

TENANCY TRIBUNAL AT Whangarei

APPLICANT: Cassandra Dawn Howell
Tenant

RESPONDENT: Eliza Wai Han Lee
Landlord

TENANCY ADDRESS: 228 Western Hills Drive, Avenues, Whangarei 0110

ORDER

1. Eliza Wai Han Lee must pay Cassandra Dawn Howell \$630.44 immediately, calculated as shown in table below:

Description	Landlord	Tenant
Compensation: Moving costs and inconvenience		\$300.00
Balance of bond		\$160.00
Compensation: Smoke alarms		\$150.00
Filing fee reimbursement		\$20.44
Total award		\$630.44
Total payable by Landlord to Tenant		\$630.44

Reasons:

1. The tenanted premise is one of two "sleep-outs" next to the landlord's house.
2. The sleep-outs do not have a bathroom, kitchen or laundry. Part of the landlord's house has been converted to a bathroom / laundry for the tenants' exclusive use. The tenants use the kitchen in the main house, sharing with the landlord.
3. Ms Howell occupied the sleep-out from April until late August 2018. The rent per week was \$160.00. Ms Howell paid a bond of \$320.00.

4. Ms Howell's application raises issues about lodgement of the bond, refund of the bond, smoke alarms, breach of quiet enjoyment, unlawful entry, and the circumstances around the ending of the tenancy.

Jurisdiction

5. The unusual set up of the property gives rise to a jurisdictional issue.
6. The Tenancy Tribunal can only hear disputes about tenancies that are subject to the Residential Tenancies Act 1986 ("RTA").
7. The RTA applies to all residential tenancies, unless the tenancy is one of the specific types listed in section 5 of the RTA, which are excluded tenancies. One type of excluded tenancy is: "where the premises, not being a boarding house, continue to be used, during the tenancy, principally as a place of residence by the landlord or the owner of the premises".
8. The property is not a boarding house. Boarding houses are "occupied, or intended by the landlord to be occupied, by at least 6 tenants at any one time" (see section 66B RTA).
9. Therefore, the question is whether the landlord used "the premises" as a place of residence during the tenancy. This is essentially a question about the extent of shared occupancy. If Ms Lee was sharing her house with Ms Howell then Ms Howell was a boarder and not a tenant, and the RTA does not apply.
10. Having heard from Ms Howell and Ms Lee, my view is that extent of shared occupancy was minimal, and on that basis my finding is that this is not an excluded tenancy. The only area that the tenants shared with the landlord was the landlord's kitchen. There was no understanding that Ms Howell could have the use of the house apart from the kitchen, or that Ms Lee could have the use of the tenants' bathroom or the sleep-outs.
11. Because the majority of "the premises" is comprised of areas that were not shared with the landlord, it cannot be said that Ms Lee used the premises as a place of residence.
12. Therefore the RTA applies, and the Tenancy Tribunal has jurisdiction to hear the application.

Bond lodgement and refund

13. Ms Lee submitted that when she attempted to lodge the bond at the MBIE office in Whangarei she was told that the bond did not need to be lodged. Presumably the staff member formed the view (based on what he or she was told by Ms Lee) that the arrangement with Ms Howell was a boarding / flatmate arrangement rather than a tenancy to which the RTA applied.

14. For the reasons stated above, I respectfully disagree with this view. The RTA applied to this tenancy. It follows that the landlord was legally obliged to lodge the bond with the Bond Centre within 23 working days of receiving the bond (section 19(1)(b) RTA).
15. Failure to lodge the bond is an unlawful act, and exemplary damages of up to \$1,000.00 can be awarded against the landlord (section 19(2) RTA).
16. Section 109 RTA states that the Tenancy Tribunal can award exemplary damages for unlawful acts if the Tribunal is satisfied that the act has been committed intentionally, and if it is “just” to award exemplary damages having regard to:
 - a. The intent of the person in committing the unlawful act; and
 - b. The effect of the unlawful act; and
 - c. The interests of the person against whom the act was committed; and
 - d. The public interest.
17. In this instance, my finding is that it would not be just to make an award of exemplary damages against Ms Lee. Exemplary damages are punitive in nature. I am satisfied that Ms Lee intended to lodge the bond and took proper and appropriate steps to do so. Ms Lee was entitled to rely upon the advice given by MBIE that it was not necessary to lodge the bond. This is not an instance of carelessness or neglect of legal duties.
18. The tenancy has now ended. Ms Lee is holding the bond. Ms Howell acknowledges that she did not pay her last week of rent, but there are no other proven claims against the bond. Therefore I find that Ms Howell is entitled to a refund of \$160.00.

Breach of quiet enjoyment / unlawful entry

19. Landlords have a limited right to enter tenanted premises (see section 48 RTA). If a landlord enters the premises other than in accordance with section 48, this is an unlawful act and exemplary damages of up to \$1,000.00 can apply.
20. Ms Howell submitted that both Ms Lee and the occupant of the other sleep out entered her property on multiple occasions when she was out. Ms Howell stated that she knew this because she found black hairs inside the sleep out.
21. Ms Lee denied that she ever entered the sleep out.
22. The burden of proof is with Ms Howell. Although Ms Howell has a suspicion that Ms Lee (and the other tenant) entered the sleep out when she was out, there is no proof of this.
23. Tenants have a right to reasonable peace, comfort and privacy. If a landlord breaches this duty, and if the circumstances of the breach amount to harassment

of the tenant, this is an unlawful act and exemplary damages of up to \$2,000.00 can apply (see section 38 RTA).

