EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT KAITAIA

I TE KŌTI-Ā-ROHE
KI KAITAIA

CIV–2018–029–000102
[2018] NZDC 21559

BETWEEN	MARIA BARTON Appellant
AND	ANNE OSBORNE FAR NORTH CIRCLE REAL ESTATE Respondents

Hearing: 12 October 2018

Appearances: Appellant appears in Person
J Baguley for the Respondents

Judgment: 19 October 2018

RESERVED JUDGMENT OF JUDGE D J McDONALD

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[1] On 8 May 2018 Far North Circle Real Estate Limited, as agent for Ms Anne Osborne, the landlord, filed an application in the Tenancy Tribunal seeking a direction that the 90 day termination notice had been served on Ms Barton.

[2] Further that the termination notice was not a retaliatory notice under s 54 Residential Tenancies Act 1986.

Tenancy

[3] Ms Barton entered into a written tenancy agreement with Mr and Mrs Osborne, the landlords, on 16 October 2015, for a property at [address deleted], Kaitaia. It was a periodic tenancy starting on that date.

[4] Mr Osborne died in early 2018. It was a condition of the tenancy agreement that the landlord shall give 90 days notice of termination in writing.

Hearings

[5] The landlord's application and an application by Ms Barton for damages against the landlord were set down for hearing on 9 April 2018. Ms Barton successfully sought from the adjudicator Mr Blake an adjournment of both applications on medical grounds. She also sought to have Mr Blake recuse himself from any further hearings.

[6] The next hearing was on 30 May 2016. Ms Loane appeared for the landlord. She is employed by North Circle Real Estate Limited. Ms Barton appeared in person and again sought that the hearing be adjourned on the basis that she was unwell. She told the adjudicator, Mr Blake, that she could not fully participate in the hearing. She further told Mr Blake that she would not be vacating the premises, contending that the notices to vacate were invalid and retaliatory.

[7] There was some considerable discussion about whether Ms Barton had and would in the future allow tradesmen into the property. Ms Barton sought a new hearing sometime in October when she said she would be well enough to attend.

[8] Mr Blake granted the adjournment sought by Ms Barton, but to 5 July 2018. The 90 day notice expired on 14 July 2018, if the notice was valid and not retaliatory, that Ms Barton had to vacate the premises.

[9] He made two orders:

> The tribunal hearby orders:
>
> 1. The application is adjourned to Thursday, 5 July 2018 at 9.30 am for three hours in the Kaitaia District Court.
>
> 2. This order serves as notice of the hearing that is to take place at the date and time referred to above.
>
> 3. Following interim orders shall apply until they are lifted or altered by further orders.

[10] The further orders made are not relevant to this current decision.

[11] On 5 July 2018, there was a further hearing by the landlord. At the commencement of that hearing Mr Blake said:

> So we will continue on in respect of three applications. We are set down for a three hour hearing but as I indicated, the previous order, the most pressing issue is the status of the 90 day notice and I am obviously prepared to sit for a three hour hearing with you and cover over as much as we can, but Ms Barton it depends on your health and your ability to assist this afternoon.

[12] The hearing only dealt with the application by the landlord, as that was all the time allowed.

[13] At the end of the hearing the adjudicator made the following orders.

(a) The landlord's 90 day termination notice dated 9 April 2018 is a valid termination notice under s 51 of the Residential Tenancies Act 1986.

(b) The termination notice is not retaliatory notice under s 54 of the Residential Tenancies Act 1986.

Appeal

[14] Ms Barton filed a notice of appeal dated 13 July 2018 against the orders made by the adjudicator. The grounds as set out in the notice of appeal were:

> I disagree with the adjudicator Blake's decision because he refused to accept my evidence in the hearing and his decision is wrong. I also requested that he recuse himself from these proceedings on 9/4/2018 and he refused. I further sent emails respectfully requesting another adjudicator and this was also refused.

[15] The appeal is opposed by the respondent.

