COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Maasanen v. Furtado,* 2023 BCCA 193

Date: 20230427
Docket: CA47117

Between:

Ronald Walter Maasanen and Debra Lynn Tattersall, also known as Debra Lynn Tattersall-Maasanen

Appellants
(Respondents)

And

Maico Furtado, also known as Mike Furtado, and Antonio Furtado

Respondents
(Petitioners)

Corrected Judgment: The text of the judgment was corrected at para. 29 on May 16, 2023.

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated September 10, 2020 (*Furtado v. Maasanen*, 2020 BCSC 1340, Victoria Docket S201851).

Oral Reasons for Judgment

Counsel for the Appellants:	O. James
Counsel for the Respondents:	D. Redman M.J. Adam
Counsel for the Attorney General of British Columbia:	J.M. Patrick
Place and Date of Hearing:	Victoria, British Columbia April 27, 2023
Place and Date of Judgment:	Victoria, British Columbia April 27, 2023

Summary:

This is an appeal from an order made by a judge on judicial review setting aside an arbitrator's decision under the Residential Tenancy Act, S.B.C. 2002, c. 78, awarding the appellant tenants the equivalent of 12 months' rent on the basis that the respondent landlords failed to occupy their suite within a reasonable period of time after giving the appellants a notice to end tenancy. The judge concluded the decision of the arbitrator was patently unreasonable because the arbitrator failed to properly consider extenuating circumstances. The appellants submit the judge improperly considered new evidence; interfered with the arbitrator's findings of fact; and erred in law by not remitting the matter back for reconsideration. Held: Appeal dismissed. It was open to the judge to receive evidence to establish what the record was before the arbitrator. The judge did not interfere with the arbitrator's findings of fact, as evidence of extenuating circumstances was clearly before the arbitrator. Finally, the judge did not err in not remitting the matter, as a reconsideration of the issue by the arbitrator could have only led to one result. In this case, there is no reasonable argument that the circumstances were anything other than extenuating.

[1] **STROMBERG-STEIN J.A.**: This is an appeal from an order on judicial review setting aside an arbitrator's decision under the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*], on the grounds it was patently unreasonable. The appeal engages two principal issues: whether the judge erred, in several respects, in concluding that the decision was patently unreasonable because the arbitrator failed to properly consider a critical issue in making the order; and whether, if the judge did not err in her conclusion, she nevertheless fell into error in deciding the substantive issue herself rather than remitting it for reconsideration.

[2] The factual background giving rise to the issues in this case is relatively straightforward.

[3] The appellants were tenants of a rental suite in Victoria, B.C. On or about February 4, 2019, the landlords served the appellants with a two-month notice to end tenancy for landlord's use of property (the "Notice"), pursuant to s. 49(3) of the *RTA*. The Notice specified that the tenancy was being terminated so Maiko (Mike) Furtado, the landlord, and his family could move into the suite. Mr. Furtado's wife had serious health difficulties and wanted to move into the suite to be close to friends and family for support.

[4] Under the Notice, the appellants were to vacate the suite by May 31, 2019. The appellants found new living accommodations quickly and vacated the suite by April 30, 2019.

[5] The suite needed to be renovated before Mr. Furtado and his family could move in. It was decided that Mrs. Furtado would not move in until after all the work was done because the dust could exacerbate her health difficulties.

[6] There were delays in completing the construction. On May 27, 2019, the District of Saanich served Mr. Furtado with a stop work order, which required that he obtain a number of permits and architectural drawings, and have asbestos testing done.

[7] Mr. Furtado said he moved into the suite on August 17, 2019, so he could continue to work on it himself and finish construction more quickly. Renovations were completed November 9, 2019, and the family moved in on that date.

[8] On November 5, 2019, the appellants filed a dispute with the Residential Tenancy Branch ("RTB"), pursuant to s. 51 of the *RTA*, seeking compensation of $22,001.04 (the equivalent of 12 months' rent), on the basis that Mr. Furtado failed to occupy the suite within a reasonable time after the effective date of the Notice.

