

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

WADE FRIESEN

Applicant

- and -

IRENE CATHOLIQUE and
HAL LOGSDON, RENTAL OFFICER OF
THE NORTHWEST TERRITORIES

Respondents

MEMORANDUM OF JUDGMENT

[1] The Applicant (the “Landlord”) appeals a decision of the Rental Officer, by which he was ordered to pay the Respondent (the “Tenant”) compensation for disturbing her possession of rental premises and to deliver her personal possessions to her. The Rental Officer’s decision rested on his finding, after a hearing, that the Landlord did not act on reasonable grounds in treating the rental premises as abandoned. As a result, he found the Landlord in breach of his obligation not to disturb the Tenant’s lawful possession of the premises. He awarded compensation to the Tenant, mainly for airfare and rent, and set that off against rental arrears and other amounts that he found she owed the Landlord.

[2] At the commencement of argument on the appeal, the Landlord sought to refer to unsworn information from third parties. I did not permit

him to refer to the information because it was unsworn and had not been provided to counsel for the Tenant.

[3] The Landlord filed an affidavit with his originating notice commencing the appeal. That affidavit essentially repeats some of the evidence the Landlord gave at the hearing before the Rental Officer. It also explains some of the grounds of appeal.

[4] The Tenant also filed an affidavit in which she states that the Landlord has not returned her personal property. That affidavit also provides some information about the situation of the Tenant's children which appears to be different from information she provided to the Rental Officer and which is relevant to one of the grounds of appeal.

[5] The Landlord relies on a number of grounds of appeal, which I will refer to below. The first issue to be addressed is the standard of review to be applied to the Rental Officer's decision. In the current state of the law, there are two possible standards, correctness and reasonableness. The question is whether the Rental Officer has to be correct in the decisions he makes or whether those decisions simply have to be reasonable, even if not necessarily the same decision the Court might make.

[6] The appeal is brought under s. 87 of the *Residential Tenancies Act*, R.S.N.W.T. 1988, c. R-5 (the "Act"). Previous decisions of this Court have held that the standard of review on such an appeal on factual matters is reasonableness: *Inuvik Housing Authority v. Kendi*, 2005 NWTSC 46; *Yeadon v. NWT Housing Corp. et al*, 2008 NWTSC 39.

[7] In this case, most of the grounds of appeal involve factual matters and so the standard of reasonableness applies. That standard recognizes that certain questions that come before a decision-maker such as the Rental Officer do not lend themselves to one specific result but may instead give rise to a number of possible, reasonable conclusions. So long as the decision made is a possible, reasonable one, the reviewing court should not intervene.

[8] Although a number of grounds of appeal are set out in the originating notice, after hearing the Landlord's arguments I am satisfied that the grounds he is relying on can be summarized as follows:

1. That the Rental Officer erred in determining that the Tenant had not abandoned the premises;
2. That the Rental Officer erred in granting relief that the Tenant had not sought in her application;
3. That the Landlord did not have sufficient notice of the documents relied on by the Tenant and accepted by the Rental Officer;
4. That the Rental Officer erred in granting compensation for flights for the Tenant's children in the absence of documentary and other evidence relating to such flights;
5. That the Rental Officer erred in failing to give the Landlord sufficient opportunity to respond to the Tenant's claim for flight and rent expenses;
6. That the Rental Officer failed to consider relief sought by the Landlord for damage to the premises and utility expenses.

[9] The grounds of appeal must be considered against the background of this matter, which is as follows.

[10] The Landlord and the Tenant had a lease agreement for rental premises in Yellowknife. That agreement was not placed in evidence by either party at the hearing before the Rental Officer nor on the appeal to this Court, however for purposes of this appeal its absence is not a problem.

[11] At some point during the term of the lease agreement, the Tenant encountered problems with lack of heat in the premises; she also failed to make rent and other payments. She told the Landlord that she intended to move out of the premises at the end of December 2008. She did not, however, give written notice of termination of the tenancy.

