IN THE SUPREME COURT OF BRITISH COLUMBIA

Re: Judicial Review Procedure Act, Residential Tenancy Act

Citation: ***Ross v. British Columbia (Residential Tenancy Act, Dispute Resolution Officer)***, 2008 BCSC 1862

Date: 20080212
Docket: S078505
Registry: Vancouver

Between:

June Ross, Tenant

Petitioner

And:

Mrs. Simpson and Karen Knott in their capacity as Dispute Resolution Officers under the Residential Tenancy Act and Colene Gudeit, Landlord

Respondents

Before: The Honourable Mr. Justice Groves

Oral Reasons for Judgment

In Chambers
February 12, 2008

Counsel for the Petitioner:	J. Hadley
Counsel for the Respondents:	No one appearing
Place of Trial/Hearing:	Vancouver, B.C.

[1] **THE COURT:** This is my decision on the matter of June Ross, who is the petitioner, and Mrs. Simpson and Karen Knott in their capacity as dispute resolution officers under the ***Residential Tenancy Act*** and Colene Gudeit as respondents.

[2] The application before the court is for an order setting aside the decision issued on the 24th of September, 2004, by dispute resolution officer Karen Knott which granted the landlord Colene Gudeit's application in part and declined to hear the petitioner's application in its entirety.

[3] The judicial review also seeks to set aside the review decision issued on the 18th of October, 2007, by someone by the name of Mrs. Simpson -- I will make further comment on that later – that denied the petitioner's application for review of the original decision. The judicial review petition also seeks an order remitting the matter back to a new dispute resolution officer to rehear the matter with directions.

[4] Without getting into a detailed analysis of the facts, it appears that the petitioner, Ms. Ross, and the respondent Ms. Gudeit embarked upon what can only be described, I think fairly, as a failed landlord/tenant relationship, in that the petitioner intended to rent some premises from the respondent but some problems arose. Problems arose such that both the petitioner, Ms. Ross, and the landlord respondent, Ms. Gudeit, both filed proceedings pursuant to the ***Residential Tenancy Act*** for a residential tenancy officer, someone referred to as a "dispute resolution officer," to adjudicate their dispute as the ***Residential Tenancy Act*** provides.

[5] There are two decisions before the court. The decision of Karen Knott is the decision of the 24th of September, 2004. In that decision Ms. Knott notes that no one has appeared for the tenant, June Ross. Ms. Knott says:

> The landlord appeared and made submissions. The tenant never appeared. The tenant's application is therefore dismissed.

[6] The factual circumstances about the tenant's lack of attendance appear to be as follows. Perhaps due to volume, perhaps due to administrative convenience, perhaps due to the convenience of people, it is not uncommon for the ***Residential Tenancy Act*** reviewing officers to conduct their hearings over the telephone. The ***Residential Tenancy Act*** provides for a number of means by which dispute resolution proceedings can take place. Section 74(2) of the Act says:

> The director may hold a hearing
>
> (a) in person,
>
> (b) in writing
>
> (c) by telephone, video conference or other electronic means, or
>
> (d) by any combination of the methods under paragraphs (a) to (c).

[7] As appears to be the practice of the dispute resolution officers, a notice was sent to Ms. Ross enabling her to attend by telephone. The notice set out a Telus telephone number to call and gave instructions, as one would expect when one is a participant in a telephone conference. The instructions provided pass codes and general instructions as to how to access the telephone line for the purposes of being in attendance for the purposes of the hearing.

[8] The evidence before me which is the evidence of Ms. Ross as well as the evidence of someone who was assisting her, named Dan Irvine, he being a realtor in Vernon who has in the past assisted both landlords and tenants involved in ***Residential Tenancy Act*** disputes as an advocate. Both Ms. Ross and Mr. Irvine have indicated, in submissions to the review panel and in submissions to this court, that they followed the instructions in detail set out by the residential tenancy office for access to their conference call line; that they experienced what was anticipated, which was being placed on hold for a period of time with music playing in the background. Unfortunately having accessed this conference just before 9 o'clock as indicated, by 9:30 or thereabouts, with music still playing in the background, they, through separate phone lines, contacted the residential tenancy office. It appears that they were told by someone there to be patient, suggesting that they would be gotten to eventually. They stayed on the line. Though Mr. Irvine had to leave towards 10 o'clock, Ms. Ross, the evidence suggests, stayed on the line till well after 10 o'clock on the morning in question, the conference being scheduled to begin at 9:00 and the instructions suggesting that one get on a telephone line prior to 9:00. Ms. Ross also deposes that at about 10:13, I believe the time she says, the telephone line simply went dead.

