petitioners also seek to set aside an order of Arbitrator Grande of the RTB, dated January 19, 2024 (the “Review Decision”).

[2] The petitioners purchased a home at 3521 47 Ave West, Vancouver, BC, with a completion date of March 30, 2021. At the time of purchase, the property was rented to Mr. Alam. The petitioners required the seller to give Mr. Alam a two month notice to end tenancy for landlord’s use of property, with a move out date of May 31, 2021.

[3] Mr. Alam challenged the notice. A series of RTB decisions, and orders filed in BC Supreme Court followed, involving the sellers and, ultimately, the petitioners herein. Finally, Mr. Alam was ordered to and did vacate the property on July 23, 2021.

[4] The petitioners say they moved into the property on July 24, 2021, as soon as Mr. Alam moved out. The say they lived in the house until August 25, 2022, when they began renting the house to a new tenant.

[5] On June 26, 2023, Mr. Alam filed a notice of dispute with the RTB, arguing that the petitioners did not, in fact, occupy the property in accordance with s. 49(5) of the *Residential Tenancy Act*, S.B.C. 2002, c. 78 (the “*Act*”). He sought compensation from the petitioners pursuant to s. 51(2) of the *Act*, representing 12 times the monthly rent he paid for the property.

[6] In the Merits Decision, Arbitrator Wang found in favour of Mr. Alam, and awarded him $43,300.

[7] On January 18, 2024, 11 days after the Merits Decision, the petitioners filed an application for reconsideration, claiming that they had new and relevant evidence which was not available at the time of the original hearing. On January 19, 2024, the

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arbitrator dismissed the petitioners' application for review, finding the evidence was not new and was available or could have been made available prior to the hearing.

[8] On January 30, 2024, the petitioners filed this application for judicial review. Mr. Alam filed his response on February 27, 2024.

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[9] The Director of the RTB filed a response on February 28, 2024. The Director submits that the petitioners improperly named the Attorney General, the Deputy Attorney General, and the Residential Tenancy Branch as respondents. The Director submits that these three respondents ought to be removed from the style of cause and replaced with the Director of the RTB, whose is the delegated authority to resolve disputes under the *Act*. I agree and make this order.

[10] The Director provided submissions on the relevant standard of review, on which decision is properly under review, and on the available remedies on a judicial review.

What is the Appropriate Standard of Review

[11] The petitioners submit that the hearings before the RTB were procedurally unfair. Mr. Alam argues that the procedure before the arbitrators was fair and the petitioners were given a full opportunity to be heard.

[12] The appropriate standard of review of an arbitrator's decision under the *Act* has been determined many times by this court, and is grounded in ss. 5.1 and 84.1 of the *Act* and s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Questions of fact, law and discretion are only open to review if such decisions are patently unreasonable: *Campbell v. The Bloom Group*, 2023 BCCA 84 at paras. 11–14. Questions of procedural fairness, however, must be decided "having regard to whether, in all of the circumstances, the tribunal acted fairly": *Campbell* at para. 4.

[13] Many cases have considered what level of procedural fairness is to be applied in RTB hearings, and have concluded that such hearings require the

adjudicator to observe a high degree of procedural fairness, following the analysis in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699: *Fernandez v. Sakr*, 2012 BCSC 1024 at paras. 25–30; *Ganitano v. Metro Vancouver Housing Corp.*, 2009 BCSC 787 at para. 40; *Fulber v. Doll*, 2001 BCSC 891 at para. 30; *Ndachena v. Nguyen*, 2018 BCSC 1468 at para. 58.

[14] As stated by the Court in *Athwal v. Johnson*, 2023 BCCA 460:

> [23] It is trite law that an administrative decision resulting from an unfair process cannot stand. A determination of 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 & Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 [*Baker*] at para. 22; *Cariboo Gur Sikh Temple Society (1979) v. British Columbia (Employment Standards Tribunal),* 2019 BCCA 131 at para. 13.
>
> [24] In the present case, in light of the decision being made and its statutory, institutional and social context, I am of the view that the parties were entitled to a high level of procedural fairness. I would adopt the reasons of Justice Sewell in *Ndachena v. Nguyen,* 2018 BCSC 1468, which I find applicable:
>
>> [56] The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker.
>>
>> [57] 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. This list is not exhaustive.
>>
>> [58] I am satisfied that the petitioners were entitled to a high level of procedural fairness in the Dispute Resolution Applications. The issues before the Arbitrator were adversarial with serious financial consequences to the petitioners. The statutory scheme under the *RTA* vests the RTB with the same powers in residential tenancy disputes to grant monetary judgments as the provincial court has in other matters.
>>
>> [59] The RTB Rules govern Dispute Resolution proceedings. They contemplate a high level of procedural fairness. Any person dealing

