

SUPREME COURT OF NOVA SCOTIA
Citation: *Bastarache v. Hoque*, 2023 NSSC 300

Date: 20230922
Docket: 522715
Registry: Halifax

Between:

Jessica Bastarache

Appellant

v.

Nina Hoque

Respondent

Small Claims Court Appeal Decision

Judge: The Honourable Justice Christa M. Brothers
Heard: July 27, 2023, in Halifax, Nova Scotia
Decision: September 22, 2023
Counsel: Nadia Shivji and Ashley Aird (Senior Law Student), for the Appellant
Calvin DeWolfe, for the Respondent

By the Court:

[1] This is an appeal from a decision of an adjudicator of the Small Claims Court rendered on March 6, 2023. The grounds of appeal are set forth in the Amended Notice of Appeal as follows:

- (i) The adjudicator reached a conclusion ordering vacant possession in which there is no evidence or legal basis to support such finding;
- (ii) The adjudicator ordered vacant possession on the basis of an alleged pattern of behaviour and communication, neither of which were plead [*sic*], and the tenant did not have the opportunity to respond to same.

[2] The landlord, Nina Hoque ("Hoque"), rents an apartment to Jessica Bastarache ("Bastarache"). On September 23, 2022, Hoque filed an application with the Director of Residential Tenancies seeking a termination of Bastarache's and vacant possession of the unit. Hoque complained about the following:

1. High mould count at the property, which she maintained was confirmed by a property inspector and attributed to the tenant's lifestyle;
2. The state in which the tenant was maintaining the property. The recommendations of the property inspector were that a decluttering and deep cleaning was necessary;
3. The tenant had two or three large fish tanks and a cat which were not approved pets under the lease. The fish tanks were contributing to the humidity in the apartment;
4. The tenant had a dog which Hoque alleged was aggressive;
5. The tenant was not maintaining the lawn, as required under the lease;
6. The tenant had an unapproved roommate; and,
7. The tenant had installed laundry equipment which was not provided for in the lease.

[3] The matter was heard by the Director of Residential Tenancies and a decision was rendered on November 21, 2022. The landlord was neither present nor represented at that hearing. The following was ordered:

- The tenant's Notice to Quit was set aside;

- The landlord, Nina Hoque, must comply with the *Residential Tenancies Act*, Regulations and Lease Agreement, and must make any and all necessary repairs in accordance with Notices of Violation issued against them;
- The landlord, Nina Hoque, must pay to the tenant, Jessica Bastarache, the amount of \$1,306 as rate abatement.

[4] Hoque appealed the order to the Small Claims Court. She stated in the Notice of Appeal that she had tried to call in to the hearing from England to give her evidence, but she had not been able to get through.

[5] The appeal was heard by way of telephone conference before Adjudicator Greenwood on February 22, 2023. Both parties were present for the telephone conference hearing. Hoque was self-represented and Bastarache was represented by counsel.

[6] Adjudicator Greenwood released a thorough, 41-paragraph decision on March 6, 2023. The adjudicator made many findings of fact and reviewed the evidence and her conclusions in detail. The following was the adjudicator's ultimate conclusion:

40 The Tenant is ordered to provide vacant possession of the premises on or before 11:59 p.m. on April 30, 2023. The Tenant's obligations under the lease remain unaffected in the interim.

41 The Tenant is entitled to a rent abatement with pre-judgment interest for the months of June through November in the amount of \$1,000.74. Of that amount, \$850 shall be applied to April rent and the Landlord shall pay to the Tenant \$150.74.

[7] The adjudicator reviewed the history of interactions between Hoque and Bastarache. Hoque's first email to Bastarache about her failure to meet her obligations is dated May 15, 2022. Bastarache first emailed Hoque about maintenance issues at the property on June 2, 2022. The adjudicator did not find that the actions of either were retaliatory. She found that both parties were seeking to enforce their rights pursuant to the lease and the *Residential Tenancies Act*.

