

KING'S BENCH FOR SASKATCHEWAN

Citation: 2024 SKKB 49

Date: 2024 03 22
File No.: KBG-RG-00478-2024
Judicial Centre: Regina

IN THE MATTER OF S. 72(1) OF *THE RESIDENTIAL TENANCIES ACT*,
2006, SS 2006, c R-22.0001

BETWEEN:

JAY HUSK

PLAINTIFF

- and -

LORI KUFFNER

DEFENDANT

- and -

DIRECTOR OF THE OFFICE OF RESIDENTIAL
TENANCIES

RESPONDENT

Counsel:

Jay Husk
Sharon Williams
No one appearing

self-represented plaintiff
agent for the defendant
for the Office of the Residential Tenancies

JUDGMENT
March 22, 2024

BERGBUSCH J.

Introduction

[1] The applicant, Jay Husk, appeals from the decision of a hearing officer of the Office of Residential Tenancies [ORT]. In the decision, the hearing officer declined to grant the landlord a writ of possession and ordered the tenant to pay the landlord

\$3,600, which the hearing officer calculated to be the amount owing on account of rent arrears: *Kuffner v Husk*, 2024 SKORT 303 [*Decision*]. Mr. Husk takes issue with the hearing officer's determination of the amount he owes.

[2] For the reasons which follow, I conclude that the hearing officer disregarded or mischaracterized relevant evidence, which amounted to an error of law. To remedy this error, the *Decision* regarding the rent arrears owed by the tenant is amended.

Background

[3] Lori Kuffner purchased the rental property, a house located at 1242 Retallack Street, Regina, Saskatchewan [Property], in April 2021. Mr. Husk was already residing in the Property. He has continued to rent the house ever since.

[4] Mr. Husk paid \$1,000 per month until July 1, 2021, when Ms. Kuffner reduced the monthly rent to \$800. However, Mr. Husk preferred to continue to pay \$1,000 per month except in July and January when he paid nothing. This arrangement was confirmed in a letter from Ms. Kuffner to Mr. Husk dated July 27, 2021, and a letter addressed "To Whom This May Concern" dated January 4, 2024, signed by Ms. Kuffner, both of which were filed before the hearing officer.

[5] Mr. Husk filed in evidence every cheque for rent from August 1, 2012, to September 5, 2023. Mr. Husk provided cheques to the landlord for January and July in 2022 and 2023, but those were marked void consistent with the agreement that he did not make a payment in those months. He also filed a receipt from Shawn's Property Management Ltd., the former property manager of the Property, confirming receipt of 18 cheques for February 2022 to July 2023. Mr. Husk filed a second receipt from Shawn's Property Management Ltd., which acknowledged receipt of two cheques from Mr. Husk for \$1,000 for the months of August and September 2023.

[6] Mr. Husk did not make any rent payments after September 1, 2023.

[7] On October 13, 2023, Mr. Husk received a letter from Shawn's Property Management Ltd. advising that they had terminated their management of the Property.

[8] In November 2023, Sharon Williams posted a notice advising that she was the new property manager and instructing Mr. Husk to leave the rent cheque in his mailbox for pickup.

[9] The landlord served an immediate notice to vacate and notice of arrears [Notice] on November 22, 2023. The Notice alleged arrears of \$1,200 that were more than 15 days old.

[10] The ORT hearing began by teleconference on January 31, 2024, with Mr. Husk appearing on his own behalf and Ms. Williams appearing as agent for Ms. Kuffner. Because of a poor connection, the teleconference was adjourned to the following day. Mr. Husk requested a lengthier adjournment so that he could prepare, but the hearing officer denied his request.

[11] At the hearing Mr. Husk gave several reasons for not paying the rent:

- (a) He wanted an answer from the landlord regarding an offer to purchase the Property.
- (b) He was upset about an attempt made by the landlord to access the Property for reasons other than necessary maintenance.
- (c) He did not know who to pay the rent to.

