Inuvik Housing Authority v. *Alunik,* 2014 NWTSC 37

Date: 2014 05 13
Docket: S-1-CV-2013-000079

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

INUVIK HOUSING AUTHORITY

Appellant

-and-

DENNIS ALUNIK

Respondent

Appeal from a Decision of the Rental Officer.

Heard at Yellowknife, NT, on January 21, 2014.

Reasons filed: May 13, 2014

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE S.H. SMALLWOOD

Counsel for the Appellant: Anne F. Walker
Respondent was Self-represented.

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REASONS FOR JUDGMENT

[1] This an appeal from a decision of the Rental Officer made pursuant to the *Residential Tenancies Act,* R.S.N.W.T. 1988, c. R-5 ("the *Act"*). Following a hearing on May 14, 2013, the Rental Officer ordered that Mr. Alunik's tenancy had been terminated on January 31, 2013, ordered Mr. Alunik's eviction from the rental premises effective May 29, 2013 and determined that Mr. Alunik owed the Inuvik Housing Authority (IHA) the sum of $1264.35 in compensation for use and occupation of the premises up to May 14, 2013. The IHA is appealing the amount of compensation ordered by the Rental Officer.

Background

[2] On March 14, 2013, the IHA filed an Application with the Rental Officer seeking termination of Mr. Alunik's tenancy agreement, an eviction order and compensation for use and occupation. The Application stated that the IHA's reasons for seeking this relief arose from a history of noise and disturbance complaints and an alcohol-related fire incident.

[3] Mr. Alunik was given notice of the Application which was held on May 14, 2013. At the hearing, the Rental Officer heard evidence from Ms. Tingmiak, on behalf of the IHA, and Mr. Alunik.

[4] Ms. Tingmiak advised the Rental Officer that Mr. Alunik had entered into an indeterminate lease on April 1, 2012. He had received his first warning for noise and disturbance on November 5, 2012. On November 9, 2012, Mr. Alunik's tenancy was terminated for an alcohol-related cooking fire. Mr. Alunik appeared before the IHA Board on December 12, 2012 to request another chance. Mr. Alunik requested that his stove be removed from his unit and advised that he would use his microwave instead. The Board agreed and gave Mr. Alunik another chance. On December 21, 2012, Mr. Alunik was sent another notice of termination, this time for noise and disturbance. Since the termination notice, there had been a number of other incidents on: January 6, 2013; February 3, 11, 17 and 24, 2013; March 3 and 19, 2013; April 9, 11, 16, 23, and 25, 2013; and May 2 and 7, 2013.

[5] Ms. Tingmiak advised that most of the incidents involved Mr. Alunik's guests and that they would leave Mr. Alunik's unit and wander the hallways causing problems and would also leave by a fire exit which was alarmed and automatically contacted the fire department. Mr. Alunik had also had three alcohol-related cooking fires in his unit.

[6] Ms. Tingmiak requested that the tenancy agreement be terminated, that an Eviction Order be granted and that the IHA be compensated for use and occupation by Mr. Alunik. Mr. Alunik did not dispute the allegations and agreed that the tenancy should be terminated.

[7] The Rental Officer advised Mr. Alunik that the IHA was seeking $3250 in compensation for use and occupation. Mr. Alunik responded "that's a lot" but did not make any submissions regarding the amount of compensation that should be awarded.

[8] At the hearing, the Rental Officer found that the tenancy agreement had been terminated, granted an Eviction Order and awarded the IHA compensation for use and occupation. The exact amount of compensation was not specified at the hearing and the Rental Officer advised Mr. Alunik that the formal Order would contain the calculations of how much Mr. Alunik owed the IHA.

[9] In the written Reasons for Decision, the Rental Officer found that the tenancy agreement set the full economic rent at $871 per month. He found that there was no evidence that there had been any notice of an increase to that amount. The Rental Officer ordered that Mr. Alunik pay $1264.35 to the IHA as

compensation for use and occupation of the premises from April 1, 2013 to the date of the hearing.

[10] The IHA appealed the decision of the Rental Officer regarding the amount of compensation and claims that the Rental Officer should have used the amount of $1625 per month for the full economic rent as there was evidence that Mr. Alunik had received notice of the increase in rent which the Rental Officer should have considered.