[8] Before the Small Claims Court, Hoque maintained her position that Bastarache had breached the lease and the landlord rules by having unpermitted pets and an unauthorized roommate, and by not performing her obligations with respect to lawn care. In addition, Hoque alleged that Bastarache breached the requirements

of statutory conditions three and four with respect to good behaviour and ordinary cleanliness.

[9] Specific incidents of alleged bad behaviour raised by Hoque included unauthorized laundry equipment and storing personal belongings in the furnace room; disparaging Hoque on social media; failing to notify Hoque of maintenance issues in a timely manner; and/or failing to reasonably cooperate with the Hoque's efforts to remediate maintenance issues. Hoque also maintained that she was diligent in addressing maintenance issues once notified, but that Bastarache's conduct contributed to both the creation of the issues and delays in remediation.

[10] Bastarache denied breaching the lease or statutory conditions and sought additional rent abatement of 25% for two months following the original hearing, to compensate her for ongoing maintenance problems. Bastarache claimed that Hoque was aware of her pets and tacitly approved of their presence on the property. Bastarache acknowledged that the apartment was untidy but argued that it was not unfit for habitation. Bastarache argued that she responded in a timely fashion to Hoque's complaints about the furnace room and that her posts on social media did not constitute a breach of statutory condition three.

[11] Adjudicator Greenwood made findings about the unkempt conditions of the property and Bastarache's failure to fulfill her obligations and mitigate any issues with respect to pest control. The adjudicator stated at paragraph 16:

... video evidence led by the Landlord shows cluttered and unkept [*sic*] conditions which would contribute to the issue and I have no reason to conclude that the yard was kept in any better condition than the apartment. The Tenant did not give extensive or comprehensive testimonial evidence in the hearing and did not specifically dispute the Landlord's allegations with respect to lawn care.

[12] Adjudicator Greenwood made findings concerning excess moisture, mould, and resulting damages. While the adjudicator found that Hoque was slow to comply with directions to conduct air quality tests and to perform remediation as required, she also found that Bastarache contributed to the issues and failed to undertake mitigation or remediation efforts consistent with her own obligations.

[13] Adjudicator Greenwood found that there was no evidence to support Bastarache's claim that Hoque was aware of unpermitted pets. Neither cats nor fish were mentioned on the pet application. In June 2019, Hoque inquired about pets and was only told about two dogs. The adjudicator further found:

26 The Tenant acknowledged that she had a cat and fish tanks throughout the tenancy, but the cat had recently died and she has removed the two smaller fish tanks. The Tenant also testified that she did not think it was necessary to seek permission for fish.

[14] Adjudicator Greenwood found that Bastarache failed to engage the pet application process to have her cats and fish approved. The video evidence demonstrated multiple tanks, one of which lined almost an entire wall. Bastarache had previously suggested that it held 100 gallons of water. Even after the moisture issues arose, Bastarache continued to keep the large fish tank. Adjudicator Greenwood stated:

27 ... based on these factors, I found that the Tenant breached the lease by failing to submit pet applications for her cat and large fish tank and keeping these unpermitted pets in the unit over an extended period of time.

[15] Adjudicator Greenwood was also satisfied that Bastarache had breached the lease by having an unauthorized roommate. The adjudicator stated:

28 The Landlord submitted as evidence images of social media posts of the Tenant in which she refers to having a roommate. The evidence is not clear with respect to the period of time it occurred. On cross-examination, the Tenant denied having a roommate but did not explain the social media posts in her own testimony. Failing to seek the Landlord's permission to have a roommate is consistent with the Tenant's overall pattern of re-writing the rules of the lease without consulting the Landlord. Accordingly, on the balance of probabilities, I've concluded that she did have an unauthorized roommate in breach of the lease.