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> with the RTB would have a reasonable expectation that the RTB Rules would be complied with.
>
> [60] Rule 1.1 states that the objective of the RTB Rules is to ensure a fair, efficient and consistent process for the resolution of disputes between landlords and tenants.
>
> [61] The RTB Rules contain specific provisions for the giving of notice of evidence to be relied upon at a Dispute Resolution hearing. Rule 2.5 requires an applicant for Dispute Resolution to submit copies of all documentary and digital evidence to be relied upon at the hearing of the Dispute Resolution Application. Once the RTB gives notice of the date of the Dispute Resolution hearing, an applicant must serve the other party with copies of all documents required to be filed under Rule 2.5. Rule 3.5 requires the applicant to demonstrate that each respondent was served with all evidence required by the RTB Rules.

(See also *Ganitano v. Metro Vancouver Housing Corporation*, 2009 BCSC 787 at para. 40; *Kikals v. British Columbia (Residential Tenancy Branch)*, 2009 BCSC 1642 [Kikals] at paras. 56–58; *Fulber v. Doll*, 2001 BCSC 891 at paras. 26–30.)

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[15] In *Athwal*, the Court of Appeal also considered procedural fairness requirements in the context of a compensation claim made pursuant to s. 51 of the *Act*. The Court held:

> [73] Under a similar line of analysis, if the appellants' renovations in this case were indeed necessary, but were delayed for reasons outside of their control, it may also be said that the applicable provisions in the *RTA* were not intended to capture the appellants. A claim for compensation under s. 51 has both a compensatory and a punitive, or deterrent, nature. The quantum of compensation will often be significant, and requires careful consideration of whether the landlord's actions warrant such a remedy. I do not say this to make any pronouncement about the merits of the underlying action, but rather to say that in these circumstances, the evidence before the arbitrator was manifestly insufficient to decide whether the appellants failed to comply with the stated purpose in the Two-Month Notice within a reasonable amount of time and there were no extenuating circumstances.
>
> [74] The arbitrator's determination under s. 51 is inherently contextual. It would be an error of law for an arbitrator to fetter their discretion by simply relying on policy directions when considering an individual's case. The application of a rigid policy is insufficient; so too is a determination made on the basis of an incomplete record tainted by a procedural defect. It certainly cannot be said that the outcome would have been the same had the appellants been afforded a procedurally fair hearing.

[16] The outcome of this dispute was very significant. In the Vancouver market, rental rates are very high, and the *Act* prescribes a punitive award of 12 months rent.

In this case, the claim was for $43,300. This claim exceeds the jurisdiction of the BC Small Claims Court, and represents an amount which, but for the *Act* directing this claim for compensation to the RTB, would be dealt with by the BC Supreme Court.

[17] I find that parties were entitled to a high level of procedural fairness in this hearing process.

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The Merits Decision

[18] The arbitrator was asked by the tenant to make an order for compensation in the amount of $43,000.

[19] The transcript of the hearing before Arbitrator Wang reveals that each party was given approximately 15 minutes to present their case. It is clear from the transcript that the petitioner Ms. Leung struggled with the English language.

[20] An issue arose at the outset regarding a second package of disclosure from Mr. Alam. The arbitrator asked Ms. Leung if she had received the new evidence, and she said she got it on November 30, 2023, seven days prior to the hearing. Mr. Alam said he delivered it earlier than seven days before the hearing, but there was no tracking number in the system to assist in determining when the package was delivered. It was not clear from the record what materials were delivered in the second package of disclosure, although Ms. Leung made reference to some photographs and court documents. The arbitrator decided to continue with the hearing, and “sort that out” at the end of the hearing.