The law

[16] An appeal to this Court from the Tenancy Tribunal is by way of a re-hearing. The appeal is heard on the record of the oral evidence given before the Tenancy Tribunal subject to a discretionary of power to re-hear the whole or any part of the

evidence or to receive further evidence; see *Shotover Gorge Jetboats v Jamieson* [1987] 1 NZLR 437 (CA).

[17] I am not restricted by any findings which the adjudicator has made but I acknowledge the advantage held by the decision maker at the first instance where he saw and heard the witnesses. I also acknowledge the wealth of experience built up by Mr Blake sitting as an adjudicator.

[18] As was said in *Housing Corporation v Salt* [2008] DCR 697.

> There is something akin to a presumption that the decision appealed from is correct and is also customary for the appellant body to exercise restraint in interfering discretionary decisions.
>
> Thus ordinarily, the appellant body will only differ from the factual findings of the decision maker of the first instance if:
>
> - The conclusions reached was not open on the evidence, that is, where there is no evidence to support it; or;
>
> - The lower body was plainly wrong in the conclusions it reached.

[19] s 118 Residential Tenancies Act 1986 allows the District Court Judge on appeal to quash the order of the Tribunal and order a re-hearing by the Tribunal or substitute any orders that the Tribunal could have made or to dismiss the appeal. When the District Court is considering appeals from the Tribunal regard needs to be had to s 85. That section provides the manner in which the jurisdiction of the Tribunal is to be exercised:

> 85(1) …the Tribunal shall exercise its jurisdiction in a manner that is most likely to ensure the fair and expeditious resolution of disputes between landlords and tenants of residential premises.
>
> 85(2) Further, the Tribunal shall determine each dispute according to the general principles of law relating to the matter and the substantial merits and justice of the case but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

The appellant's position

[20] Ms Barton submitted to me that the adjudicator Mr Blake should have recused himself when she asked him to on 9 April 2018. She told me that she had made a

formal complaint against Mr Blake to the Justice Department as he had sat on another hearing involving her relating to the same house but different from the one subject to the appeal. She had sent emails to the Ministry. She submitted that Mr Blake either wrongly refused to recuse himself or did not make a decision about that.

[21] On the merits Ms Barton said the termination notice was not validly served on her because it was not personally brought to her attention until she received an email from the landlord's agent on 7 May 2018. The adjudicator allowed Ms Loane to show a photo on her cell phone which purported to be her hand about to deliver an envelope containing, Ms Loane said, the notice of termination prior to being put into Ms Barton's letterbox.

[22] Ms Barton referred me to a pamphlet containing advice to persons appearing before the Tribunal. Three copies of any document should be made. Ms Loane did not comply with that Justice Department advice. The evidence should have been excluded by the adjudicator. Ms Barton said there was no evidence that the termination notice was put in letterbox on 10 April 2018. She said it should have been emailed to her or given to her personally.

[23] If the 90 day notice was validly served on her then it was retaliatory. An earlier notice had been served on 20 March 2018, four days after she herself had made an application to the tribunal seeking $1365.87 actual compensation (plumbing repair, new lock, damages to window lock, two shelving units and $500 worth of books, and $46,660 for exemplary damages, (no maintenance, unclean house, breach of privacy, harassment, late lodgement of the bond).

[24] All Ms Barton submitted she wanted was to remain in the home that she had lived in for some years with her pets, although she accepted that Ms Osborne as owner and landlord had the right to sell the home.

The respondent's position

[25] Ms Baguley appeared for Ms Osborne. She submitted that the adjudicator's decision was correct. There was evidence to support the orders made. The adjudicator

had not recused himself as there was no grounds for him to do so. Ms Barton was properly served with the notice of termination. The photograph was not inadmissible merely because it did not follow the advice contained in the Ministry of Justice pamphlets. The adjudicator was entitled, as he did, to accept the evidence of Ms Loane on behalf of the landlord.

[26] It was not retaliatory. Following the death of her husband, Ms Osborne was wanting to sell her four rental properties including the one occupied by Ms Barton. It was not sold because in effect Ms Barton has prevented tradesmen going on to the property to do repairs and prevented prospective purchasers from viewing it.

Discussion

[27] I will deal with each of the matters raised by Miss Barton in turn.