[16] Adjudicator Greenwood went on to review Hoque's evidence that she learned that the lawn was not being maintained in May 2022 and reminded Bastarache that it was her obligation under the lease. The adjudicator found that Bastarache's response was that the lawn would have to wait until she was not busy. The adjudicator found that this was a breach of her lawn care obligations.

[17] Adjudicator Greenwood found, based on video and photographic evidence, that Bastarache kept her apartment in a messy, cluttered state that fell below the standard of "ordinary cleanliness required pursuant to statutory condition number four." However, the adjudicator did not find that the apartment was unfit for habitation and, therefore, did not find that the breach of this condition alone was enough to justify eviction.

[18] Adjudicator Greenwood went on to review the state of the furnace room, the social media posts, and Bastarache's cooperation (or lack thereof) with remediation of maintenance issues under the auspices of statutory condition three and good behaviour. The adjudicator did not find any breach of the statutory conditions with regards to Bastarache's use of the furnace room or her social media posts. However, Adjudicator Greenwood did find fault with Bastarache's actions with regard to her lack of cooperation with remediation of maintenance issues:

34 While the Tenant is still entitled for some abatement of rent due to the Landlord's breach of statutory condition number one, the Tenant's conduct demonstrates a disregard for her own obligations and how they relate to the rodents, moisture and mold. In addition to failing to maintain ordinary cleanliness, maintaining the lawn and showering with the windows shut, both before and after the moisture issues were identified by the HRM inspector and air quality tests, the Tenant also failed to accommodate a complete carpet cleaning or deep cleaning of the unit. The Tenant continued to maintain a very large fish tank in the basement in breach of the lease which contributes to excess moisture in a small basement apartment and interferes with the effectiveness of a dehumidifier. It is both obvious and easily ascertainable through minimal research that maintaining a 100-gallon fish tank in a small basement apartment creates excess humidity and moisture.

35 The evidence shows a pattern of conduct in the Tenant's actions and dealings with the Landlord that demonstrates a disregard for obligations, the Landlord's rights and the fact that reasonable cooperation is necessary to enable the Landlord to meet its maintenance obligations. In addition to what has been previously discussed, further indication of this attitude and pattern of conduct is how the Tenant responded when the Landlord was attempting to address the upstairs toilet leak. Rather than reasonably recognizing the urgency of the situation and the necessity of professional assessment in response to the leak, she argued and took the position of the Landlord was unreasonable for wanting access to her unit while she was working.

[19] Adjudicator Greenwood found that both Bastarache and Hoque failed to meet their obligations. Adjudicator Greenwood determined that Bastarache was entitled to rent abatement as a result of the incremental manner in which the maintenance issues were addressed.

[20] Adjudicator Greenwood also found that Hoque was entitled to vacant possession. In so finding, the adjudicator stated at paragraph 38:

No one action of the Tenant is sufficient to justify eviction, however, taken together, they do. I would have been inclined to simply make an order pursuant to section 17A(a) and (b) of the Act to ensure compliance if there were just a few

isolated breaches. However, the pattern of breaches and communications between the Tenant and Landlord indicate that the Tenant feels entitled to set her own rules. Some of her actions or omissions also work against the Landlord's efforts to address moisture or humidity issues and are likely to continue to damage the Landlord's property over time. I do not believe the Landlord will be able to remediate the moisture and mold issues fully while the Tenant remains present in the unit.

[21] Bastarache was ordered to provide vacant possession on or before 11:59 on April 30, 2023. The adjudicator also ordered rent abatement in the amount of \$1,000.74.

[22] On appeal to this court, Bastarache relied on the second ground of appeal – that the adjudicator had breached the requirements of natural justice by failing to give the parties an opportunity to respond to an interpretation of the evidence that was not argued by either party. The first ground of appeal was abandoned during the hearing. If it had not been, I would have dismissed it, as there was clearly no overriding or palpable error of fact committed by the adjudicator.