[9] The matter was heard by an arbitrator on a conference call attended by the parties. The arbitrator focused on the meaning of a "reasonable period" as the amount of time fairly required for the landlords to accomplish the intended purpose of the Notice; namely, to occupy the suite. The arbitrator found that the landlords did not follow through on the intended purpose of the Notice until November 9, 2019, just over six months after gaining vacant possession. In the arbitrator's view, six months "far exceeds" what could be considered as a reasonable period of time to follow through on the intended purpose of the two months' Notice.

[10] In the result, the arbitrator ordered the landlords pay the appellants compensation of $22,001.04, pursuant to s. 51(2) of the *RTA*, and the $100 filing fee, pursuant to s. 72 of the *RTA*.

[11] The landlords sought judicial review of the decision, seeking to set it aside on two principal grounds: (1) the arbitrator failed to consider or misapprehended evidence that Mr. Furtado moved into the suite on August 17, 2019; and (2) the arbitrator failed to consider the extenuating circumstances that led to the delay in moving in.

[12] The judge correctly identified the standard of review to be whether the arbitrator's decision was patently unreasonable: s. 5.1 of the *RTA* and s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

[13] The arbitrator found that Mr. Furtado moved some of his belongings into the suite on August 17, 2019, and he and his family moved in November 9, 2019.

[14] The judge observed that it was unclear what evidence was before the arbitrator regarding when Mr. Furtado moved into the suite, as the parties disputed what evidence was before the arbitrator. At the judicial review hearing, Mr. Furtado submitted affidavit evidence stating that he "believes" he testified during the hearing in front of the arbitrator that he moved into the suite in August 2019. In their submissions, the tenants denied he gave that evidence, but provided the judge with no evidence to support this submission. What was clear was that the evidence included two receipts from a moving company, dated August 17, 2019, and November 9, 2019. The judge found that Mr. Furtado moved into the unit on August 17, 2019.

[15] The judge held that she was unable to conclude that the arbitrator was made aware that Mr. Furtado moved into the suite in August 2019. She recognised that the arbitrator concluded that Mr. Furtado did not follow through on his intended purpose of the Notice until November 9, 2019, over six months after gaining vacant possession of the rental property.

[16] The judge identified patently unreasonable errors for the decision.

[17] First, the arbitrator summarized the section of the legislation which was at the heart of the application. In doing so, the arbitrator omitted consideration of

extenuating circumstances under ss. 51(2) and (3) of the *RTA*. Under s. 51(3) of the *RTA*:

> The director may excuse the landlord … if, in the director's opinion, extenuating circumstances prevented the landlord … from
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> (a) accomplishing within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy".

[18] The judge concluded that, if evidence of extenuating circumstances is presented, it must be considered. The arbitrator did not do so. The nub of the analysis in the judge's reasons is at paras. 32–35:

> [32] In my view, the plain reading of s. 51(2) is that if evidence of extenuating circumstances is presented, the adjudicator must consider it to determine whether those circumstances prevented the landlord from accomplishing, within a reasonable period after the effective date of the Notice, the stated purpose for ending the tenancy.
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> [33] There was presented to the arbitrator evidence of circumstances which could be seen as extenuating, including the unforeseen scope of the renovations, the difficulties getting tradespeople to complete the work, the stop work order and resultant permits required by the municipality and that because of Mrs. Furtado's health issues she could not move in until the work was fully complete. Although the arbitrator recited these facts in the decision, the arbitrator failed to take them into consideration in determining whether the petitioners moved into the suite within a "reasonable time."
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> [34] It was incumbent on the arbitrator to consider whether the evidence constituted extenuating circumstances that prevented the petitioners from occupying the suite earlier and if so, whether those circumstances would make it unreasonable and unjust to order the petitioners to pay compensation to the respondents.
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> [35] The arbitrator not only failed to consider the evidence of extenuating circumstances as mandated by the *RTA*, the arbitrator completely removed the consideration of same out of the analysis by inaccurately paraphrasing the sections of the *RTA*.

[19] As a result, the arbitrator's decision was unsupported by both fact and law and was patently unreasonable. Not only did the arbitrator fail to consider extenuating circumstances, no effect was given to the essentially uncontroverted evidence that Mr. Furtado had moved into the suite in August 2019.