Recusal

[28] It would appear that Ms Barton did request Mr Blake recuse himself at the first short hearing on 9 April 2018. I set out the relevant part from the transcript:

> **MS BARTON:**
>
> I would like you to recuse yourself please.
>
> **ADJUDICATOR BLAKE:**
>
> I will not recuse myself (inaudible).
>
> **MS BARTON:**
>
> Okay. Well Your Honour I would like an adjournment because Ann and John (I infer the landlords) are not present.
>
> **ADJUDICATOR BLAKE:**
>
> They are not present but…
>
> **MS BARTON:**
>
> They need to be here Your Honour (inaudible).

ADJUDICATOR BLAKE:

Let's explore this a little bit. So if they are not here if that's going to work to anyone's disadvantage who is it going to work to.

MS BARTON:

I don't care. It goes to my disadvantage having you as an adjudicator in this hearing.

ADJUDICATOR BLAKE:

So how would an adjournment help you in that regard?

MS BARTON:

Well I will be asking for another adjudicator.

ADJUDICATOR BLAKE:

Could you have made that request prior to this hearing?

MS BARTON:

no because I only found out you were going to preside here on Friday and I have already made several phone calls and sent several emails that that it either be adjourned today or that another adjudicator can hear me (inaudible). And if the Osbornes are not going to be present then yeah.

ADJUDICATOR BLAKE:

Was there a response to those requests that you made? You said you made several prior requests.

MS BARTON:

Not at the moment but I know my legal rights and I'm within rights to ask for either you to recuse yourself or that I we have a rehearing. I have medical grounds as well to have it heard at a later date.

ADJUDICATOR BLAKE:

I see.

MS BARTON:

I've got a medical certificate here if you require it.

[29] The adjudicator then considers the medical certificate. At the end adjudicator Blake says, "All right so be it." He grants the adjournment, then says:

> I can't comment on recusal, you have to follow the appropriate channels for that. I accept your medical evidence. I'll grant you the adjournment and will

> schedule a new date and time and you will be notified of that Mrs Barton. Thank you very much.

[30] At the next two hearings, Ms Barton did not raise the issue of recusal again when Mr Blake was sitting.

[31] Ms Barton seems to be submitting that there was actual bias on behalf of Mr Blake. While I accept that strict rules of procedure and legal niceties need not be followed in the Tenancy Tribunal, something other than a bald statement, "I want you to recuse yourself," must be made before it can be properly dealt with. Grounds of actual bias need to be articulated. Grounds of apparent bias again need to be articulated.

[32] As was said in *Siemer v Heron (recusal)*:

> It is well established that apparent bias arises only if a fair-minded informal lay observer might reasonably apprehend that there is a real and not remote possibility that the Judge might not bring an impartial mind to the resolution of the question the Judge is required to decide.[1] The observer will not adopt the perspective of a party seeking recusal unless objectively it is a justified one. It is necessary for those making decisions on whether there is apparent bias in a particular situation first to identify what was said that might lead to the Judge to decide the case other than on its merit and second to evaluate the connection between the matter and the feared deviation.

[33] The application must be made to the judicial officer not to the Ministry of Justice. A litigant who seeks a Judge to a judicial officer to recuse himself must set out fully before that judicial officer the grounds and the reasons. In my view, even though Ms Barton was acting for herself that should have been done. I have read the transcripts of the three hearings. There is nothing in those which would lead me to the view that Mr Blake should have stepped aside. He was courteous to Ms Barton. He granted her two applications for the first two hearings to adjourn them on medical grounds. He allowed her to fully develop her arguments and produce documents.

[34] That ground of appeal fails.

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[1] *Siemer v Heron (recusal)* [2011] NZSC 116, [2012] 1 NZLR 293 at para 11.

Notice of termination and service

[35] The relevant notices dated 9 April 2018. It complies with the Act; it was in writing, I identified the premises ([address deleted], Kaitaia), to which it relates, the date on which the tenant is to vacate, 14 July 2018 and as the adjudicator accepted it had been signed by the landlord's agent. It gave a termination date in excess of 90 days from service.