[23] With respect to the second group of appeal, Bastarache submits that no pattern of breaches or pattern of conduct was pleaded by Hoque as grounds for her eviction, nor was it argued at the hearing before the adjudicator. It follows, Bastarache says, that she did not have an opportunity to respond to this finding by the adjudicator.

Law and Analysis

[24] Section 17C of the *Residential Tenancies Act* provides that an appeal to the Small Claims Court is available to any party from an order of the Director. Section 17C states:

17C (1) Except as otherwise provided in this Act, any party to an order of the Director may appeal to the Small Claims Court.

(2) An appeal may be commenced by filing with the Small Claims Court, within ten days of the making of this order, a notice of appeal in the form prescribed by regulations made pursuant to the *Small Claims Court Act* accompanied by the fee prescribed by regulations made pursuant to the *Small Claims Court Act*.

(3) The appellant shall serve each party to the order and the Director with the notice of appeal and the notice of hearing.

(3A) Service of all documents may be personal service or such other manner of service or substituted service permitted pursuant to the *Small Claims Court Act*.

(4) The Small Claims Court shall conduct the hearing in respect of a matter for which a notice of appeal is filed.

(5) The Small Claims Court shall determine its own practice and procedure but shall give full opportunity for the parties to present evidence and make submissions.

(6) The Small Claims Court may conduct a hearing orally, including by telephone.

(7) Evidence may be given before the Small Claims Court in any manner that the Small Claims Court considers appropriate and the Small Claims Court is not bound by rules of law respecting evidence applicable to judicial proceedings.

(8) The evidence at a hearing shall not be recorded.

[25] The Small Claims Court's powers on appeal are found at section 17D:

17D (1) Within fourteen days of holding a hearing pursuant to subsection 17C(4), the Small Claims Court shall

- (a) confirm, vary or rescind the order of the Director; or
- (b) make any order that the Director could have made.

(2) The Small Claims Court may award to a successful party to an appeal the cost of the fee paid pursuant to subsection 17C(2) and any costs awarded to that party pursuant to clause 17A(k) but no other costs associated with the appeal.

[26] Section 32 of the *Small Claims Court Act*, R.S.N.S. 1989, C. 430, sets out the available grounds of appeal from an order or determination of an adjudicator. It states, in part:

32 A party to proceedings before the court may appeal to the Supreme Court from an order or determination of an adjudicator on the ground of:

- (a) jurisdictional error;
- (b) error of law;
- (c) failure to follow the requirements of natural justice,

by filing with the prothonotary of the Supreme Court a Notice of Appeal.

[27] Bastarache alleges that she was not given the opportunity to respond to the notion that she had exhibited a "pattern of conduct" justifying eviction, as found by the adjudicator. In other words, Bastarache says there was a failure by the adjudicator to follow the requirements of natural justice.

[28] There is no dispute that the standard of review where a ground of appeal raises an error of law is correctness. The ground of appeal which alleges a failure to follow the requirements of natural justice does not engage the traditional standard review analysis. Instead, the court's role is to determine if the process was fair to the appellant (*Sackville Trenching Ltd. v. Nova Scotia (Occupational Health and Safety Appeal Panel)*, 2012 NSCA 39).

[29] So what is meant by "fairness"? In the text Sara Blake, *Administrative Law in Canada*, 4th ed (Markum, Ont: Lexis Nexis Butterworths, 2006) at page 36, the author explains the duty of procedural fairness as follows:

Fairness requires that a party who will be affected by a decision must first be informed of the case to be met. Without knowledge of the matters in issue one cannot effectively exercise one's right to be heard. Disclosure enables a party to review the alleged facts, to prepare to challenge them with evidence that rebuts them or reduces their impact and to prepare submissions explaining how they should be weighed and analyzed.