[21] Towards the end of the hearing, the following exchange took place:

> THE ARBITRATOR: Okay. Okay. So, about the tenant’s evidence, so, Landlord, you have had a chance to look at it, right? So pictures, and I think maybe a statement, things like that?
>
> MS. LEUNG: [Indiscernible] they – they have because all of the kitchen is – they have no big change. I don’t think there’s landscreen [phonetic]. We need to hire landscreen [phonetic] to do some – some things, put some [indiscernible]. I don’t think they hire [indiscernible] – big issue. And all of this after we fix this problem, then

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	we slowly to do kind of repair. I don't think this is called [indiscernible] "renovation."
THE ARBITRATOR:	Okay. So, yeah, if that's the case, I will admit them. Then we don't have to find tracking numbers and figure out when exactly they were served, but provided the Landlords, you had the chance to look at them. And I understand your position is that you don't think they're really helpful. They – they show some differences in landscaping and exterior, but –
MS. LEUNG:	No.
THE ARBITRATOR:	-- you don't think that that – okay. So I will consider that evidence. I will admit that, and then we'll include that as part of the evidence to be considered.

[22] In the Merits Decision, the arbitrator states:

> At the end of the hearing, the parties agreed to admit all of the evidence submitted by both parties for the purpose of this decision.

[23] This statement in the Merits Decision is clearly not accurate.

[24] The *Act* permits the Director to establish rules of procedure for dispute resolution, including the disclosure, exchange or provision of information and records by parties before or during a dispute resolution process: s. 57.7(4)(c).

[25] The RTB issues rules of procedures ("Rules of Procedure"), which have the stated objective of ensuring a "fair, efficient, and consistent process for resolving disputes".

[26] The Rules of Procedure do provide the arbitrator with the discretion to admit evidence late in the proceeding:

> **3.17 Consideration of new and relevant evidence**
>
> Evidence not provided to the other party and the Residential Tenancy Branch directly or through a Service BC Office in accordance with the Act or Rules 2.5 [Documents that must be submitted with an Application for Dispute Resolution], 3.1, 3.2, 3.10.5, 3.14 3.15, and 10 may or may not be considered depending on whether the party can show to the arbitrator that it is new and relevant evidence and that it was not available at the time that their application was made or when they served and submitted their evidence.

> The arbitrator has the discretion to determine whether to accept documentary or digital evidence that does not meet the criteria established above provided that the acceptance of late evidence does not unreasonably prejudice one party or result in a breach of the principles of natural justice.
>
> Both parties must have the opportunity to be heard on the question of accepting late evidence.
>
> …
>
> **3.19 Submitting evidence after the hearing starts**
>
> No additional evidence may be submitted after the dispute resolution hearing starts, except as directed by the arbitrator. In providing direction, the arbitrator will:
>
> > a) specify the date by which the evidence must be submitted to the Residential Tenancy Branch directly or through a Service BC Office and whether it must be served on the other party; and
> >
> > b) provide an opportunity for the other party to respond to the additional evidence, if required. In considering whether to admit documentary or digital evidence after the hearing starts, the arbitrator must give both parties an opportunity to be heard on the question of admitting such evidence.

[27] The arbitrator did not comply with the RTB Rules. The transcript does not reveal any exploration with Mr. Alam as to why the late produced evidence was not available at the time his original evidence was submitted. More importantly, the arbitrator did not advise Ms. Leung of her right to provide submissions on any prejudice arising to her from the admission of this late evidence. Asking if she read the material is not sufficient to address the question of prejudice. Further, Ms. Leung's answer is clearly not responsive to the question posed to her by the arbitrator, as to whether she received the material and had time to review it. Given Ms. Leung's obvious language difficulties, the arbitrator should have explained to Ms. Leung what Rule 3.17 meant, in terms of prejudice and procedural fairness, and given her an opportunity to consider her position and respond. If an adjournment was required to allow for a fair hearing of the issues, including allowing Ms. Leung to provide additional responsive evidence, that should have been considered.

[28] The proceedings before the arbitrator were scheduled on a very tight timeframe. The arbitrator explained that they had one hour for the hearing. No new

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evidence would be permitted, and no additional time would be set aside for additional hearing time. The arbitrator made this clear, as follows:

> Page 37
>
> 87 Q All right. Thank you, Tenant. Just quickly, I'll ask of when did you speak with the diplomat, or when did you visit him at his home?
>
> A It was later. I don't remember exactly. I can – perhaps if we have another hearing, I can figure this out.
>
> 88 Q Unfortunately, we don't have another hearing.
>
> Page 54
>
> THE ARBITRATOR: Okay. Landscaping. Okay. I've noted that. Yeah, I think we'll go back and review what both parties have said.
>
> Like I mentioned, I'm not able to accept more evidence because – right? As parties have acknowledged, you have evidence deadlines prior to the hearing, so if you wanted statements from witnesses, or anything like that, that would have to be submitted prior, and of course witnesses [indiscernible] call in during the hearing, but this is – this is it.

