IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wall v. The Kettle Friendship Society,* 2024 BCSC 1417

Date: 20240711
Docket: S240827
Registry: Vancouver

Between:

Jeremy Wall

Petitioner

And:

The Kettle Friendship Society

Respondent

Before: The Honourable Justice Warren

On judicial review from: An order of the Residential Tenancy Branch, dated January 10, 2024.

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	J.G. Cummings R.W. Parsons
Counsel for the Respondent:	S.A. Douglas
Place and Date of Hearing:	Vancouver, B.C. July 11, 2024
Place and Date of Judgment:	Vancouver, B.C. July 11, 2024

THE COURT:

Introduction

[1] The petitioner, Mr. Wall, seeks judicial review of a January 10th, 2024 decision of Arbitrator Ho Yee of the Residential Tenancy Branch ("RTB"), dismissing Mr. Wall's application for cancellation of the respondent landlord's one-month notice to end tenancy for cause under s. 47 of the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*Act*].

[2] The sole basis for the arbitrator's decision was his conclusion that Mr. Wall was "repeatedly late paying the rent," which is one of the reasons expressed in s. 47(1) of the *Act* as a basis for ending a tenancy under that section: see s. 47(1)(b). The landlord's one-month notice cited several grounds in addition to the allegation that Mr. Wall was repeatedly late paying the rent, but the only ground considered by the arbitrator was that allegation. That is the only decision that is before me.

[3] Mr. Wall submits that the arbitrator's decision is patently unreasonable because:

1) the arbitrator incorrectly applied s. 47(1)(b) of the *Act;*

2) the decision was based on a clear misapprehension of the evidence, that is with respect to the consistency of Mr. Wall's evidence; and

3) the arbitrator failed to consider relevant evidence on certain key issues.

[4] Mr. Wall also submits that the RTB process was unfair.

Background

[5] Mr. Wall is a tenant in a unit at 608 – 1134 Burrard Street, Vancouver. He moved into that unit on February 1, 2023. The tenancy agreement is dated February 7, 2023. It requires Mr. Wall to pay $420 per month in rent.

[6] The building in question is a subsidized building for low-income individuals in Vancouver. It is operated by the respondent society.

[7] There is no dispute that Mr. Wall paid his rent in full each month of his tenancy except for April 1, 2023. In that month only $375 of the $420 rent was paid.

[8] Mr. Wall is a recipient of persons with disabilities assistance through the Ministry of Social Development and Poverty Reduction. His rent was paid directly by the Ministry. The underpayment in April 2023 resulted from a mistake made by the Ministry.

[9] On May 18, 2023, Mr. Wall received a letter from the landlord informing him that his rent was in arrears in the amount of $45. In an affidavit filed in this proceeding, Mr. Wall claims that he then paid the $45 to the landlord by providing it in cash to a staff member at the landlord's office in the building. He says he did that within one month of receiving the May letter, but he cannot recall the exact date he made the payment. It may be that his evidence on this point was less certain at the hearing before the arbitrator. It is clear that in the RTB hearing he said he paid it, but his evidence about when he paid it may have been less certain.

[10] Mr. Wall says that he received a receipt for that $45 payment, but he lost the receipt.

[11] On July 12, 2023, Mr. Wall received a second letter that informed him of the rent arrears of $45. He says that he did not reply because he had already paid the arrears.

[12] On August 10, 2023, Mr. Wall received a third letter, which was referred to, in the letter itself, as “the first warning letter”. This letter again claims that Mr. Wall owes rent arrears of $45.

[13] The next day, on August 11, 2023, Mr. Wall visited the landlord's office in the building and asked why he was receiving these letters given that he had already

paid the arrears. In response, the employee or employees at the office told him they would pass that information along to management.

[14] On September 9, 2023, Mr. Wall received a fourth letter, which was referred to, in the letter itself, as the “second warning letter”. This letter stated that the arrears had to be paid by September 30, 2023. However, on September 19, 2023, Mr. Wall received the one-month notice to end tenancy for cause.