[12] The hearing officer made short work of the first two reasons but accepted that, with the change in property managers, Mr. Husk faced a confusing situation in trying to determine who he should pay the rent to. As a result, in his *Decision* at para

14 the hearing officer did not order Mr. Husk to vacate the property and instead directed him to pay the outstanding rent:

[14] It has been clarified who the property manager is, so the tenant has no further reason to retain the rent; and as long as he pays that rent, equity will not allow me to evict a tenant who was placed in such a confusing situation by no fault of his own. The tenant's tenancy remains in place, but the tenant is to pay the landlord the outstanding rent. ...

[13] The hearing officer then directed Mr. Husk to pay the following amounts:

[15] The tenant is to pay the \$1,200 owing to the end of November 2023, and \$2,400 for December 2023, January 2024, and February 2024 rent.

[14] Accordingly, in the final paragraph of his *Decision* the hearing officer made the following order:

[11] I hereby Order pursuant to s.57 and 70 of the *Residential Tenancies Act*, 2006 that:

- i. The tenant's tenancy was not ended by the landlord serving Immediate Notice to Vacate and Notice of Arrears on the 22nd day of November 2023; and
- ii. The tenant, Jay Husk, to pay the landlord, Lori Kuffner, \$3,600.00.

[Errors in original]

[15] Mr. Husk requested clarification of the *Decision* pursuant to s. 76 of *The Residential Tenancies Act, 2006*, SS 2006, c R-22.0001 [Act], claiming that he owed \$2,600, not \$3,600. In *Kuffner v Husk*, 2024 SKORT 507 at para 4 [Clarification Decision], the hearing officer described Mr. Husk's evidence at the original hearing as "convoluted," writing that he gave little weight to Mr. Husk's evidence. The hearing officer summarized how he had determined the rent arrears as follows:

[5] Paragraph [15] of the decision explains how the amount owing was calculated, and the material facts were taken from the testimony of both parties who agreed on the months that had not been paid. I give greater weight to the agreement in the testimony than to the convoluted evidence filed by the tenant. The decision explains clearly

how the amounts owing were calculated, and upon what evidence. There is no need for additional clarification.

[16] Mr. Husk served a notice of appeal on the ORT on March 1, 2024, and on the landlord's agent on March 2, 2024. Mr. Husk also paid one month's rent of \$800 to the ORT, which issued a certificate of payment of rent pursuant to s. 10.1 of *The Residential Tenancies Regulations, 2007*, RRS c R-22.0001 Reg 1 [*Regulations*].

Issues

[17] The notice of appeal sets out the following grounds of appeal:

1. Landlord failed to provide documentation to support claim of rent owing.
2. The Hearing Office [*sic*] ignored or overlooked my documentation showing that rent was not owed.
3. My evidence was ignored or overlooked again when clarification was requested.

[18] I determine that the issues in this appeal are the following:

- (a) What is the scope of the appeal and the applicable standard of review?
- (b) Did the hearing officer err in law by making findings of fact unsupported by any evidence or by disregarding or mischaracterizing relevant evidence?
- (c) If the hearing officer erred, what is the appropriate remedy?

Analysis

1. What is the scope of the appeal and the applicable standard of review?

[19] The appeal is brought pursuant to s. 72 of the *Act*, which reads, in relevant part, as follows:

72(1) Subject to subsections (1.1) and (1.3), any person who is aggrieved by a decision or order of a hearing officer or the director, whether or not the decision or order is made without notice, may appeal the decision or order on a question of law or of jurisdiction to the Court of Queen’s Bench within 30 days after the date on which the decision or order is signed and dated by a hearing officer.

(1.1) The Court of Queen’s Bench may extend the time for appeal for up to two years from the date on which the decision or order is signed and dated by a hearing officer if the proposed appellant can establish that the proposed appellant did not receive notice of the decision or order.

(1.2) An appeal pursuant to subsection (1) must be made at the judicial centre nearest to the location of the rental unit with respect to which the decision or order was made.