[36] The notice was said to have been served by Ms Loane by leaving it in the post, letterbox at [address deleted] on 10 April 2018. The time starts, in accordance with the Act, two days after that. If there was evidence before the adjudicator that that was done then that is valid service of the notice. Section 136(1)(c) states:

> (1) Where any notice or document is required or authorised by this Act to be given to or served on a landlord or a tenant, it shall be sufficient if it is given or served in any of the following ways:
>
> …
>
> (c) it may be delivered to the premises to which any address for service relates, and either placed in the mailbox or attached to the door in a prominent position:

[37] Section 136(2A) is to the same effect.

[38] Ms Barton submitted, as she did before the adjudicator, the notice should have been emailed to her. Her email address is at the top right-hand corner of the tenancy agreement. However, the agreement states that the service of notices shall be at the tenant's premises. While a notice can be served by email that is only if that was Ms Barton's address for service on the tenancy agreement. She later gave notice that it was. The address for service in the written tenancy agreement are the premises. No other notice has been given giving a different address for service prior to the notice of termination being placed in her letterbox.

[39] Ms Loane said she hand-delivered the termination notice dated 9/4/2018 by placing it in the mail–letterbox at [address deleted] on 10 April 2018. She took a photo on her phone of the envelope in which she said the termination notice was. That was date and time stamped on her phone.

[40] While Ms Barton challenged that evidence in my view there is nothing in the Tenancy Act, Evidence Act or any other rules which would have justified Mr Blake from ruling the evidence inadmissible. A direction in a handout from the Justice Department to litigants who are to appear before the Tenancy Tribunal has no standing of law.

[41] Mr Blake considered that evidence in light of Ms Barton's submission that the notice was not put in her letterbox, and the photo was inadmissible. I found against Ms Barton on the facts. He said at paragraph [13] of his decision:

> My finding is that there is no evidence of an elaborate hoax. Ms Loane's photograph confirms her oral evidence that she delivered three letters into the letterbox of the tenanted premises on 10 April 2018. Although only the outside of the envelope is visible on the photographs, (inaudible) the fact that the termination letter is dated 9 April 2018. I accept Ms Loane's oral evidence that one of the letters delivered into the letterbox on 10 April was the termination notice.

[42] There is no requirement for the landlord to phone, text, email nor in some other way communicate to a tenant that the notice is in the letterbox. Under the Act once it is put in the letterbox it is deemed to have been served.

[43] I find nothing in the evidence given before the adjudicator of the submissions made to me which would lead me to a different view than the one Mr Blake came to. There was evidence on which he could base his decision. The conclusion he came to was not plainly wrong.

[44] Ms Barton's submission that she should have been believed, not Ms Loane, finds no favour with me. That was a conclusion that Mr Blake could have come to, and did.

Was the notice retaliatory?

[45] Ms Barton submitted that the notice was retaliatory in that she had filed her own application for damages four days prior to the first notice of termination served on 20 March 2018. That notice was withdrawn because it did not give her a full 90 days notice. Ms Barton submitted that the same reason applies to the second notice.

[46] That issue was clearly before the adjudicator. He referred to s 54 of the Act and the definition of retaliatory notice. A notice of termination is retaliatory if the landlord is motivated wholly or partly by the exercise or proposed exercise by the tenant of any right, power, authority, or remedy under the tenancy agreement, the Residential Tenancies Act 1986 or any other Act or by any complaint by the tenant against the landlord as to the tenancy. Motivate means to furnish with a motive, to give impetus to, to incite or impel.

[47] Mr Blake, the adjudicator, came to the conclusion that the notice was not retaliatory after considering the evidence given both by Ms Barton and Ms Loane on behalf of the landlord. In effect, he found that the owner, Ms Osborne, following the death of her husband wanted to sell the four rental properties that they had owned together, including that of Ms Barton. I accept that that is a finding open to the adjudicator on the evidence and the submissions he heard.

[48] It follows the adjudicator was neither wrong in law nor came to a conclusion that was not open on the evidence.

[49] That ground of appeal fails.

Result

[50] The appeal is dismissed.

D J McDonald
District Court Judge