[15] Mr. Wall claims that on November 29, 2023, on the advice of an advocate from First United, he paid the landlord another $45. He has now provided a receipt, but that receipt was not in evidence at the hearing before the RTB.

[16] Mr. Wall applied to the RTB to cancel the notice. The hearing was conducted on January 9, 2024. Mr. Wall was represented by an advocate. Both sides appeared by teleconference.

[17] On January 10, 2024, the arbitrator released his decision dismissing Mr. Wall's application for cancellation of the notice and granting the landlord an order of possession. Mr. Wall has since obtained stays from this court. He continues to reside in the unit, the last stay being in effect until today or tomorrow.

The Decision Under Review

[18] In his decision, the arbitrator briefly reviewed the facts. He then proceeded with his analysis, starting at page 5 of the decision. He noted that any one of the grounds listed in s. 47(1), on its own, is sufficient to end a tenancy under that section. He quoted s. 47(1)(b), which provides that a landlord may end a tenancy by giving notice to end the tenancy if the tenant is “repeatedly late paying rent”.

[19] The arbitrator then referred to the RTB's Policy Guideline Number 38, which provides, as he put it, “guidance regarding the circumstances whereby a Landlord may end a tenancy when the Tenant is repeatedly late paying rent”. That policy provides in part as follows:

> Three late payments are the minimum number sufficient to justify a notice under these provisions.

[20] The arbitrator found that Mr. Wall was in arrears in the amount of $45 in relation to the April 2023 rent and that there were a number of letters sent to Mr. Wall informing him that the amount was outstanding and had to be rectified.

[21] The arbitrator rejected Mr. Wall's evidence that he had paid the arrears and found that it was “unclear” why Mr. Wall only reached out to the landlord about the issue in August 2023. He characterized Mr. Wall's evidence as inconsistent, unsupported, and dubious, and found that the landlord's evidence was more consistent and logical and that he preferred the landlord's evidence.

[22] The arbitrator then concluded that Mr. Wall was "repeatedly late paying the rent" within the meaning of s. 47(1)(b) because “there were at least three instances of late payment of rent” given that the rent was not paid in April and this was not rectified in response to the landlord's letters. In other words, the failure to pay the full amount of rent owing for a single month, combined with the failure to rectify the situation in response to the landlord's four letters, was found to amount to being "repeatedly late paying rent."

Standard of Review

[23] The standard of review is uncontroversial. It is expressed accurately and concisely in paragraphs 3 through 5 of the response to the application that was filed by the RTB:

> **Fundamental Principles of Judicial Review**
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> 3. The role of the court on judicial review is to ensure that a statutory decision-maker or tribunal acted within the authority bestowed upon it by the Legislature. The role of the court on judicial review is not to hear new evidence or argument or to decide or re-decide the case; it is simply to ensure that the tribunal (1) acted within its jurisdiction by deciding what it was directed to decide by its constituent legislation; and (2) did not fail to provide a fair hearing or render a decision outside the degree of deference owed by the reviewing court.
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> **Standard of Review – Patent Unreasonableness**
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> 4. For decisions of the Director, Residential Tenancy Branch, the standard of review is patent unreasonableness pursuant to s. 5.1 of the *Residential Tenancy Act*, S.B.C. 2002, c. 78 (“*RTA*”) and s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (“*ATA*”). The *RTA*’s privative

clause is found at s. 84.1. Section 58(3) of the *ATA* defines "patently unreasonable" with respect to a discretionary decision. It does not define patent unreasonableness as it relates to a finding of fact or law, but an explanation can be found in *Yee v. Montie*. The Supreme Court of Canada has stated that a patently unreasonable decision is one where the result borders on the absurd.

Procedural Fairness

5. Questions of procedural fairness must be reviewed on a standard of fairness, as required by s. 58(2)(b) of the *ATA*. Assessing the level of procedural fairness required in a given tribunal process requires a "contextual approach" that looks to the decision being made and its statutory, institutional and social context.