(1.3) A tenant may only appeal an order that includes a writ of possession pursuant to subsection 70(13) with respect to a failure to vacate a property in accordance with a notice served pursuant to subsection 57(1) or (5) or clause 58(1)(b) if the tenant files with the Court of Queen’s Bench a certificate of payment of rent issued pursuant to the regulations.

...

(3) The appellant shall serve the notice of appeal or the application for leave to appeal pursuant to this section on the respondent and the director.

...

[Emphasis added]

[20] The Act limits appeals to this Court to questions of law or jurisdiction. Accordingly, this Court does not have jurisdiction to review questions of fact or of mixed fact and law, even on the deferential standard of palpable and overriding error. This Court can only intervene if a hearing officer’s finding of fact is the product of an error of law. This was explained by Elson J. in *Lansdowne Equity Ventures Ltd. v Cove Communities Inc.*, 2020 SKQB 113 at para 30:

[30] ... In s. 72(1) of the RTA [*The Residential Tenancies Act, 2006*], the Legislature has expressly limited the scope of an appeal to “questions of law or jurisdiction”. As such, questions of fact or questions of mixed fact and law are beyond this Court’s jurisdiction

to review. In this respect, it is not simply a question of greater deference than that applied to a question of law. Even if a hearing officer makes a palpable and overriding error in a finding of fact, this Court cannot intervene unless the error of fact takes on the quality of an error of law. As observed by Cameron J.A., in *P.S.S. Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*, 2007 SKCA 149, 302 Sask R 161 [P.S.S.], a finding of fact will constitute an error of law where it is made on the basis of: 1) no evidence; 2) irrelevant evidence; 3) disregarded relevant evidence; 4) mischaracterized relevant evidence; or 5) an unfounded/irrational inference.

[21] In *P.R. Investments Inc. v Amos*, 2018 SKQB 127 at paras 20-21 [*P.R. Investments*], Leurer J. (as he then was) also made the point that a finding of fact may be the subject of an appeal under s. 72 where “it is sufficiently egregious to amount to an error of law”: *P.R. Investments* at para 22. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37, [2019] 4 SCR 653 [*Vavilov*], the Supreme Court clarified that the appellate standard of review applies to statutory appeals, and the standard for reviewing alleged errors of law is correctness.

[22] In this case, Mr. Husk’s notice of appeal alleges that the hearing officer made findings of fact about the rent owing despite the landlord having filed no evidence and by overlooking Mr. Husk’s evidence.

[23] On their face, the grounds of appeal advanced by Mr. Husk might be seen as an attempt to re-argue the facts on appeal. The hearing officer was entitled to weigh the evidence presented by the landlord and the tenant and decide how much or how little of it he accepted. If the hearing officer gave little weight to Mr. Husk’s evidence because he found it to be convoluted (as he wrote in the *Clarification Decision*) and based his findings of fact on other evidence that he accepted, then those findings cannot be impeached on appeal because of the limited appellate authority conferred by s. 72 of the *Act*. However, if the hearing officer made findings of fact unsupported by any evidence or if he disregarded or mischaracterized relevant evidence, such defects might amount to an error of law.

[24] I will consider whether Mr. Husk's complaints raise a question of law and, if so, I will review the alleged errors on the correctness standard, as instructed by *Vavilov*.

2. Did the hearing officer err in law by making findings of fact unsupported by any evidence or by disregarding relevant evidence?

[25] To address this question, it is helpful to review the key pieces of evidence that were before the hearing officer. When the appeal was argued before me, Mr. Husk and Ms. Williams, the landlord's agent, confirmed that none of this evidence was disputed at all during the hearing.

[26] First, the parties' agreement regarding the monthly rent payable by Mr. Husk, set out in a letter written by the landlord dated January 4, 2024, was uncontroverted. Beginning on July 1, 2021, Ms. Kuffner reduced Mr. Husk's monthly rent from \$1,000 to \$800. As the letter indicates, Mr. Husk preferred to continue to pay \$1,000 per month, skipping a payment in January and July. Nonetheless, Mr. Husk was obliged to pay only \$800 per month.