[12] The Landlord went to the rental premises four times in the last week of December 2008 but found no one there and concluded from the lack of footprints in the snow outside the premises that no one had come or gone in that week. Sometime in that week he was also told by a prospective tenant that the Tenant told him that she intended to move out at the end of December. The Landlord went into the rental premises and found that some,

but not all, of the personal possessions of the Tenant and her family had been packed into boxes. Other possessions were located throughout the home and there was also a Christmas tree in the living room with one or more presents underneath it. The Landlord found what he described as rotting food on the stove top and in the refrigerator. He testified that there was damage to the premises and that they were not clean.

[13] In early January, the Landlord moved the Tenant's belongings into storage, had the premises cleaned, and allowed someone else to move in. Several days later the Tenant returned to Yellowknife after visiting her home community over Christmas. She attended at the premises and found the new tenant living there. She subsequently filed an application with the Rental Officer based on sections 25(1) and 34(1) of the Act, which prohibit a landlord from altering the locking system on a door during a tenant's occupancy and from disturbing a tenant's possession or enjoyment of the rental premises.

[14] Shortly thereafter, the Landlord filed his own application with the Rental Officer, claiming rental arrears and other payments as well as amounts expended to clean and repair the premises and store the Tenant's possessions.

[15] The Rental Officer dealt with both applications in the course of the same hearing. The Landlord represented himself while the Tenant was represented by a lay advocate.

[16] After hearing from the parties and two witnesses called by the Landlord, the Rental Officer reserved and later issued a written decision. He found that the Landlord did not have reasonable grounds to believe that the Tenant had abandoned the premises. He awarded the Tenant compensation for airfare to have her children stay with relatives, for three months' room and board at her new premises and for repair of a furnace pump. He awarded the Landlord compensation for rent arrears owing by the Tenant, and payments made by the Landlord on the fuel and water accounts. After setting off the security deposit and interest, he ruled that the Landlord owed the Tenant \$129.78. He also ordered the Landlord to return the Tenant's possessions to her.

Ground of Appeal #1 - Did the Rental Officer err in determining that the Tenant had not abandoned the premises?

[17] Turning now to the first ground of appeal, the question is whether the Rental Officer's finding about abandonment of the premises was reasonable. The Landlord says it was not, the Tenant says that it was.

[18] The relevant sections of the Act provide as follows:

1 (3) For the purpose of this Act, a tenant has abandoned the rental premises and the residential complex where the tenancy has not been terminated in accordance with this Act and

- (a) the landlord has reasonable grounds to believe that the tenant has left the rental premises; or
- (b) the tenant does not ordinarily live in the rental premises, has not expressed an intention to resume living in the rental premises, and the rent the tenant has paid is no longer sufficient to meet the tenant's obligation to pay rent.

...

55 (1) A notice of termination by a tenant or a landlord shall be in writing and must

- (a) be signed by the tenant or the landlord or an agent of the tenant or the landlord;
- (b) identify the rental premises to which the notice applies;
- (c) state the date on which the tenancy is to terminate; and
- (d) state the reason for the termination of the tenancy.

...

62 (1) Where a tenant abandons a rental premises, the tenancy agreement is terminated on the date the rental premises were abandoned but the tenant remains liable, subject to subsection 9(2), to compensate the landlord for loss of future rent that would have been payable under the tenancy agreement.

...

[19] In this case, the Tenant had not given written notice of termination and therefore her tenancy had not been terminated in accordance with the Act. To justify his actions, the Landlord had to satisfy the Rental Officer that when he took possession of the premises, he had reasonable grounds to believe that the Tenant had left the premises in the sense of abandoning them, as per ss. 62(1) and 1(3)(a). The Rental Officer was correct, in my view, in finding that s. 1(3)(b) does not apply, because the Tenant did not ordinarily live in the premises.

[20] The concept of abandonment involves finality. The following definition, although given in the context of personal property, is helpful:

Abandonment occurs when there is “a giving up, a total desertion, and absolute relinquishment” of private goods by the former owner. It may arise when the owner with the specific intent of desertion and relinquishment casts away or leaves behind his property ... [quoted in *Simpson v. Gowers et al.*, [1981] O.J. No. 2958, 32 O.R. (2d) 385 (C.A.).]

