COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Jadavji v. Yin,*
2023 BCCA 355

Date: 20230908
Docket: CA48797

Between:

Azmairnin Jadavji

Appellant
(Petitioner)

And

Jingjing Yin

Respondent
(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated December 23, 2022 (*Jadavji v. Yin*, 2022 BCSC 2260, Vancouver Docket S223259).

Oral Reasons for Judgment

Counsel for the Appellant:	N.J. Muirhead J.F. Gray N. Wu, Articled Student
Counsel for the Respondent:	J.D. West A. Levine
Place and Date of Hearing:	Vancouver, British Columbia September 8, 2023
Place and Date of Judgment:	Vancouver, British Columbia September 8, 2023

Summary:

The appellant tenant appeals from the dismissal of his application for judicial review of a decision of the Residential Tenancy Branch ("RTB"). The respondent landlord served a notice to end the tenancy because of non-payment of rent. The tenant initially withheld rent on the basis of deficiencies in the rental property, including an inoperative wine cooler and dirty blinds. The RTB Arbitrator first held in favour of the tenant, ordering a replacement wine cooler and certain repairs. After this was done, the tenant continued to withhold rent, insisting that the replacement wine cooler was not of comparable quality. The landlord issued another notice to end tenancy. This time, the Arbitrator found in favour of the landlord and issued an order of possession. A judge of the Supreme Court of British Columbia dismissed the appellant's request for judicial review. The issue before the judge, and now on appeal, is whether the Arbitrator's decision was patently unreasonable or procedurally unfair because the Arbitrator failed to consider the discretion afforded under s. 66(2)(b) of the Residential Tenancy Act [*RTA*] *to extend the time limit for paying overdue rent where "the tenant has deducted the unpaid amount because the tenant believed that the deduction was allowed for emergency repairs or under an order of the director". The appellant alleges that the Arbitrator must have been ignorant of this discretion given that his reasons do not refer to it.*

Held: Appeal dismissed. While a tribunal must provide some indication of its reasons concerning a "serious and consequential" issue, the s. 66(2)(b) discretion was not such an issue here, as the tenant did not seek such relief before the Arbitrator. Moreover, the language in s. 66(2)(b) is permissive, and the appellant cited no authority for the proposition that Arbitrators must consider and discuss every discretionary power available to them under the RTA. Finally, contrary to the appellant's invitation to assume that the Arbitrator was ignorant of the discretion, administrative decision makers are presumed to be aware of the relevant provisions of their enabling legislation.

SKOLROOD J.A.:

[1] This appeal arises out of a tenancy dispute between the appellant tenant and the respondent landlord that ultimately resulted in the landlord issuing a notice to end tenancy for unpaid rent pursuant to s. 46(1) of the *Residential Tenancy Act*, R.S.B.C. 2002, c. 78 [*RTA*]. The tenant disputed the notice before the Residential Tenancy Branch ("RTB"). On April 7, 2022, an RTB Arbitrator upheld the notice and issued an Order of Possession pursuant to s. 55(1) of the *RTA*.

[2] The tenant sought judicial review of the RTB decision, but his application was dismissed in reasons for judgment indexed at 2022 BCSC 2260.

[3] The tenant now appeals to this Court. For the reasons that follow, I would dismiss the appeal.

Background

[4] The parties entered into a tenancy agreement dated April 1, 2020 (the "Tenancy Agreement") for the rental of a townhome in West Vancouver (the "Property"). The Tenancy Agreement was for a period of three years at a monthly rent of $5700.

[5] Immediately upon taking possession of the Property, the tenant complained to the landlord about a number of perceived deficiencies and on July 17, 2020, the tenant filed an application with the RTB seeking a monetary order in respect of those deficiencies, a rent reduction, and an order requiring the landlord to make certain repairs.

[6] On October 24, 2020, an RTB Arbitrator issued a monetary order in favour of the tenant in the amount of $1,075 for deficiencies in the Property. The arbitrator also ordered that the landlord provide a functional wine cooler by no later than December 15, 2020. The issue of the wine cooler appears to have been of particular concern to the tenant.