Standard of Review

[11] There are two standards of review which might be applicable to the review of a decision of the Rental Officer: correctness and reasonableness. The correctness standard requires a reviewing court to determine whether the decision was correct. There is no deference shown to the decision-maker's findings and a reviewing court is entitled to substitute its view for that of the decision-maker.

[12] The reasonableness standard, however, requires a reviewing court to show deference to the findings of the decision-maker. So long as the decision falls within a range of possible, reasonable conclusions, a reviewing court will not interfere with the decision. Reasonableness involves a consideration of justification, transparency and intelligibility in the decision-making process.

[13] In determining which standard of review is applicable, the first step is to ascertain whether the existing case law has previously determined the applicable standard of review: *New Brunswick (Board of Management)* v. *Dunsmuir*, 2008 SCC 9 at para. 57.

[14] The standard of review that is applicable to a decision of the Rental Officer has been determined by this Court on several occasions. Where the Rental Officer acts within the scope of his jurisdiction or the appeal involves a question of fact, the standard is that of reasonableness. Where the issue is one of law, jurisdiction or procedural fairness, the standard is that of correctness. *Jeske* v. *Yellowknife Housing Authority*, 2013 NWTSC 17 at para. 23; *Robertson* v. *Goertzen*, 2010 NWTSC 81 at para. 13; *Union of Northern Workers* v. *Carriere*, 2013 NWTSC 5 at para. 59.

[15] The IHA claims that, in finding that there was no evidence of any notice of the rent increase provided to Mr. Alunik, the Rental Officer erred in law, declined jurisdiction, was procedurally unfair, and rendered an unreasonable decision.

[16] The Rental Officer's decision that there was no evidence that Mr. Alunik had received notice of the rent increase is an issue of fact to which the standard of review is reasonableness. The questions of whether the Rental Officer erred in law, declined jurisdiction or was procedurally unfair engages the correctness standard of review.

Was the Rental Officer's Decision Reasonable?

[17] The IHA argues that the failure of the Rental Officer to locate or consider evidence of notice of the rent increase in determining the compensation to be ordered for use and occupation of the rental premises after the termination of the tenancy agreement rendered his decision unreasonable. I do not agree. The evidence before the Rental Officer did not clearly establish that Mr. Alunik had received notice of the rent increase; therefore, it was reasonable for the Rental Officer to conclude that there was no evidence of notice of a rent increase.

[18] The tenancy agreement entered into by the IHA and Mr. Alunik on April 3, 2012 was included in the Application to a Rental Officer. Schedule A to the tenancy agreement indicates that the maximum monthly rent payable was $871per month. In the tenancy agreement, the IHA agreed to provide at least one month's notice in advance of any rent increase to the amount in Schedule A.

[19] There was no indication in the Application to a Rental Officer that there had been an increase in the maximum monthly rent of $871 or that notice had been given to Mr. Alunik of any increase in monthly rent.

[20] At the hearing, the amount of the monthly rent was discussed although the issue of notice was not directly addressed. The transcript of the hearing reveals the following exchange between Ms. Tingmiak and the Rental Officer regarding the rent:

> Rental Officer: Okay, so it's reverted to month-to-month? Okay. So, [indistinct] I take it this tenancy agreement then was terminated on January thirty-first by your notice.
>
> Ms. Tingmiak: Yes.

> Rental Officer: And, so, have you been charging him economic rent since that date?
>
> Ms. Tingmiak: Well, no. We only started him economic rent 'cause he hasn't come in to do his work.
>
> Rental Officer: Okay.
>
> Ms. Tingmiak: If he came in to do his paperwork, we would have reversed those two sixteen twenty-fives and just gone income.

[21] Later in the hearing, the Rental Officer discussed the IHA's claim for compensation with Mr. Alunik:

> Rental Officer: …they're looking for an Eviction Order [indistinct] and an Order to pay – for you to pay the compensation for the time that you've been there. [Indistinct] currently that amount they're saying is thirty-two hundred and fifty dollars. Is there anything that you…
>
> Mr. Alunik: Thirty-two hundred and fifty bucks.
>
> Rental Officer: Yes.
>
> Mr. Alunik: Wholly [sic] cow, that's a lot.
>
> Rental Officer: Did you give him a – a copy of this?
>
> Ms. Tingmiak: Yeah, I did. I just gave it to him. He's got it.