[29] The issues at stake were very significant to the parties. Blind compliance with procedural rules is not a complete answer to the question of whether procedural fairness was met in this case.

[30] The statements of the arbitrator reveal a desire to complete the hearing as quickly as possible, and not a desire to ensure that they receive all the evidence necessary to render a fair decision.

[31] The RTB is designed to assist lay people in advancing their disputes. Where the issue is a damage deposit worth $1,000, the process followed by the arbitrator might have been adequate. However, I am not satisfied the process followed in this case was responsive to the statutory, institutional, and social context of a hearing to decide a claim in excess of $40,000.

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[32] In the Merits Decision, the arbitrator comments that the landlords did not provide supporting evidence, such as documents showing a change of address, testimony from friends or family visiting the property, photographs taken on site, evidence of mail delivered to the property, internet services, cable services, or meal deliveries.

[33] I have a number of difficulties with this observation by the arbitrator. Ms. Leung was clearly struggling with the process. Both the tenant and the landlords spent time on irrelevant issues, such as the tenant's complaints with the outcome of the previous hearings before the RTB, and the landlords' response to these complaints of the tenant. The bulk of the documents produced related to these earlier proceedings. Ms. Leung was never asked if she had the kinds of documents available to her, as suggested by the arbitrator. She was not given an opportunity to respond to the suggestion that she ought to have produced such documents.

[34] The arbitrator allowed extensive hearsay evidence from Mr. Alam regarding things told to him by the current tenant in the property. There was no witness statement regarding this evidence produced in advance, or indication in the materials filed that this evidence would be called or accepted. I find it was fundamentally unfair to the landlords to allow this evidence in, without providing the landlords an opportunity to call their own evidence to rebut the hearsay evidence provided by the tenant.

[35] Given what was at stake, the arbitrator ought to have taken the time to explain what was needed, and to adjourn the hearing to allow the parties to come to the hearing prepared to address the actual issue between the parties in this dispute. The landlords ought to have been given an opportunity to adduce additional evidence to address the allegations made by the tenant for the first time in the hearing.

[36] It may be that the current Rules of Procedure are inadequate to properly address the complexities of the claim in this case. However, in the context of claims which can result in significant penalties, the RTB must provide a better process. If

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this matter proceeded in BC Supreme Court, which the quantum at issue in this case would demand but for the legislation, the parties would have to produce in advance all documents relevant to the issue, and would have to identify all their witnesses in advance. Hearsay evidence would not be admissible. I recognize that that the RTB is intended as a more streamlined process than BC Supreme Court, and is not required to adhere to the strict rules of evidence required in court. Nevertheless, the process must provide for the basic protections consistent with procedural fairness.

[37] The arbitrator cannot foreclose the possibility of new evidence being brought forward, where that evidence is required to allow for the truth to emerge. The arbitrator cannot foreclose the possibility of a further hearing, if that is required to give the parties a fair opportunity to meet the case against them. This is not to say that in all cases further evidence must be allowed, or adjournments granted; but it is to say that the arbitrator must be alive to the difficulties lay people may have with understanding the process, with language, and with understanding what evidence is required to prove a case. Arbitrators must be responsive to the needs of the unrepresented people appearing before them, and assist them with the process. They cannot use the process as a weapon against people struggling to understand and participate in the process.

[38] I accept the Court's reasoning in *Panaich v. Martin*, 2023 BCSC 2149, where the Court held:

> [27] The objective of the RTB is to "ensure a fair, efficient and consistent process for resolving disputes between landlords and tenants": Rule 1.1 of the RTB Rules of Procedure. Section 75 of the *RTA* declares that rules of evidence do not apply:
>
>> 75 The director may admit as evidence, whether or not it would be admissible under the laws of evidence, any oral or written testimony or any record or thing that the director considers to be
>>
>>> (a) necessary and appropriate, and
>>>
>>> (b) relevant to the dispute resolution proceeding.
>
> [28] Pursuant to s. 76 of the *RTA* the director may on the director's own initiative require a person to attend a hearing to give evidence or produce documents or anything else relating to the subject of the dispute.