[7] The parties were back before the RTB in March and April 2021, with the tenant taking the position that the landlord had not provided an adequate replacement wine cooler and had failed to have the blinds in the Property properly cleaned.

[8] On May 28, 2021, the RTB Arbitrator issued an order requiring the landlord to:

a) Replace the wine cooler with a comparable unit by June 15, 2021 failing which the tenant was entitled to deduct $500 from the monthly rent until the cooler was replaced; and

b) Arrange for professional cleaning of the blinds in the Property by June 15, 2021 failing which the tenant was entitled to deduct $100 from the monthly rent until the blinds were cleaned.

[9] In July 2021, the landlord installed a replacement wine cooler and arranged for the blinds to be cleaned, however the tenant was of the view that the new wine cooler was not of comparable quality and that not all of the blinds had been cleaned. According to the landlord, four blinds were not cleaned because the tenant refused to move his furniture out of the way.

[10] The landlord took the position that the May 28, 2021 RTB order was complied with and that the tenant was no longer entitled to deduct rent. The tenant disagreed and continued to deduct $600 from his monthly rent.

[11] On February 8, 2022, the landlord served the tenant with the 10-day Notice to end tenancy for unpaid rent pursuant to s. 46 of the *RTA*. Under the Notice, the tenant had five days to pay the amount owing or to apply to dispute the Notice.

The RTB Decision

[12] The tenant chose to dispute the Notice and a hearing was held before the RTB on April 7, 2022. The Arbitrator rendered a decision the same day. In the decision, the Arbitrator noted that there were effectively cross-applications by the parties. The landlord sought an order of possession and a monetary order for unpaid rent, while the tenant sought an order cancelling the Notice to end tenancy and an order for a rent reduction due to repairs, services or facilities agreed to but not provided.

[13] The Arbitrator found in favour of the landlord. The Arbitrator held that the wine cooler had been adequately replaced in July 2021, thus the $500 rent reduction was no longer in effect, and that the $100 rent reduction for the blinds was similarly no longer in effect because the four uncleaned blinds were the result of the tenant's failure to assist and accommodate the cleaning.

[14] The Arbitrator:

a) Held that the Notice issued by the landlord was effective to terminate the tenancy;

b) Awarded the landlord $5400 in unpaid rent arrears;

c) Granted the landlord an Order of Possession; and

d) Dismissed the tenant's dispute application.

[15] On April 13, 2022, the tenant applied for a review of the RTB decision on the basis that he had joined the April 7 hearing, conducted by teleconference, late due to an invalid access code and was therefore denied the opportunity to participate fully. The review application was dismissed on April 19, 2022. The tenant then sought judicial review in the Supreme Court.

The Judge's Reasons on Judicial Review

[16] The judge held that the standard of review applicable to the RTB decision was patent unreasonableness (RFJ at paras. 21–23).

[17] While the tenant's judicial review petition advanced a number of grounds, at the hearing before the judge, the sole issue pursued was whether the decision of the Arbitrator was patently unreasonable by virtue of the Arbitrator's failure to consider the discretion afforded under s. 66(2)(b) of the *RTA*, which permits an arbitrator to extend the time limit for paying overdue rent where "the tenant has deducted the unpaid amount because the tenant believed that the deduction was allowed for emergency repairs or under an order of the director".

[18] The judge held that the language of s. 66(2)(b) is permissive and that an arbitrator is not required to consider the provision before dismissing a tenant's application to dispute a notice to end tenancy (RFJ at para. 38). The judge further observed that the tenant had not sought relief under s. 66(2)(b) at the hearing before the Arbitrator. Had he done so, the landlord would have had an opportunity to

address the issue and the Arbitrator may have been required to provide some indication of why he did or did not exercise that discretion (RFJ at para. 40).

[19] Given the judge's finding that the Arbitrator was not statutorily required to consider s. 66(2)(b), the failure to do so did not render the decision patently unreasonable (RFJ at para. 41).