[22] The document that is referred to in the transcript is not identified by Ms. Tingmiak or the Rental Officer and there is no description of it provided in the transcript. The Record of the Rental Officer (Tab 10) includes "Evidence submitted at the hearing by the Applicant" which consists of 2 pages: an Information Sheet, which outlines the disturbance complaints; and a sheet which indicates that the April 2013 and May 2013 rent charges for Mr. Alunik were $1625.00 per month for a total outstanding balance of $3250.00. There is no reference in the transcript to other documents being provided by Ms. Tingmiak at the hearing. It appears that the documents included in the Record of the Rental Officer are the documents that the Rental Officer and Ms. Tingmiak were referring to in the transcript as both refer to the monthly rent and an outstanding balance of $3250. However, this does not address the issue of whether Mr. Alunik received notice of any rent increase at least one month in advance.

[23] In support of the appeal, the IHA filed two Affidavits: the Affidavit of Ioan Astle, filed July 11, 2013 and the Supplementary Affidavit of Ioan Astle, filed October 28, 2013. In the Supplementary Affidavit, Ioan Astle deposes that she was advised by Ms. Tingmiak that, following the hearing, the Rental Officer contacted Ms. Tingmiak regarding whether the IHA had provided notice to Mr. Alunik of the rent increase. In response, Ms. Tingmiak advised the Rental Officer that Mr. Alunik had received notice and provided him with a letter addressed to Mr. Alunik advising of the rent increase, which is included as an Exhibit to the Supplementary Affidavit.

[24] The letter indicates that the new maximum rent would be $1625 per month. It is dated June 1, 2012 and addressed to Mr. Alunik at an address which is a post office box in Inuvik.

[25] Apparently after receiving this letter, the Rental Officer filed Reasons for Decision on May 16, 2013 in which he found "no evidence of any notice of increase" to the $871 per month maximum rent.

[26] Section 71 of the *Act* provides that notice that is to be served on a tenant must be served or given by personal service, registered mail, fax, or a method set out in the regulations. The *Residential Tenancies Regulations* (R-052-2010) provide that notice can also be served by e-mail if an e-mail address has been provided by the tenant: s. 4(2).

[27] While the letter does purport to advise Mr. Alunik of the rent increase to $1625 per month, the existence of the letter, on its own, is not sufficient to establish that notice was properly brought to Mr. Alunik's attention. There is no evidence that the requirements of the *Act* or *Regulations* with respect to service were complied with. The questions of how and when Mr. Alunik might have been served with the letter still remain.

[28] Counsel for the IHA, at the appeal hearing, submitted that the letter had been mailed to Mr. Alunik and that the IHA assumed that he received it. Even if the Court were to accept this form of evidence from counsel table, this method of service does not comply with the terms of the *Act*. There was no indication that the letter was sent by registered mail or another acceptable form or service.

[29] The methods of service established in the *Act* are designed to ensure that the landlord or tenant, as the case may be, can serve a tenant, landlord or Rental

Officer with notice and can provide satisfactory proof to the Rental Officer or other authority that service has been effected. In this case, there is no evidence that there was proper service of the notice.

[30] The Affidavit of Ioan Astle contains IHA Rent Calculation documents which pertain to Mr. Alunik's residence for the months of June, July and August 2012. The documents are reportedly signed by Mr. Alunik and acknowledge that his monthly maximum rent was $871 in June 2012 and $1625 in each of July and August 2012. The document for July 2012 was signed on July 3, 2012 and for August 2012 on July 30, 2012. If accepted, these documents could establish that Mr. Alunik, by signing them, had acknowledged the maximum monthly rent as $1625, and was aware of the rent increase as early as July 3, 2012.

[31] Section 87(5) of the *Act* permits this Court to "receive any evidence, oral or written, that is relevant to support or repudiate any allegation contained in the appeal."