[Footnotes omitted]

[24] I also adopt Justice Brongers' summary of the standard of review in *Hollyburn Properties Limited v. Staehli*, 2022 BCSC 28 at paras. 23 – 27:

> [23] A comprehensive consideration of the standard of review that applies to decisions rendered by RTB arbitrators pursuant to the *RTA* can be found in the Court's recent decision in *Kong v. Lee*, 2021 BCSC 606, at paras. 54-66.
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> [24] In this judgment, Madam Justice MacDonald explained first that the standard is prescribed by provincial legislation. Accordingly, the presumption that the standard is reasonableness established by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 does not apply. That legislation is s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 ("*ATA*"), which applies by operation of ss. 5.1 and 84.1 of the *RTA*. Section 58(2) of the *ATA* provides that findings of fact and law made within a tribunal's exclusive jurisdiction and protected by a privative clause can only be set aside if they are patently unreasonable. Therefore, the standard of patent unreasonableness applies to all substantive aspects of the Arbitrator's decision.
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> [25] As the *ATA* does not define patent unreasonableness as it applies to a tribunal's factual or legal findings, however, guidance regarding its meaning must be sought from the case law. In *Kong* at paras. 58-65, Madam Justice MacDonald set out a number of jurisprudential holdings which provide content to the notion of patent unreasonableness, including:
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> (a) as expert tribunals are entitled to significant deference, the standard is an onerous one and their decisions can only be quashed if there is no rational or tenable line of analysis supporting them (*Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109 at para. 65; aff'd 2009 BCCA 229);
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> (b) a decision is patently unreasonable if it is openly, evidently, and clearly irrational, or unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures (*Gichuru v. Palmar Properties Inc.*, 2001 BCSC

827 at para. 34, citing *Lavender Co-Operative Housing Association v. Ford*, 2011 BCCA 114);

(c) a patently unreasonable decision is one that almost borders on the absurd (*Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23 at para. 18 and *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 28);

(d) it is a possible that a great deal of reading and thinking will be required before the problem in a patently unreasonable decision is apparent, but once its defect is identified, it can be explained simply and easily, leaving no real possibility of doubting that the decision is defective (*Yee v. Montie*, 2016 BCCA 256 at para. 22);

(e) the standard of patent unreasonableness also applies to the consideration of adequacy of reasons, which involves an assessment of the justification, transparency and intelligibility of the decision-making process (*Vavilov*); and

(f) under the *RTA* regime, the overriding test for adequacy of reasons is whether a reviewing court is able to understand how and why the decision was made (*Ganitano v. Yeung*, 2016 BCSC 2227 at para. 24).

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

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

[25] I emphasize that the standard is an onerous one, and it is not easy for an applicant to meet the threshold.

Analysis

[26] It is not necessary to deal with the submission that the procedure adopted by the RTB was unfair because I have no difficulty concluding that the arbitrator's decision is patently unreasonable.

[27] Policy Guideline 38 provides guidance but is not binding. I am not suggesting that the arbitrator considered it to be binding, but it is important to bear in mind that it is just guidance. It provides that three late payments are the minimum number sufficient to justify a notice under s. 47(1)(b). This signifies that the RTB considers that, at least in some circumstances, more than three late payments might not be sufficient.

[28] When s. 47(1)(b) is read in the context of s. 47 as a whole, it is apparent that it is intended to apply in circumstances that are significantly detrimental to the landlord. Section 47 is not intended to be engaged by *de minimus* or insignificant conduct. In this regard, I adopt the analysis of Justice Sewell in *Guevara v. Louie*, 2020 BCSC 380, at paras. 53 – 56, and in particular para. 55:

> [55] Section 47 sets out a number of grounds on which a landlord may rely upon to terminate a tenancy. A review of all of the grounds on which a tenancy may be terminated under s. 47 makes it apparent that the tenant must have engaged in serious misconduct that seriously affected the landlord or the other tenants of the building in which the premises are located, failed to comply with a condition precedent to the rental agreement coming into effect (s. 47(1)(a)) or have taken an unreasonable amount of time to comply with a material term of the tenancy agreement.