Issues on Appeal

[20] The tenant alleges the following errors:

a) The arbitrator breached the duty of procedural fairness by failing to give reasons as to why he did not exercise his discretion under s. 66(2)(b);

b) Alternatively, the arbitrator erred by failing to consider whether to exercise his discretion to extend the time limit to pay overdue rent under s. 66(2)(b); and

c) The judge erred in her application of the standard of review.

[21] The landlord submits that the tenant has raised new issues on the appeal, specifically that the Arbitrator's decision was procedurally unfair because no reasons were given for declining to exercise the discretion afforded by s. 66(2)(b), and, alternatively, that the failure to consider s. 66(2)(b) rendered the Arbitrator's decision arbitrary and therefore patently unreasonable.

[22] The landlord further submits that there was no breach of procedural fairness in the Arbitrator not considering s. 66(2)(b) when that issue was not raised before the Arbitrator. The landlord argues that s. 66(2)(b) is permissive and does not constitute a statutory requirement that the Arbitrator was required to consider, thus the failure to do so does not render the decision patently unreasonable.

Discussion

[23] It is not necessary to separately address the various errors alleged by the tenant. They are all simply different formulations of the same central issue: did the

Arbitrator err by failing to consider the discretion set out in s. 66(2)(b) of the *RTA* to extend the time limit for the tenant to pay the rent arrears, given the tenant's alleged belief that he was withholding rent pursuant to an earlier RTB order?

[24] While I agree with the landlord that the tenant has advanced his appeal on a different footing than what was argued before the Arbitrator and before the judge, I would not characterize the issues raised by the tenant as new, given again that his arguments all revolve around the central question of s. 66(2)(b), which was squarely before the judge.

[25] It is well established, and the parties do not dispute, that on an appeal from a judicial review decision, the role of the appellate court is to determine whether the reviewing judge correctly applied the appropriate standard of review. In this sense, the appellate court "steps into the shoes" of the reviewing judge and focusses its attention on the administrative decision in issue: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 247; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45–46; *Cowichan Valley (Regional District) v. Wilson*, 2023 BCCA 25 at para. 69.

[26] It is also well established that the standard of review applicable to findings of fact and discretionary decisions of an RTB arbitrator is patent unreasonableness: *Yee v. Montie*, 2016 BCCA 256 at para. 19. Allegations of procedural unfairness are reviewable on a general "fairness standard". As set out in s. 59(5) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, which applies to the RTB by virtue of s. 5.1 of the *RTA*, the question is "whether, in all the circumstances, the tribunal acted fairly."

[27] There is no issue here that the judge applied the appropriate standard of review of patent unreasonableness. I do note that the judge did not expressly consider the fairness standard as the tenant did not advance the argument before her that the Arbitrator's decision was procedurally unfair due to the absence of reasons addressing s. 66(2)(b).

[28] Turning to the RTB decision, the tenant submits that the Arbitrator was required to address, and provide reasons, on the discretion to extend the time to pay the outstanding rent, pursuant to s. 66(2)(b). The tenant argues that the question of whether he was entitled to relief under s. 66(2)(b) was squarely raised on the evidence led at the RTB hearing in that the tenant specifically relied upon the rent deductions previously authorized.

[29] The tenant cites *Morgan-Hung v. British Columbia (Human Rights Tribunal)*, 2011 BCCA 122 in support of his position that the Arbitrator was required to address the s. 66(2)(b) issue. *Morgan-Hung* was an appeal from a decision dismissing the appellant's judicial review application of a decision of the B.C. Human Rights Tribunal. One of the grounds of review advanced by the appellant was the failure of the tribunal to address her claim for recovery of medical expenses.