[21] The determinative time for the existence of reasonable grounds must be the time when the landlord takes possession of the property. At the time he takes possession of the premises, does he or she have reasonable grounds to believe that the tenant has left the premises in the sense of having given them up completely? Thus, things said by the tenant to others and not known to the landlord at the time he takes possession, and things done by the tenant after the landlord takes possession, are not likely to be relevant. I point this out because some of the unsworn statements the Landlord sought to introduce at the appeal were things allegedly said by the Tenant to other people at various times.

[22] At the hearing before the Rental Officer the Landlord relied mainly on the Tenant’s statement to him that she intended to leave the premises at the end of December. He also relied on his observations of the premises themselves.

[23] The Tenant testified that her statement to the Landlord about moving out was made in frustration. She denied telling the prospective tenant or his girlfriend that she intended to move out.

[24] The Rental Officer reviewed the evidence carefully. He also considered the fact that it was Christmas time and that, as admitted by the Landlord, many people leave town for the Christmas holidays. He found that since virtually all the Tenant’s possessions were still in the home, the Landlord did not have reasonable grounds to consider that she had abandoned the property. The Rental Officer’s remarks to the parties during the hearing make it clear that he also considered the fact that some people do leave possessions behind when they leave a home for good.

[25] Based on the evidence, the Rental Officer's decision that the Landlord did not have reasonable grounds to believe that the Tenant had left the premises was a reasonable decision. Although the evidence might be regarded as going so far as to indicate that the Tenant intended to vacate the premises and had started packing up her possessions for that purpose, it should have been obvious to the Landlord, or at the very least occurred to him as a distinct possibility, that she had not yet vacated.

Ground of Appeal #2 - Did the Rental Office err in granting relief that the Tenant had not sought in her application?

[26] The application filed by the Tenant with the Rental Officer did not describe the specific relief she sought. It did, however, state that her application was for an order pursuant to sections 25(1) and 34(1) of the Act. Those sections state:

25 (1) No landlord or tenant shall, during occupancy of the rental premises by the tenant, alter or cause to be altered the locking system on any door giving entry to the rental premises except by mutual consent.

...

(3) Where, on the application of a landlord or a tenant, a rental officer determines that an obligation imposed by this section has been breached, the rental officer may make an order

- (a) requiring the person who breached the obligation to give access to the rental premises or to the residential complex;
- (b) requiring the person who breached the obligation not to breach the obligation again;
- (c) requiring the person who breached the obligation to compensate the party affected for loss suffered as a direct result of the breach.

...

34 (1) No landlord shall disturb a tenant's possession or enjoyment of the rental premises or residential complex.

(2) Where, on the application of a tenant, a rental officer determines that the landlord has breached the obligation imposed by subsection (1), the rental officer may make an order

- (a) requiring the landlord to comply with the landlord's obligation;

- (b) requiring the landlord to not breach the landlord's obligation again;
- (c) requiring the landlord to compensate the tenant for loss suffered as a direct result of the breach; or
- (d) terminating the tenancy on a date specified in the order and ordering the tenant to vacate the rental premises on that date.

[27] In my view reference in the application to the aforesaid sections of the Act was sufficient to put the Landlord on notice that the Tenant was seeking an order for relief under one or more of the subsections referred to. It should have been clear to the Landlord that the issues were whether he had wrongfully disturbed her occupation of the premises, in effect "locked her out" and if so, what relief should be granted to her as permitted by sections 25 and 34. The Landlord is not a lawyer, but as one who is in the business of renting premises, he has a duty to familiarize himself with the Act and the obligations it places on him as well as the potential consequences if he breaches those obligations.

[28] Having said that, considering that many individuals, both landlords and tenants, represent themselves in proceedings before the Rental Officer, it might be prudent for the Rental Officer to consider amending the application form used so that the specific relief a party seeks must be detailed.