> [29] Section 64(4) of the *RTA* permits the director to provide a non-party the right to be heard at a hearing:
>
> > 64 (4) If, in the director's opinion, another tenant of a landlord who is a party to a dispute resolution proceeding will be or is likely to be materially affected by the determination of the dispute, the director may
> >
> > > (a) order that the other tenant be given notice of the proceeding, and
> > >
> > > (b) provide that other tenant with an opportunity to be heard in the proceedings.
>
> [30] I find that these provisions clearly show that the RTB is a system that is geared toward helping self-represented parties obtain a just and fair dispute resolution. And the arbitrator is to play a pivotal role in that process.

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[39] Similar to the case before me, in *Panaich*, the arbitrator did not allow the petitioners to adduce additional evidence to present their case fully and to ensure the arbitrator had all the evidence necessary to fairly decide the issue, did not adjourn the hearing to allow the petitioners to provide their evidence to the tenant, and did not give the petitioners an opportunity to address facts that he found to be pivotal in his later reasons. The Court in *Panaich* found this to be troubling given the significant monetary penalty the petitioners was facing. I agree with this conclusion and I find the Court’s reasoning to be applicable to the case before me.

[40] I am troubled by the following conclusions reached by the arbitrator:

a) The landlords’ move in date of July 24, 2021, and move out date of August 25, 2022, was not corroborated by any extrinsic evidence such as moving invoices or testimony from neighbours. This finding is concerning because there were in fact two pieces of corroborative evidence establishing the move in and move out dates, namely the billing records from Fortis and BC Hydro. In addition, the landlords were not questioned by the arbitrator about moving invoices or the knowledge of neighbours regarding the moving dates. To find fault with the absence of such evidence, without ever exploring with the parties whether such evidence exists in the first place, is troubling.

b) The landlords did not explain why they moved into the house the day after Mr. Alam left, and stayed in the house until the new tenant arrived. Again, Ms. Leung was not questioned about this, or asked to provide an explanation. In addition, I cannot understand the significance of this issue to the arbitrator. I do not understand why it would be suspicious, as is implied by the arbitrator, for a family to move into a home they purchased several months prior, and which they had finally got legal access to after a series of orders, as soon as they possibly could. I also do not understand why it is suspicious for a family to move out the day before renting the house to a new tenant. Without more of a discussion in the reasons, and the landlords being given an opportunity to explain their moving dates, this finding of the arbitrator is troubling.

c) It is not likely that the family lived in one room of the property during the winter. The uncontroverted evidence of Ms. Leung at the hearing was that the house was contaminated with mould, and the family could not use the furnace until the mould issue had been resolved. As a result, until the mould issue was resolved, they confined themselves primarily to one room, which they heated with an electric heater. While Mr. Alam suggested this was not plausible, he did not adduce any evidence to contradict this evidence. Mr. Alam's suspicions cannot be accepted as evidence of fact. The arbitrator cannot prefer the suspicions of Mr. Alam over the uncontroverted evidence given by a witness, particularly where the arbitrator does not provide any reasons for why they find Ms. Leung's evidence to be unlikely.

d) The arbitrator sets out evidence about the inspection of the furnace undertaken by the landlords in July 2021, which established the furnace was in working order, and the owners requested it to be turned off. This evidence is consistent with the testimony of Ms. Leung, that she asked for the furnace to be turned off until the mould issue was addressed, because she was afraid the heat would make the mould worse. Once the mould

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issue was resolved at the end of 2021, the family began using the furnace. The use of gas beginning in January 2022, was corroborated by the bills submitted from Fortis BC.

It is unclear what the arbitrator was intending by recounting the evidence regarding the furnace inspection. The arbitrator draws no express findings in relation to the evidence, but the implication appears to be that because the furnace was operating properly, some aspect of Ms. Leung's testimony cannot be believed. As there is actually no inconsistency between Ms. Leung's testimony and the inspection document, this implication is troubling.

e) The electricity bills for February 15, 2022, and April 14, 2022, were higher than the bill in December 2021. The arbitrator concludes the consumption levels do not indicate that higher electrical usage occurred in the winter when the furnace was not working. Again, Ms. Leung was not questioned about her electricity bills, or the reasons for why certain months were higher than others. She was not questioned about how many hours of the day they used the space heater. There was no evidence about the electricity required to run the heaters. There was simply no evidence before the arbitrator to support their conclusion.

f) The arbitrator found that the electric and gas bills showed low levels of electricity and gas from August to December 2021, with a spike in January that gradually decreased. The arbitrator concluded "I find these documents do not prove that more likely than not, the utilities were consumed due to residential occupation rather than renovations undertaken at the property." There was simply no evidence before the arbitrator as to what renovations were occurring when, or what the use of utilities would be for any renovations. No questions were asked of Ms. Leung in this respect. Similarly, Ms. Leung was not asked to explain fluctuations in usage of the utilities. Without Ms. Leung being given an

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> opportunity to address the concerns of the arbitrator, and in the absence of any actual evidence regarding the use of utilities, these findings are particularly troubling.