[30] In *Waterman v. Waterman*, 2014 NSCA 110, the majority of the Nova Scotia Court of Appeal wrote:

[63] Natural justice has two important and distinct rules: an adjudicator must be impartial, and the parties must have adequate notice, and an opportunity to be heard. These rules have been historically described by the courts using Latin phrases. Gonthier J., in *Consolidated-Bathurst Packaging Ltd v. International Woodworkers of America, Local 2-69*, [1990] 1 S.C.R. 282, described the rules as follows:

[66] ...It has often been said that these rules can be separated in two categories, namely "that an adjudicator be disinterested and unbiased (*nemo iudex in causa sua*) and that the parties be given adequate notice and opportunity to be heard (*audi alteram partem*)

[31] The questions, then, are whether there was an impartial adjudicator and whether the parties were given adequate notice and opportunity to be heard. There is no allegation that Adjudicator Greenwood was anything but impartial.

Bastarache's focus is on the argument that she was not given adequate notice and opportunity to be heard on the issues.

[32] The case against Bastarache at the Small Claims Court level was apparent. All the issues were raised, both in materials provided before the hearing and during the hearing in evidence. There was no surprise to Bastarache that Hoque would argue, and did argue, that she had failed to keep the premises in a proper fashion; that she had failed to perform lawn care; that she had allegedly posted inappropriate social media posts; that she had unauthorized pets and an unauthorized roommate; and that she was not cooperating to help remediate the pests and mould. Absolutely none of that should have been a surprise to Bastarache.

[33] Bastarache had notice of the hearing and had opportunities to participate and to respond to Hoque's evidence and submissions.

[34] I am not persuaded that any denial of natural justice occurred in this case. It is not a novel result that an adjudicator would take into account a number of a tenant's actions to conclude that there are sufficient grounds for eviction. This is neither unique, nor novel, nor an unexpected result. Other decisions from the Small Claims Court have found that a pattern of behaviour can justify eviction. In *Brown v. Cornerstone Developments Ltd.*, 2018 NSSM 37, the adjudicator concluded at paragraph 35:

No one action is sufficient to warrant an eviction. However, I find, when considered together, the actions of the Tenant provide sufficient grounds of a breach of Statutory Condition 3 to justify an eviction. Had it only been one or two issues, I would have been prepared to make an order pursuant to section 17A(a) and (b) to ensure compliance with the *Residential Tenancies Act*.

[35] Nowhere in the *Residential Tenancies Act* is there any basis for an assumption that each potential breach by a tenant is to be considered in isolation from every other breach. This would be a perverse result.

[36] At the appeal hearing, counsel for Bastarache conceded that there was no challenge to the adjudicator's findings of fact. It must not be forgotten that the only person who knew ahead of that hearing whether or not she had, in fact, been in breach of the conditions of her lease or any statutory conditions was Bastarache herself. She knew that Hoque was seeking to evict her because of the variety of issues raised prior to the hearing. She knew that the hearing before the adjudicator was her opportunity to provide evidence, if it existed, that she had not breached the

lease or violated the statutory conditions as alleged by Hoque. Bastarache was the only one in possession of the evidence necessary to refute any of the allegations.

[37] The argument advanced by Bastarache is that she had no notice that if she was found to have committed multiple breaches, that those breaches could be considered as demonstrating a pattern of conduct justifying eviction. However, this fails to acknowledge that Hoque was relying on a number of violations and breaches of the lease for eviction. A tenant does not need an adjudicator to specifically advise them ahead of time that if the tenant is found to have committed multiple breaches, a finding could be made that the tenant is trying to set their own rules. It is obvious that such a finding would be available to the adjudicator.

[38] Even if I was satisfied that Bastarache was entitled to notice that any breaches could be considered cumulatively to justify eviction, which I am not, there is no evidence before me that such notice would have changed the result.