[9] Thus, Ms. Knott either did not access the telephone line correctly from her end, or there was some problem with the telephone line such that, the petitioner could not access the hearing.

[10] As a result of the failed telephone conference, and a dismissal of her application, the petitioner followed the options which are open to her, which are to

request a review of the decision. In the request for review, the petitioner indicating the circumstances, in her submissions to the reviewing officer, of what happened on that date, including setting out in some detail the evidence that she had in support of what happened on that date.

[11] I want to make some general comments about the review officer's decision. The way in which the decision is written in three ways suggests a complete lack of attention to detail by the person who wrote the review decision.

[12] The first lack of attention to detail is the fact that, though a minor point, the initial decision makes reference to two files which were before the initial reviewing officer, Karen Knott. The review decision, purportedly to be a review of both files, only makes reference to one.

[13] A second point. The reviewing officer is simply known as Mrs. Simpson. In any adjudicative function in a free and democratic society persons who are being adjudicated should be able to identify the person who is doing the adjudication. Adjudicators should identify themselves with names or titles, but they should identify themselves as real people. A name is a very relevant part of any court or adjudicated process. There seems to be no reason or rationale, and it is simply not acceptable, in a free and democratic society that an adjudicator who is imposing in this case a monetary penalty on an individual can simply remain an anonymous individual by referring to themselves as Mrs. Simpson. I would hazard to guess that there are tens of thousands of Mrs. Simpsons in British Columbia. This though is again a minor point.

[14] The third error is that this adjudicator, this Mrs. Simpson, did not in her reasons identify the parties properly, taking the view that Ms. Ross was a landlord as opposed to a tenant and Ms. Gudeit was a tenant as opposed to a landlord. Additionally, somewhere along the line, in Mrs. Simpson's view, the person who sent a letter in support of Ms. Ross's position and who assisted her, Dave Irvine, became a party to the proceedings. He is noted as a party, as a landlord. Again, this is a minor point.

[15] These three errors in style or errors in adjudicative writing could lead one to conclude that there was a complete lack of attention to detail in this Mrs. Simpson, adjudicating this review decision in the manner in which she did.

[16] In terms of the adjudication by Mrs. Simpson, the substantive point argued by counsel for the petitioner relates to a person's inability to attend. The ***Residential Tenancy Act*** sets some direction in s. 79(2) which reads as follows:

> A decision or an order of the director may be reviewed on only one or more of the following grounds:
>
> (a) a party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control

[17] Here again the facts as presented to Mrs. Simpson, the reviewing officer, are that the petitioner indicated and provided evidence through herself and Mr. Irvine of following the instructions set out by the residential tenancy office to enable her to attend at the hearing. She clearly got through, at least partially, to the telephone number because, as indicated, she was told in the instructions to expect that there would be a period of time when music was playing as she sat on hold on the

telephone line. That in fact happened. She was however never connected. This was evidence which was clearly provided to the reviewing officer, Mrs. Simpson. Mrs. Simpson opines in regards to the inability to attend the following:

> An arbitration hearing is a formal legal process and parties should take reasonable steps to ensure that they will be in attendance at the hearing. This ground is not intended to permit a matter to be reopened if a party, through the exercise of reasonable planning, could have attended. With respect to hearings to be held by conference call, parties must ensure they follow instructions and call at the specified time and ensuring to be in a location to be able to call at the specified time.

In that regard Ms. Simpson has clearly and effectively set out what the test is for a review on the basis of being unable to attend. As for findings in that regard, Ms. Simpson says the following:

> The landlord appeared via conference call at the date and the time set for the conference call hearing of this matter and the tenant did not appear. The tenant now applies to review, stating that she was unable to attend because she attempted to follow the conference call instructions and was not successful in entering the conference. I have no evidence to support a finding that there were any difficulties with the conference call system that would have prevented the tenant from accessing the hearing. I therefore dismiss the tenant's application as it does not disclose sufficient evidence of a ground for review.