[20] The judge then considered the remedy, holding at para. 38:

> [38] Given the uncontroverted evidence that Mike moved into the suite in August 2019 and what I find to be extenuating circumstances, I exercise my discretion not to remit the matter back to the director for reconsideration. Accordingly, I order that the decision and the monetary award to the respondents in the amount of $22,001.04 plus $100 costs be set aside.

[21] On appeal, the tenants submit that the judge improperly considered new evidence on the judicial review; interfered with the arbitrator's findings of fact; and erred in law either by concluding that it was incumbent on the arbitrator to consider extenuating circumstances, or by concluding the arbitrator had not properly considered them. These arguments support the contention that the judge erred in concluding the decision was patently unreasonable. Finally, they argue, and are joined by the Attorney General of British Columbia, that the judge ought to have remitted the matter to the director for reconsideration.

Discussion

[22] First, it is common ground the judge identified the correct standard of review, being patent unreasonableness.

[23] On the issue of new evidence, in my view, it was open to the judge to receive evidence to establish what the record was before the arbitrator. I do not view this evidence as intended to supplement the record, or to support a different evidentiary record to that before the arbitrator. No objection was taken to the judge receiving this evidence to clarify the record. I would note the record before the arbitrator was filed on appeal and supports the judge's conclusion that Mr. Furtado had moved into the suite in August 2019. The judge was not considering new evidence *per se*; it was just clarifying and not supplementing the record.

[24] In any event, the evidence about this issue does not address the basis on which the judge allowed the petition; rather, the decision turns on the judge's conclusion that the arbitrator failed to consider evidence of extenuating circumstances that the statute mandates as relevant to whether the order the tenants sought should be made. The statute expressly permits the director to excuse

the landlord if there are extenuating circumstances that prevent the landlord from accomplishing the stated purpose for ending the tenancy within a reasonable period after the effective date of the Notice: *RTA*, s. 51(3).

[25] It cannot be disputed that evidence of extenuating circumstances was before the arbitrator, as set out above in para. 33 of the reasons for judgment. It is clear that the arbitrator ignored that evidence, and did not consider it in deciding whether a remedy was available to the tenants. It was also evident that the tenants did not make submissions to the arbitrator about that evidence, and why it would not be effective to deny them a remedy.

[26] I can see no error in the judge's conclusion that the arbitrator's decision is patently unreasonable. The obligation to consider the evidence is obvious; failing which the decision is plainly unsupportable in law. The arbitrator plainly failed to apply the law. I would not give effect to this ground of appeal.

[27] For the first time on this appeal, a new issue is raised that a different notice to end tenancy under the *RTA* should have been issued. It is not appropriate for this Court to consider this new issue.

[28] I turn now to the remedy. I accept the general proposition that, typically, in allowing a petition for judicial review and setting aside a decision, the conventional order is to remit the matter for reconsideration, perhaps limited to one issue. But, as is acknowledged and is common ground, what remedy to grant is a discretionary matter, albeit one to be exercised on a principled and judicial basis. The principles engaged in the exercise of discretion are well settled, and laid out in the cases, including *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 142; *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board,* [1994] 1 S.C.R. 202 at 228–230; and *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 at paras. 45–51.

[29] Here, although the judge gave only cursory reasons to explain her exercise of discretion, I find that decision is supportable. The circumstances leading to the delay

in occupation were incontrovertible. There is no reasonable argument that they were anything other than extenuating. This is precisely the kind of exceptional case identified in *Vavilov* that justifies a departure from the ordinary remedy of remitting the question for redetermination. The legislation cannot possibly have intended to capture this landlord on these facts. In my view, a reconsideration of the issue by an arbitrator could lead to only one result. Given the amounts in issue, the costs of the process, the risks of further judicial review proceedings in the light of the apparent bad blood between the parties, and the efficient use of public resources, the judge's decision not to remit the matter, but to make the decision, was a principled exercise of discretion, and not one calling for appellate intervention.

[30] I am not persuaded this is the case to further articulate general principles governing the exercise of discretion to remit a matter to a statutory decision maker. I am satisfied, in the particular circumstances of this case, the exercise of discretion was justified.

[31] I would dismiss the appeal.

[32] **HARRIS J.A.**: I agree.

[33] **HUNTER J.A.**: I agree.

[34] **HARRIS J.A.**: The appeal is dismissed.

"The Honourable Madam Justice Stromberg-Stein"