[29] Since the relief granted by the Rental Officer was in the form of compensation, it falls within the sections of the Act referred to by the Tenant in her application. Accordingly, I would not give effect to this ground of appeal.

Ground #3 - was the Landlord given sufficient notice of documents relied on by the Tenant and accepted by the Rental Officer?

[30] The only document that seems to be at issue on this ground is a copy of an airline ticket in the name of the Tenant. The Landlord indicates that it was not attached to the documents he received from the Rental Officer prior to the hearing and that he saw it for the first time on request after receiving the Rental Officer's decision. Since no compensation was awarded for the Tenant's airfare, the document was not crucial to the Rental Officer's decision, and it is not clear that he relied on it at all, but the Landlord makes the point that had he known that the ticket provided to the Rental Officer was for the Tenant alone, that would have alerted him to the fact that there

were no tickets substantiating flights for the children. However, in light of my decision on the other grounds relating to the children's airfare, I need not rule on this ground of appeal.

Ground #4 - Did the Rental Officer err in granting compensation for flights for the Tenant's children in the absence of documentary and other evidence relating to such flights?

[31] There was no reference to compensation for flights for her children in the Tenant's written application to the Rental Officer. The Tenant gave evidence at the hearing that after she discovered that another tenant had moved into the rental premises, she moved in with a friend but there was not enough room for her children. She testified that two of her children were living with her father in Lutsel K'e and the other one was at school in Fort Smith. She also said that she had not seen the children, only tried to contact them by phone (Transcript, page 3). Her advocate told the Rental Officer that she was seeking compensation because ... she had to cover travel from her children from Yellowknife to Lutsel K'e, return for a visit once and back. So she's looking for the landlord to cover travel required for her to make sure that her children had a home, so that she could visit her children too. So we're looking for \$800 for compensation for travel for her children (Transcript, page 4). There was no evidence given as to how the \$800.00 was calculated.

[32] The Rental Officer's decision on this point was as follows:

The tenant is staying with friends but her children were sent to Lutsel K'e and Ft. Smith to stay with relatives. The tenant has had to pay airfares to transport the children and will have to pay additional airfare when she finds new accommodation. I find these costs to be \$1488.80 calculated as follows:

Two return airfares (Yellowknife to Lutsel K'e)	\$800.00
One return airfare (Yellowknife to Ft. Smith)	\$688.80
Total	\$1488.80

[33] The compensation ordered by the Rental Officer exceeded what the Tenant had sought. Although it is not entirely clear from the evidence, it may be that the Tenant had not sought airfare for the child in Fort Smith because the child was attending school there and would have gone there

even if the landlord had not taken possession of the rental premises. There was no evidence that the child in Fort Smith was staying with relatives because the Tenant lost her accommodation in Yellowknife. It is also not clear whether the Rental Officer was including airfare to cover visits while the children were living outside Yellowknife or simply to bring them back to Yellowknife once the Tenant obtained suitable accommodation for them.

[34] Unfortunately, the affidavit filed by the Tenant on this application further muddies the waters. In that affidavit, she says that she had to board one of her children, age 18, with her niece in Fort Smith and the other, age 16, with her father in Lutsel K'e since she had no room for them. She says nothing about a second child staying in Lutsel K'e.

[35] As far as lack of documentation goes, it was up to the Rental Officer to decide whether the evidence presented to him was sufficient to satisfy him. Although it is normally prudent to require documentary proof of out-of-pocket expenses, or at least seek an explanation as to why such proof is not available, the Rental Officer is not required to have documentary evidence of any claim for expenses or losses. The mere fact that there was no documentation of the airfare expenses is not a reason in itself to set aside his order for payment of those expenses. However, the fact that the Rental Officer included the Fort Smith airfare that was not sought and for which there was no evidence makes his decision unreasonable on that point. In light of the confusion caused by the Tenant's recent affidavit, the issue of airfare for the other children should also be re-addressed. As I indicate further on, these issues will be referred back to the Rental Officer for a new hearing.