[29] To conclude that the failure to pay arrears despite repeated requests justifies eviction pursuant to s. 47(1)(b), the circumstances would have to be significantly detrimental to the landlord, or such that it could be said that the tenant has engaged in serious misconduct. However, the arbitrator did not engage in any coherent analysis of the meaning of "repeatedly late", how it applied to Mr. Wall in the circumstances of this case, or how what Mr. Wall did could be characterized as serious misconduct. The arbitrator gave no consideration to the actual circumstances, such as the fact there had only been one incident of the incorrect amount of rent having been paid, the fact that the rent was paid on Mr. Wall's behalf by the Ministry, or the small amount of the shortfall.

[30] Even if Mr. Wall's evidence was properly rejected by the arbitrator, there was no basis to find that Mr. Wall ignored all of the landlord's letters. There was no dispute that the September 9, 2023 letter from the landlord gave Mr. Wall to

September 30, 2023 to pay, but the landlord then issued the notice on September 19, 2023. There is no dispute that the day after receiving the August 10, 2023 letter, Mr. Wall went to the landlord's office, asked why he was receiving these letters, claimed that he already paid, and was told that this information would be passed on to management. In the circumstances, it cannot be said that Mr. Wall ignored the August or September letters.

[31] I cannot reweigh the evidence that was before the arbitrator, but on the record that was before him, the best it gets for the landlord, again assuming that it was appropriate to reject Mr. Wall's evidence, is that on a single occasion the Ministry underpaid Mr. Wall's rent by $45, and then Mr. Wall failed to take steps to correct the situation after being notified about it on two occasions (the May 18 and July 12 letters), in circumstances where he then subsequently attended at the landlord’s office and claimed that it had already been paid.

[32] Mr. Wall did respond, ultimately, by putting the landlord on notice that the arrears were disputed. In other words, by August 11, 2023, the landlord must be taken to have known that Mr. Wall was not simply refusing to pay but rather was claiming that he had already paid. This is not a case where the existence of arrears is not disputed but the tenant just continues to refuse to pay. Again, the best it gets for the landlord is that on that one single occasion, the Ministry underpaid Mr. Wall's rent by a small amount, Mr. Wall failed to correct the situation after being notified about it on two occasions, and then, on the third occasion, Mr. Wall let the landlord know that there was a dispute about whether it had already been paid.

[33] As I have mentioned, as a person with disabilities, Mr. Wall's rent is paid directly to the landlord by the Ministry, and the April underpayment must have resulted by a mistake by Ministry staff. This is an important circumstance given that the purpose of s. 47(1), as I have said, is to protect a landlord from significantly detrimental or serious misconduct by a tenant. In this case, the risk of future underpayments was very small because of the payment arrangement, but this

important consideration does not appear to have even been considered by the arbitrator.

[34] All of these factors considered together satisfy me that the arbitrator's finding that Mr. Wall was repeatedly late paying the rent, as that phrase is used in s. 47(1)(b) of the *Act*, is patently unreasonable. In other words, it is clearly unreasonable on its face, and it cannot rationally be supported on the record that was before the arbitrator.

[35] Mr. Cummings has reminded me that the usual remedy is to remit the matter back to the RTB, but I am satisfied that, in this case, the outcome at a rehearing would be inevitable given the findings that I have made. In the circumstances, I am going to set aside the decision and the order of possession. To be clear, this does not prevent the RTB from reconvening the hearing to address the other grounds that were relied on by the landlord in the notice to end tenancy for cause.

[36] Do you want to make submissions on costs?

(SUBMISSIONS ON COSTS)

[37] THE COURT: I am going to award costs to Mr. Wall. I am not going to award costs under Rule 13-2(22) to the landlord. I am not suggesting that the landlord acted improperly in taking steps to enforce the RTB order, but the reality is that the timelines tenants have to act within in these matters are tight. Often the tenant is not in a position to quickly obtain legal advice and respond to RTB orders, which often have significant and fundamental impacts on their lives. At the end of the day, as unfortunate as it is for the landlord, the enforcement steps were taken on a decision that has now been found to have been patently unreasonable. I am not persuaded that there is anything about this case that would justify departing from the ordinary costs order, which is that the successful party is entitled to their costs at Scale B.

"Warren J."