24. Ms Howell alleged that Ms Lee harassed her by sending her literally hundreds of abusive and unreasonable text messages. Ms Lee countered with an allegation that in fact she received hundreds of abusive and unreasonable text messages from Ms Howell.
25. However, the limited number of text messages that were produced in evidence do not support either of these allegations. The couple of dozen text messages produced in evidence are largely polite and innocuous.
26. In *McDonald v Dodds* [2010] CIV-2009-019-001524 the District Court held that “harassment” in terms of section 38 of the RTA means “to worry, trouble or distress” and that it “indicates a particular pattern of behaviour towards another person of the type defined”.
27. Although this was clearly a difficult and unhappy landlord / tenant relationship, there is not enough evidence to show that Ms Lee engaged in a pattern of behaviour that was intended to trouble, worry, or distress Ms Howell.
28. Therefore this part of the application is dismissed.

Smoke alarms

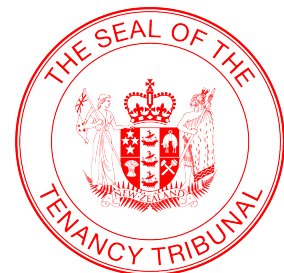
29. There were no smoke alarms in Ms Howell’s sleep out when her tenancy began.
30. Ms Lee submitted that she was prepared to install smoke alarms, but Ms Howell declined her offer and arranged for smoke alarms herself.
31. Under the RTA, landlords have a legal duty to ensure that tenanted premises have compliant and appropriate smoke alarms installed. A breach of this duty is an unlawful act, and exemplary damages of up to \$3,000.00 can apply.
32. Having regard to the criteria set out in section 109, my finding is that it is not appropriate to award exemplary damages in this instance. I accept that Ms Lee had a genuine understanding that this tenancy was not subject to the RTA. I also accept that Ms Lee offered to have smoke alarms fitted when Ms Howell asked about smoke alarms.
33. However, I will make an award of compensatory damages to reflect the principle that in fact Ms Lee did have a legal duty to have smoke alarms in the sleep out from the beginning of Ms Howell’s tenancy. It should not have been necessary for Ms Howell to ask and to make her own arrangements.
34. I will award compensatory damages of \$150.00

Termination

35. Ms Lee required Ms Howell to move out immediately when she was in rent arrears. Ms Lee submitted that this was part of her verbal tenancy agreement with Ms Howell.
36. For the reasons given above, my finding is that the RTA applied to this tenancy. Ms Lee could only terminate the tenancy by the means listed in section 50 of the RTA.
37. The termination did not comply with section 50. It was unlawful.
38. I accept Ms Howell's submission that she incurred extra cost and inconvenience due to the manner of the termination of the tenancy. She is entitled to compensation.
39. Taking into account the additional cost of moving due to not having the opportunity to arrange for friends to help, and also the stress and inconvenience of a rushed move, I will award compensation of \$300.00.

Filing fee

40. Ms Howell has been largely successful in this application and is entitled to reimbursement of the filing fee (section 102(4)(b) RTA)



N Blake
18 December 2018

Please read carefully:

SHOULD YOU REQUIRE ANY HELP OR INFORMATION REGARDING THIS MATTER PLEASE CONTACT **TENANCY SERVICES 0800 836 262**.

MEHEMA HE PĀTAI TĀU E PĀ ANA KI TENEI TAKE, PĀTAI ATU KI TE TARI **TENANCY SERVICES 0800 836 262**.

AFAI E TE MANA'OMIA SE FESOASOANI E UIGA I LENEI MATAUPU FA'AMOLEMOLE IA FA'AFESO'OTAI'I LOA LE OFISA O LE **TENANCY SERVICES 0800 836 262**.

Rehearings:

You may make an application to the Tenancy Tribunal for a rehearing. Such an application must be made within five working days of the order and must be lodged at the Court where the dispute was heard.

The **only** ground for a rehearing of an application is that a substantial wrong or miscarriage of justice has or may have occurred or is likely to occur. Being unhappy or dissatisfied with the decision is not a ground for a rehearing. (See 'Right of Appeal' below).

Right of Appeal:

If you are dissatisfied with the decision of the Tenancy Tribunal, you may appeal to the District Court. You only have 10 working days after the date of the decision to lodge a notice of appeal.

However, you may **not** appeal to the District Court:

1. Against an interim order made by the Tribunal.
2. Against an order, or the failure to make an order, for the payment of money where the amount that would be in dispute on appeal is less than \$1,000.
3. Against a work order, or the failure to make a work order, where the value of the work that would be in dispute on appeal is less than \$1,000.

There is a \$200.00 filing fee payable at the time of filing the appeal.

Enforcement:

Where the Tribunal made an order that needs to be enforced then the party seeking enforcement should contact the Collections Office of the District Court on **0800 233 222** or go to www.justice.govt.nz/fines/civil-debt for forms and information.

Notice to a party ordered to pay money or vacate premises, etc:

Failure to comply with any order may result in substantial additional costs for enforcement. It may also involve being ordered to appear in the District Court for an examination of your means or seizure of your property.