[39] In *Spencer v. Bennett*, 2009 NSSC 368, the respondent sued the appellant in Small Claims Court to recover \$1,000 which she alleged that she had loaned to the appellant. At the end of the hearing, the adjudicator said she would grant judgment if the respondent produced her credit card statement confirming a cash advance in August 2008 in the amount of \$1,000. The respondent produced the statement after the hearing, and the adjudicator issued the order. The appellant appealed, alleging, *inter alia*, a breach of natural justice on the basis that he had no opportunity to cross-examine on or make submissions about the credit card statement. Justice Bryson, as he then was, found that there was no breach of natural justice by the adjudicator. The court went on, however, to conclude in the alternative that even if the appellant was denied natural justice, the lack of opportunity to cross-examine had no effect on the outcome, and therefore there was no miscarriage of justice. The same is true here.

[40] One of the issues that unnecessarily complicated this appeal was the fact that no appeal book was filed by Bastarache. Furthermore, there was no application for fresh evidence nor was any adduced to indicate what evidence the appellant would have provided to the adjudicator if she had been given notice as argued. Here, I have no evidence that there would have been an effect on the outcome had Bastarache been advised by the adjudicator that she was considering whether the breaches reflected a pattern of conduct. Indeed, it is hard to imagine what additional evidence she could have led, beyond the evidence offered in defence of the breach allegations themselves.

[41] The authority relied on by Bastarache in this case, *R. v. Whincup*, 2011 BCCA 520, is distinguishable. That case, unlike this one, involved a misapprehension of fact.

[42] In determining this appeal, the efficient and inexpensive Small Claims Court process must be considered. I refer to *Whalen v. Towle*, 2003 NSSC 259, as follows:

7 Furthermore, there is no record of the proceedings in Small Claims Court. As well, the appeal process is limited in that this Court, the Supreme Court of Nova Scotia, is the forum of last resort. In other words, in order to provide an efficient and inexpensive process, certain judicial safeguards are sacrificed. This is to ensure that matters involving small claims can be processed efficiently and fairly.

8 Therefore, the Small Claims Court regime represents a less than perfect regime, but it is a fundamentally fair one. Whether in the criminal vein or the civil vein, in Canada's justice system, we strive for justice that is fundamentally fair and we acknowledge that perfect justice is often unobtainable. This was succinctly pointed out, albeit, in the criminal context by Chief Justice McLachlin in the Supreme Court of Canada decision of *R. v. O'Connor*, [1995] S.C.J. No. 98. At paragraph 193 she states:

What constitutes a fair trial takes into account not only the perspective of the accused but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chemicr as perfection in any other social agency. What the law demands is not perfect justice but fundamentally fair justice.

[Emphasis added]

[43] Furthermore, the adjudicator's findings are amply supported, as demonstrated in her reasons. Findings of facts were made and they are not appealable under section 17E(2) of the *Residential Tenancies Act* or section 32(1) of the *Small Claims Court Act*.

Conclusion

[44] Bastarache had notice of all of the allegations of breaches of the lease and statutory conditions. She had an opportunity at the hearing to address each and every one of those allegations. As a result of the evidence, the adjudicator found that Bastarache feels entitled to set her own rules. This is a finding of fact that was open to the adjudicator, based on the evidence before her, and I do not have the authority

to interfere with it. It seems disingenuous for Bastarache to argue that she was not on notice that the whole of her conduct was being considered. Bastarache was given ample notice of the arguments Hoque was presenting and was given ample opportunity to provide evidence, both documentary and *viva voce*, to address those allegations.

[45] Bastarache argued that if she had been given notice that her conduct was being considered cumulatively and as a pattern, she would have conducted the hearing differently and provided different evidence. However, no application for fresh evidence was made on appeal to provide any indication of what that additional evidence would have been. Fairness requires that a party is informed of the case to be met. Ms. Bastarache certainly was given that opportunity.

[46] For the reasons articulated, the decision of the Small Claims Court adjudicator is upheld. The Court will provide Bastarache eight (8) weeks to vacate the premises. There will be no costs awarded to either party.

Brothers, J.