[27] Second, cheques payable to Ms. Kuffner drawn on Mr. Husk's chequing account, which she cashed, were in evidence. The relevant cheques covered the period from July 1, 2021 to September 1, 2023, inclusive. The cheques show that Mr. Husk paid \$1,000 to Ms. Kuffner every month, except for January and July in 2022 and 2023.

[28] A consequence of Mr. Husk's unusual preference to overpay his monthly rent for 10 months of the year, skipping two months, is that he gradually built up a credit. This can be shown in a simple table, as follows:

Month	Rent Owed	Rent Paid	Credit
July 5, 2021 ¹	\$800	\$1,000	\$200
August 5, 2021 ²	\$800	\$1,000	\$400
September 5, 2021	\$800	\$1,000	\$600
October 5, 2021	\$800	\$1,000	\$800
November 5, 2021	\$800	\$1,000	\$1,000
December 5, 2021	\$800	\$1,000	\$1,200
January 5, 2022	\$800	\$0	\$400
February 5, 2022	\$800	\$1,000	\$600
March 5, 2022	\$800	\$1,000	\$800
April 5, 2022	\$800	\$1,000	\$1,000
May 5, 2022	\$800	\$1,000	\$1,200
June 5, 2022	\$800	\$1,000	\$1,400
July 5, 2022	\$800	\$0	\$600
August 5, 2022	\$800	\$1,000	\$800
September 5, 2022	\$800	\$1,000	\$1,000
October 5, 2022	\$800	\$1,000	\$1,200
November 5, 2022	\$800	\$1,000	\$1,400
December 5, 2022	\$800	\$1,000	\$1,600
January 5, 2023	\$800	\$0	\$800
February 5, 2023	\$800	\$1,000	\$1,000
March 5, 2023	\$800	\$1,000	\$1,200
April 5, 2023	\$800	\$1,000	\$1,400
May 5, 2023	\$800	\$1,000	\$1,600
June 5, 2023	\$800	\$1,000	\$1,800
July 5, 2023	\$800	\$0	\$1,000
August 5, 2023	\$800	\$1,000	\$1,200
September 5, 2023	\$800	\$1,000	\$1,400
October 5, 2023	\$800	\$0	\$600
November 5, 2023	\$800	\$0	- \$200
December 5, 2023	\$800	\$0	- \$1,000
January 5, 2024	\$800	\$0	- \$1,800
February 5, 2024	\$800	\$0	- \$2,600

[29] Another way of demonstrating the amount Mr. Husk paid in rent from

¹ Despite the agreement that Mr. Husk would not pay rent in July and January each year, he did make a payment of \$1,000 in July 2021.

² Mr. Husk paid only \$621.00 directly to Ms. Kuffner for August 2021. However, evidence before the hearing officer showed that Mr. Husk paid invoices for furnace servicing and for a water meter replacement which made up the difference.

July 5, 2021 to February 5, 2024 involves a simple calculation: 23 payments x \$1,000 = \$23,000. Mr. Husk's rent obligation for those months is also easy to calculate: 32 months x \$800 = \$25,600. The difference between the amounts Mr. Husk paid and what he owed is \$2,600.

[30] The hearing officer wrote that he placed little weight on Mr. Husk's position about the rent arrears because it was convoluted. The hearing file contains a handwritten table prepared by Mr. Husk, similar to the one above, except that Mr. Husk miscalculated the fourth column, showing a smaller credit than he was entitled to. This arithmetic error was immediately obvious to me. Mr. Husk asked for an adjournment of the original hearing so that he could better prepare, but the hearing officer refused this request "based on the simple nature of these applications" and because any delay would unfairly prejudice the landlord: *Decision* at paras 3-4. When Mr. Husk tried to present a corrected table during the clarification hearing, the hearing officer rejected it as new evidence. The corrected table would have been better described as the tenant's written argument as it was based upon evidence already before the hearing officer.