[32] This section gives the Court the discretion to receive evidence on appeal but it is also clear that the Court is not required to receive evidence or that it should necessarily do so. As stated by Vertes J. in *Inuvik Housing Authority* v. *Kendi,* 2005 NWTSC 46 at para. 20 (citing *Galtee Mountain Holdings Ltd.* v. *Wilson*, [1991] N.W.T.J. No 49 at p. 5):

> While the legislation gives the judge the authority to receive evidence, that is not to say that the judge is either obliged to do so nor that it is something that should be routinely done. To do so would "only encourage parties to withhold evidence from the Rental Officer, relying on a further opportunity to adduce it on appeal" and would be "contrary to the plain intention of the Legislative Assembly in providing for the speedy and informal disposition of residential tenancy disputes before a Rental Officer".

[33] There is no indication that these documents were provided to the Rental Officer and no explanation has been given for the failure to do so. This is significant because the issue of notice had been raised with Ms. Tingmiak by the Rental Officer shortly after the hearing. By doing so, the Rental Officer clearly signaled to the IHA that he was concerned that there was no evidence that notice of the rent increase had been provided to Mr. Alunik.

[34] This was the IHA's application and part of the relief that was requested by the IHA was compensation for use and occupation in an amount equal to the

maximum monthly rent. Therefore, it was incumbent upon the IHA to satisfy the Rental Officer that the maximum monthly rent was $1625 and that the notice requirements which permitted this increase had been met.

[35] In the circumstances, to permit this additional evidence to be considered on appeal would not encourage parties to put forward their best case before the Rental Officer. Moreover, it would allow the IHA to attempt to fill the holes in their case on appeal with evidence that was clearly available and that could have easily been presented to the Rental Officer, either at the hearing or in response to his inquiry afterwards. Therefore, I have not considered this evidence.

[36] In conclusion, the evidence before the Rental Officer did not clearly establish that Mr. Alunik had received notice of the rent increase. As a result, his conclusion that there was no evidence of notice of a rent increase was within the range of possible, reasonable conclusions. Therefore, I find the Rental Officer's decision was reasonable.

[37] In my view, this finding is sufficient to dispose of the appeal. However, since the IHA has made a number of arguments which engage the correctness standard or review, I will go on to address those issues.

Did the Rental Officer err in law, decline jurisdiction or was the process procedurally unfair?

[38] The IHA argues that because the Rental Officer did not raise the issue of notice at the hearing and did not properly investigate the issue of notice, he failed to consider relevant or material evidence which was an error in law, procedurally unfair and resulted in the Rental Officer declining jurisdiction. I do not agree. There was no evidence of notice of the rent increase presented to the Rental Officer. It was the IHA's application and therefore incumbent upon the IHA to satisfy the Rental Officer that their application should be granted. It was not the obligation of the Rental Officer to continue to inquire about notice after having raised the issue.

[39] The IHA claims that the failure to consider relevant or material evidence is an error of law. If the Rental Officer ignored or failed to consider evidence that he was required by law to consider, that is an error of law: *Canada (Director of Investigation & Research* v. *Southam Inc.*, [1997] 1 S.C.R. 748 at para. 41.

[40] The IHA further claims that the Rental Officer declined jurisdiction by his failure to consider material evidence. The determination of the facts in an unreasonable manner can result in a jurisdictional error:

> To the extent that a statutory delegate has discretion to determine the facts, it must exercise its discretion reasonably. If it does so, it is acting within its jurisdiction, and no judicial review can arise (because there is no jurisdictional error, and there is no error of law within jurisdiction). On the other hand, if the statutory delegate exercises its discretion to determine the facts in an unreasonable manner, it has not in law exercised its discretion, but rather has declined jurisdiction.
>
> Jones and de Villars, *Principles of Administrative Law,* 5th Ed. (2009), at p. 474.

[41] It is clear from the transcript that the issue of notice was not directly addressed at the hearing itself. At some point following the hearing, it appears the Rental Officer became concerned that there was no evidence of notice of the rent increase and contacted Ms. Tingmiak to inquire about notice. This is understandable when considering the Record that was before the Rental Officer. The IHA's application to the Rental Officer included the tenancy agreement which referred to the maximum monthly rent as being $871 per month and there was no documentation that referred to an increase in the maximum monthly rent yet Ms. Tingmiak's submissions on behalf of the IHA and the documents submitted at the hearing referred to a maximum monthly rent of $1625.