[18] On this point, Mrs. Simpson is clearly wrong. Clearly there was evidence before her to support a finding that the tenant could not access the conference call system. It was the only evidence that was possible for the tenant to garner, which was her word as to an inability to access and the word of those who were present with her when she attempted to access it.

[19] It is impossible to imagine how the petitioner herein, June Ross, or someone in her position could get additional information about the problem with the

conference call system. It is not her telephone conference line. She does not have a contractual relationship with the telephone conference provider, Telus. In fact, that is something that is in the hands of the residential tenancy offices.

[20] In my view characterizing the evidence provided as any “no evidence” is a fundamental failure in Ms. Simpson’s review. It may in some circumstances be proper for a reviewing officer to acknowledge evidence and set out reasons why they do not accept that evidence, but it is improper in my view and a fundamental error to say that there is no evidence to support a finding when in fact the evidence clearly exists.

[21] Another concern with the decision of dispute resolution officer Mrs. Simpson is found on page 5 of her reasons. This relates to the reflections or the analysis that all persons making adjudicative decisions should follow in terms of their reasoning. The analysis in this case constitutes one paragraph. This paragraph does nothing more than repeat the criteria set out in the legislation for the review.

[22] Dealing with the adequacy of reasons, it is not in my view sufficient for an adjudicating officer to simply set out the criteria on which they are to base their decision and then make their decision without going through any analysis. Reasons require any adjudicating officer to set out a test that has to be met. It requires an adjudicating officer to find some facts, to then apply the facts against the test that has to be met, weigh it and come to some conclusion. This is another complete failure, in my view, of the decisions of Mrs. Simpson as dispute resolution officer. Ms. Simpson simply set out the test for analysis and did not go through the second,

third or fourth stage of finding facts, applying facts to the test and making a conclusion.

[23] Courts have limited jurisdiction when it comes to reviewing the decisions of the residential tenancy officer or reviewing officer. Courts are able to set aside a decision if it is patently unreasonable or if it fails to abide by the rules of natural justice and procedural fairness. Without dealing with the patently unreasonable test, I have concluded that the two decisions of the reviewing officer, Mrs. Simpson, and the original adjudicating officer, Karen Knott, both failed to meet the test of a basic level of procedural fairness and a basic level of natural justice.

[24] Incumbent upon any tribunal hearing any matter is an opportunity for a party reasonably affected by their decision or a party to the litigation before them being given an opportunity to be heard. Here both these officers breached the rules of natural justice by failing to consider the submissions of the applicant herein. The original officer perhaps did so out of inadvertence, believing that the applicant was not planning on attending and clearly making no inquiries as to whether or not she was present on the conference call at the time that she was, for lack of a better term, on hold. But more importantly, the reviewing officer, Mrs. Simpson, simply did not, in my view, provide an opportunity for Ms. Ross to be heard. Ms. Simpson ignored the only evidence she had before her, which was evidence that the petitioner intended to be present but due to a telephone line difficulty, could not be. There was in my view a breach of natural justice and a level of procedural unfairness which requires the court to set aside the decisions as noted.

[25] Consistent with the request in the petition, the dispute resolution officer Karen Knotts' original decision, dated the 24th of September, 2007, and the decision of the review officer, Mrs. Simpson, dated the 18th of October, 2007, are set aside, and there is an order remitting the dispute and subject matter of the original decision to a new dispute resolution officer for rehearing.

[26] I am going to suggest as well that the residential tenancy office consider amending its policy in regards to telephone conference. This amendment should provide for a separate line for those who experienced conference call problems. It should be a separate dedicated line at the appropriate office to allow a person who hopes to attend by telephone conference to call and speak to someone in the event there are problems with the technology. It is certainly not the first time in my experience that this type of problem has arisen while hearings were attempted to be conducted through telephone conference call. It is not a perfect system, and it is a system which has all sorts of inherent difficulties, both due to the level of sophistication that is required to access it but also due to the difficulties in telephone technology generally.

[27] It is not in my power to order so, but it is my strong suggestion to the residential tenancy office that they consider amending their instructions so that they add a separate dedicated number to allow persons who are experiencing problems with accessing the technology to call to speak to a real person who can then inform the adjudicating officer of the difficulties.

“The Honourable Mr. Justice Groves”