[31] In any event, since the material facts were undisputed, there was no need for the hearing officer to choose between differing versions of events. Considering the undisputed evidence of the terms of the rental agreement and the payments made by the tenant to the landlord, it is evident that Mr. Husk owed arrears of \$2,600 as he argued, not \$3,600 as found by the hearing officer.

[32] In the *Clarification Decision* at para 5, the hearing officer wrote that his earlier decision "explains clearly how the amounts owing were calculated, and upon what evidence." However, the *Decision* at para 15 said only this: "The tenant is to pay the \$1,200 owing to the end of November 2023, and \$2,400 for December 2023, January 2024, and February 2024 rent." It appears that the hearing officer simply accepted the amount of arrears set out in the landlord's Notice and then added \$800 for

each month after November 2023.

[33] Had the hearing officer done the straightforward calculation set out in this decision, he could only have come to the same conclusion as I have regarding the amount of arrears owing.

[34] In consequence, I find that the hearing officer's factual error resulted from his either disregarding or mischaracterizing relevant evidence. He did not consider the agreement between the parties and the payments made by Mr. Husk or, if he did, he did not take the time to work out how much Mr. Husk actually owed. In other words, the factual error made by the hearing officer was so patent that it reveals an error of law. It is unfortunate that the hearing officer did not reconsider his obvious error when asked to do so by Mr. Husk.

3. If the hearing officer erred, what is the appropriate remedy?

[35] As I have found that the hearing officer made a reviewable error of law, his decision regarding the rent arrears must be set aside. The remaining question is what further order the court should make in the circumstances.

[36] While s. 72 of the *Act* grants a right of appeal on questions of law or jurisdiction, the *Act* does not specify what orders the court may make on appeal. This was noted by Jackson J.A. in *Boardwalk General Partnership v Olson*, 2016 SKCA 135 at para 23, 410 DLR (4th) 357 [*Boardwalk*]. Justice Jackson concluded that the remedial authority of the Court of Appeal on an appeal under the *Act* could be found in s. 12 of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1. A similar expression of this Court's remedial authority is not found in *The King's Bench Act*, SS 2023, c 28, or any other applicable statute.

[37] In my view, where a statute confers a right of appeal to this Court but is silent on the court's remedial powers, a legislative intention to empower this Court to

decide the appeal and to grant a remedy consistent with the court's appellate function and the scope of the statutory right of appeal must exist by necessary implication: see *ATCO Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 SCR 140; *The Legislation Act*, SS 2019, c L-10.2, ss 2-22(1).

[38] Consistent with the Court of Appeal's powers listed in *Boardwalk* at para 23, on an appeal under s. 72 of the *Act* this Court can affirm the decision appealed from, set aside the decision, amend the decision, make the decision that the hearing officer ought to have made if this Court has all necessary evidence to do so, or remit the matter to the ORT for a new hearing. For examples of the power to amend a decision of the ORT, see *Jordan v Sears*, 2021 SKQB 6 at para 44 and *Giesbrecht v Giesbrecht*, 2011 SKQB 355 at para 7.

[39] In this case, I conclude that the appropriate remedy is to amend the hearing officer's order by replacing the erroneous amount, \$3,600, with the correct amount, \$2,600. This is more expedient than remitting the matter to the hearing officer when there can only be one outcome.

Conclusion

[40] For the foregoing reasons, the appeal is granted and the order set out in the *Decision* dated February 2, 2024 is amended so that the amount the tenant must pay to the landlord on account of rent arrears up to and including February 2024 is \$2,600, not \$3,600.

[41] Mr. Husk paid one month's rent to the ORT in order to file an appeal. Since the hearing officer did not issue a writ of possession, ss. 72(1.3) of the *Act* and s. 10.1 of the *Regulations* did not apply and he was not obliged to file a certificate of payment of rent to pursue an appeal. I order the director to return the money deposited with the ORT to Mr. Husk.

[42] Mr. Husk is entitled to costs, which I fix at \$200.

J.
P.T. BERGBUSCH