[42] As stated above, there was no evidence provided to the Rental Officer, at the hearing or following the hearing when he raised the issue with Ms. Tingmiak, that notice of the rent increase had been provided to Mr. Alunik in accordance with the *Act* or *Regulations.* As there was no evidence on this point, I cannot conclude that the Rental Officer erred in law by failing to consider relevant or material evidence. Furthermore, I cannot conclude that the Rental Office determined the facts in an unreasonable manner thus declining jurisdiction.

[43] The IHA also argues that the Rental Officer's failure to address the issue of notice at the hearing and his failure to consider the evidence presented to him by Ms. Tingmiak was procedurally unfair.

[44] As mentioned above, the issue of notice was not raised by any party at the hearing before the Rental Officer. It was only after the hearing that the issue of notice was raised. The only evidence of how this issue was addressed is in the Supplementary Affidavit of Ioan Astle where Ms. Astle relates the hearsay evidence of Ms. Tingmiak regarding what occurred after the hearing. The Affidavit states:

> Ms. Tingmiak has advised me and I verily believe it to be true that after the hearing, the Rental Officer contacted her regarding the new economic rent for the unit and asked whether the IHA had provided Mr. Alunik with notice of the rent increase. I have been advised by Ms. Tingmiak and verily believe it to be true that she told the Rental Officer that the IHA had provided Mr. Alunik with notice of the rent increase for the unit, and she then faced to the Rental Officer a copy of the subject letter dated June 1, 2012.
>
> *Supplementary Affidavit of Ioan Astle,* para. 4.

[45] Generally, the *Act* gives the Rental Officer authority to determine how hearings will be conducted. Section 75 of the *Act* requires the Rental Officer to adopt the "most expeditious" method and to follow the rules of natural justice. This is consistent with the purpose of the *Act* which is "to provide an expeditious, summary, cost-effective means to resolve landlord-tenant disputes." *Inuvik Housing Authority, supra* at para. 22.

[46] Ideally, the issue of notice would have been addressed at the hearing. That it was not is unfortunate but the *Act* also permits the Rental Officer to consider any relevant information obtained by the Rental officer in addition to evidence adduced at the hearing: s. 82 of the *Act*. The *caveat* is that the Rental Officer must inform the parties and given them an opportunity to explain or refute the additional information.

[47] It seems reasonable to conclude that following the hearing, in writing his reasons as required by s. 84.1 of the *Act*, the Rental Officer realized that there was no evidence that Mr. Alunik had received notice of the rent increase. It appears that the Rental Officer, by contacting Ms. Tingmiak and inquiring about whether notice was provided to Mr. Alunik, was seeking other relevant information to consider in making his decision. By seeking this information, the Rental Officer was alerting the IHA that he was concerned that there was no evidence regarding notice. The IHA had the opportunity at that point to provide the necessary

information to satisfy the Rental Officer that notice had been provided according to the requirements of the *Act*.

[48] Presumably, if the Rental Officer had received information that was relevant and satisfied his concerns, he would have gone on to allow Mr. Alunik an opportunity to explain or refute that evidence, as required by the *Act*.

[49] Ultimately, the onus was on the IHA to satisfy the Rental Officer that proper notice had been provided. In the absence of evidence to establish a fact or where the evidence is evenly balanced, the onus is on the proponent of that fact to prove it: *Alberta Provincial Judges' Association* v. *Alberta,* 1999 ABCA 229 at para. 102. Furthermore having raised the issue with the IHA and having given the IHA an opportunity to supply additional information, it was not the obligation of the Rental Officer to continue to inquire about the issue.

[50] In the circumstances, I cannot conclude that the Rental Officer's conduct of the hearing and inquiries following the hearing were procedurally unfair. On the contrary, by inquiring with Ms. Tingmiak about notice following the hearing, the Rental Officer specifically raised the issue and permitted the IHA another opportunity to present evidence which, in my view, accords with procedural fairness.

[51] Therefore, for the reasons stated, the appeal is dismissed.

S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
13th day of May 2014

Counsel for the Appellant: Anne F. Walker
The Respondent was self-represented.

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