[36] The Landlord also submitted in argument on this appeal that it was not reasonable for the Rental Officer to award the Tenant compensation for rent she had to pay for January, February and March 2009 since she would have had to pay more rent in any event had she stayed in the premises she rented from him. It is not clear why the Rental Officer chose to include rent as compensation in those circumstances. In the reasons for his decision, he refers to the Tenant having to pay room and board for herself and the children in the amount of \$850.00 per month. However, the evidence was that the \$850.00 was what she paid to stay with a friend; there was no evidence as to any amounts paid to house or board the children. This leads me to find that the Rental Officer's decision to award rent as compensation was unreasonable.

Ground #5 - Did the Rental Officer fail to give the Landlord sufficient opportunity to respond to the Tenant's claims for flight and rent expenses?

[37] Since I have decided on the grounds set out above that the Rental Officer's decision regarding the airfares and rent was unreasonable, and that there will have to be a new hearing as to those items, I need not address this ground of appeal.

Ground #6 - Did the Rental Officer fail to consider relief sought by the Landlord for damage to the property and utility expenses?

[38] The Landlord argues that the Rental Officer failed to consider his claims for damage done to the rental premises and for utility expenses.

[39] The Rental Officer did consider the claim for damage to the premises. He found, however, that because the Landlord wrongfully and prematurely took possession of the premises, the Tenant was deprived of the opportunity to clean the premises and make repairs to any damage. This finding was not unreasonable in the circumstances. Whether the Tenant would have been successful in repairing any damage to the Landlord's satisfaction is not the point; the point is that she was not given the opportunity to clean and repair because of the Landlord's breach of the Act in moving another tenant into the premises. The Rental Officer obviously was of the view that because of this, the Landlord rather than the Tenant should bear the cost of cleaning and repairs.

[40] As for utility expenses, the Landlord says that the Rental Officer failed to consider that the Tenant should reimburse him for the power bill for the period December 15 to 31 in the amount of \$160.45. The Landlord made that request during the course of the hearing before the Rental Officer (Transcript, page 40). Although the Rental Officer awarded the Landlord amounts for fuel and water bills, he made no award for the power bill and does not appear to have considered that issue. The power bill was the subject of some discussion during the hearing before the Rental Officer and it may be that his failure to address it was simply an oversight.

[41] Finally, at the hearing of this appeal, the Landlord also submitted that he should be reimbursed by the Tenant for one month's interest on the

security deposit. He calculated the interest as beginning in March, when he thought the Tenant paid the deposit, but since she testified that she paid it in April, he says he should be reimbursed. I am not going to order reimbursement. The Landlord prepared and filed with the Rental Officer a financial report showing interest owing from March so he must have been satisfied based on his own record keeping that he owed that amount.

Conclusion

[42] As a result of the above findings, the appeal from the Rental Officer's finding that the Tenant had not abandoned the premises is dismissed.

[43] The appeal from the Rental Officer's findings as to compensation is allowed in part and the following issues are remitted to the Rental Officer for a new hearing and decision: (1) the Tenant's claim for airfare for her children; (2) the Tenant's claim for rent; (3) the Landlord's claim for reimbursement for the power bill for the last two weeks of December 2008. It will be up to the Rental Officer to deal with issues of disclosure of documents generally, but each party should provide the other with any documents that he or she wants to rely on well in advance of the hearing before the Rental Officer.

[44] As success has been divided, each party will bear their own costs of the appeal.

[45] The Rental Officer's order that the Landlord return the Tenant's possessions to her is still in effect in accordance with its terms. The stay on that order pursuant to s. 88 of the Act is no longer in effect. I leave it to the parties to arrange for the return of the Respondent's possessions in accordance with the Rental Officer's order.

[46] Counsel for the Tenant should draft the formal order resulting from this decision. I also direct that the Clerk forward a copy of this Memorandum of Judgment to the Rental Officer.

V.A. Schuler
J.S.C.

Dated at Yellowknife, this 2st day of June, 2009.

The Applicant appeared in person.

Counsel for the Respondent, Irene Catholique: Donald Large, Q.C.

S-1-CV-2009 000 031

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REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE V.A. SCHULER