[30] This Court agreed that the failure to do so was a breach of procedural fairness. Justice Groberman said:

> [45] A tribunal's reasons need not address every issue raised before it. Where an issue is trivial, moot, or of merely academic interest, a tribunal's reasons will not be deficient merely because they fail to address it. Equally, if the determination of an issue is patently obvious from the record, discussion of the issue in the reasons may be seen as otiose. I do not intend this to be a comprehensive list of situations where reasons are not necessary.
>
> [46] Where a serious and consequential issue has been raised before a tribunal, however, the tribunal will normally be expected to resolve the issue and to provide at least some indication of its reasons for deciding it in the way that it does.

[31] The tenant submits that the question of the Arbitrator's discretion under s. 66(2)(b) was a serious and consequential issue that the Arbitrator had to address.

[32] The landlord submits that *Morgan-Hung* is distinguishable because, in that case, medical expenses were claimed, the issue was raised before the tribunal and there was evidence in the record going to the issue. This distinction is evident from Groberman's J.A. finding at para. 47 of his reasons:

> In the case before us, the Tribunal had a claim for medical expenses before it. The Tribunal had discretion to accept or reject the claim, but it had a duty

> to provide at least some explanation for its decision. In my view, the Tribunal's utter failure to address the issue in its reasons was a denial of procedural fairness, because it precludes meaningful review of the decision.

[33] I agree that *Morgan-Hung* is distinguishable on this basis. As the judge noted, the tenant did not seek relief under s. 66(2)(b) before the Arbitrator. The tenant takes issue with this finding of the judge given that there is no record of the submissions made before the Arbitrator, however, the issues were framed by the cross-applications brought by the parties, as previously described. There is nothing in those applications nor in the record to indicate that the tenant sought relief under s. 66(2)(b) and I see no basis to interfere with the judge's finding that the issue was in fact not raised before the Arbitrator.

[34] In the circumstances, the question of the Arbitrator's discretion under the section was not "a serious and consequential issue" raised before the Arbitrator as referred to by Groberman J.A. The tenant has therefore not established that the failure of the Arbitrator to address s. 66(2)(b) in his reasons rendered the decision procedurally unfair.

[35] The judge addressed the issue of whether the Arbitrator was nonetheless required to consider s. 66(2)(b) even in the absence of it being raised by the tenant, and whether it was patently unreasonable for the Arbitrator not to do so. As the judge noted, pursuant to s. 58(3)(d) of the *Administrative Tribunals Act*, a discretionary decision will be patently unreasonable if the decision fails to take statutory requirements into account. The judge found that given the permissive language used in s. 66(2), consideration of an extension of time to pay the outstanding rent under s. 66(2)(b) was not a statutory requirement (RFJ at para. 38).

[36] Rather, the section confers a discretion on the Arbitrator to grant an extension of time but, as the judge noted, the tenant provided no authority to support the proposition that an Arbitrator must consider every discretionary power under the RTA before issuing an order of possession (RFJ at para. 39).

[37] The tenant has similarly failed to identify any such authority before this Court and I agree with the judge's analysis that the Arbitrator was not statutorily required to consider s. 66(2)(b) (RFJ at para. 41).

[38] The tenant, however, argues that the failure of the Arbitrator to exercise the discretion under s. 66(2)(b), or to at least consider it, must have been based upon the Arbitrator's ignorance about the existence of the discretion. The tenant submits that this amounts to a "legal error" which renders the Arbitrator's decision arbitrary.

[39] I am unable to accept this submission. Administrative decision makers are presumed to know the relevant provisions of their enabling legislation and the law governing their particular area of expertise. Further, this is simply a different formulation of the argument that the Arbitrator was required to consider the s. 66(2)(b) discretion and erred by failing to do so. For the reasons I have given, I do not accept this argument.

Summary and Disposition

[40] The tenant has failed to establish that the decision of the Arbitrator was patently unreasonable or procedurally unfair.

[41] I would therefore dismiss the appeal.

[42] **NEWBURY J.A.**: I agree.

[43] **DEWITT-VAN OOSTEN J.A.**: I agree.

[44] **NEWBURY J.A.**: The appeal is dismissed.

"The Honourable Justice Skolrood"