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[41] Given the lack of evidence to support these findings by the arbitrator, I find the Merits Decision to be patently unreasonable.

[42] The evidence before Arbitrator Wang was manifestly insufficient to support a finding that the landlords failed to comply with the stated purpose in the notice to end tenancy. I find the decision of Arbitrator Wang in this respect to be patently unreasonable.

[43] I also find that the process undertaken before Arbitrator Wang was not procedurally fair.

[44] For these reasons, the Merits Decision must be set aside.

The Review Decision

[45] Very shortly after the Merits Decision, on January 18, 2024, the landlords sought a reconsideration, seeking to adduce new evidence. The landlords wished to submit photographs which, due to the passage of time, they had not been able locate prior to the December 7, 2023 hearing. These included photographs of the landlords moving into the house, and of the interior of the house with furniture, belongings, exercise equipment, etc. Many of the photographs are date stamped. In addition, the landlords wished to present several letters from neighbours confirming that they did in fact live in the house during the 13 months in issue, and provide a statement addressing the hearsay evidence the tenant gave regarding conversations he had with the current tenant in the property.

[46] The next day, on January 19, 2024, Arbitrator Grande rendered their decision. The only material before them was the written application of the landlords. In the decision, the arbitrator stated the applicant must meet the test that the evidence was

not available at the hearing, is new, is relevant, is credible, and will have an effect on the outcome.

[47] The arbitrator stated the applicants sought new evidence from their neighbours, and were not able to locate the photographs prior to the original hearing.

[48] There is nothing in the material to suggest the new material is not relevant, credible and may have an effect on the outcome.

[49] The arbitrator rejected the new evidence because they found the evidence was not new and was available or could have been made available prior to the original hearing.

[50] There is no basis for the finding that the photographic material was available prior to the hearing. The only evidence available to the arbitrator was that the applicants had not been able to locate the memory device storing the photographs before the original hearing. In order to find the photographs were available to the landlords prior to the hearing, the arbitrator would have to find the applicants were lying, or were not credible. There is simply no basis in the evidence before the arbitrator to make such a finding.

[51] The reasons of the arbitrator are wholly inadequate to allow a court to understand how this decision was made. The decision does not comply with the requirements on a decision maker to give adequate reasons: *Ganitano v. Yeung*, 2016 BCSC 227 at paras. 21–24, citing *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 16.

[52] In *Universite du Quebec a Trois-Rivieres v Larocque*, [1993] S.C.R. 471, 1993 CanLII 162, the Supreme Court of Canada considered a case where, in the context of a grievance, the arbitrator decided to not admit evidence offered by the respondent, because the arbitrator deemed it irrelevant based on his understanding

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of the issue before him. While the facts are different from the case before me, Madam Justice L'Heureux-Dube held at 495:

> Refusing to hear relevant and admissible evidence is a breach of the rules of natural justice. It is one thing to adopt special rules of procedure for a hearing, and another not to comply with a fundamental rule, that of doing justice to the parties by hearing relevant and therefore admissible evidence.

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[53] In the case before me, the only evidence before the arbitrator in relation to the photographs was that they were not available for the original hearing. In addition, the evidence from the neighbours and in relation to the current tenant was clearly responsive to the evidence raised for the first time at the original hearing by Mr. Alam. In that sense, the evidence was clearly new.

[54] I find the Review Decision was patently unreasonable as it reached a conclusion which was not founded on any evidence before the arbitrator, and it is procedurally unfair as the decision does not provide any reasons for why the arbitrator reached the conclusion they did.

[55] The Review Decision did not do justice to the parties. The new evidence ought to have been admitted to ensure that justice could be done between the parties. The problem is particularly acute in this case, where the Merits Decision itself breached the rules of procedural fairness. Arbitrator Grande had an opportunity to correct the procedural fairness failure arising from the original hearing. However, they simply compounded the original problem.

Conclusion

[56] The decision of Arbitrator Wang dated January 7, 2024, is set aside, and the dispute is remitted the RTB for a new hearing.

[57] The decision of Arbitrator Grande dated January 19, 2024, is set aside.

[58] I make no order for costs.

"W.A. Baker J."