[2019] NZTT Rotorua 4203973

TENANCY TRIBUNAL AT Rotorua

APPLICANT: Michaela Rektorysova

Tenant

RESPONDENT: Karl Christensen, Cindy Christensen

Landlord

TENANCY ADDRESS: 12 Iles Road, Lynmore, Rotorua 3010

ORDER

1. Karl Christensen and Cindy Christensen must pay Michaela Rektorysova $2,170.44 immediately, calculated as shown in table below:

Description	Landlord	Tenant
Exemplary damages: bond		$750.00
Exemplary damages: unlawful entry		$500.00
Compensation: garage		$100.00
Compensation: electricity charges		$50.00
Compensation: short notice period		$750.00
Filing fee reimbursement		$20.44
Total payable by Landlord to Tenant		**$2,170.44**

Reasons:

1. Ms Rektorysova ("the tenant") has applied for compensation and exemplary damages against Mr and Mrs Christensen ("the landlords"). Both parties attended the hearing; Mr Christensen represented the landlords.
2. The tenant called two witnesses to support her evidence. She and her witnesses gave clear and credible evidence and, where evidence is disputed, I prefer theirs to Mr Christensen's.

Was there a residential tenancy?

3. The tenancy lasted from 18 January 2019 to 4 August. The landlords say the Residential Tenancies Act 1986 does not apply as the tenant was a 'flatmate'.

4. The house has a kitchen, living area, two bathrooms and toilets, five bedrooms and a separate garage. Four tenants lived there, each occupying a bedroom. They had shared use of common areas and facilities. One of the tenants left partway through the tenancy and was replaced by another tenant.

5. Only one of the tenants had a written agreement, which was described as a "Flat/house sharing agreement". The tenant says the landlords refused to provide her with a written agreement.

6. The following definitions in s 2 RTA are relevant:

> ***residential premises*** means any premises used or intended for occupation by any person as a place of residence, whether or not the occupation or intended occupation for residential purposes is or would be unlawful
>
> ***tenancy***, in relation to any residential premises, means the right to occupy the premises (whether exclusively or otherwise) in consideration for rent; and includes any tenancy of residential premises implied or created by any enactment; and, where appropriate, also includes a former tenancy
>
> ***tenancy agreement***, in relation to any residential premises, means any express or implied agreement under which any person, for rent, grants or agrees to grant to any other person a tenancy of the premises; and, where appropriate, includes a former tenancy agreement and any variation of a tenancy agreement

7. There is no doubt that the premises are residential and that the tenant had the right to occupy her room and the common areas in return for rent. Because of the number of rooms and occupants, it was not a boarding house (s 66B RTA).

8. The next question is whether the tenancy is excluded from the Act by s 5 RTA. Section 5(1)(n) provides that the Act does not apply:

> 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 or by any member of the landlord's or owner's family

9. Mr Christensen says he originally intended to live in the fifth bedroom when working in Rotorua, but he says he did not do so out of consideration for the female occupants. He says all the tenants agreed to a flatmate arrangement, and only one of them asked for a written agreement. He says he and his wife paid for all the outgoings.

10. Because neither of the landlords lived at the premises, it was not used as their principal place of residence, and the RTA was not excluded under s 5(1)(n).

11. One of the tenant's witnesses gave evidence that she answered a 'flatmate wanted' advertisement. She assumed it had been placed by the other occupants and was surprised to discover the landlords had placed the advertisement. She asked for a tenancy agreement but had to reluctantly accept a flatmate agreement.

12. There is absolutely no doubt that this was not a flatmate situation: the landlords were instead renting their house room by room.

13. Landlords cannot contract out of the Act (s 11 RTA), and it is unlawful to enter into any agreement that contravenes or evades any provisions of the Act (s 137 RTA). Therefore, the purported flatmate agreements (both written and oral) were of no effect. The landlords have previously been before the Tribunal facing allegations of unlawful conduct (*Kelly v Christensen* [2017] NZTT, 4090335, Rotorua), and it is likely that the flatmate arrangement they tried to impose on the tenants was intended to circumvent the RTA.

14. Landlords are required to provide a written tenancy agreement before the start of the tenancy (s 13 RTA). The fact that the tenancy agreement is not in writing does not make it unenforceable (s 13C RTA). The failure to provide a tenancy agreement involves an element of unlawfulness, as it means the tenant was not given an insulation statement.

Did the landlords fail to lodge the bond?

15. The tenant paid a bond of two weeks' rent. The landlords did not give a receipt for the bond and failed to lodge it. They returned it to the tenant about one week after her tenancy ended.

16. A landlord must give a receipt for the bond showing the address it relates to, the amount and nature of the payment, the date of payment and the name of the person paying the bond. The landlord must also send any bond payment to the Bond Centre within 23 working days after the payment is received (s 19(1) RTA).

17. Breaching either of these obligations is an unlawful act for which the Tribunal may award exemplary damages up to a maximum of $1,000.00 (s 19(2) and Schedule 1A RTA). Where a party has committed an unlawful act intentionally, the Tribunal may award exemplary damages where it is satisfied it would be just to do so, having regard to the party's intent, the effect of the unlawful act, the interests of the other party, and the public interest (s 109(3) RTA).

18. The landlords' decision to not lodge the bond was deliberate. This was not a case where they innocently misunderstood whether the RTA applied. As I have already noted, it is likely they were intentionally trying to circumvent the Act.

19. The landlords were aware of their obligations under the RTA. In *Kelly v Christensen* they were ordered to pay exemplary damages for late lodgement of the bond.

20. Although the landlords returned the bond shortly after the tenancy ended, when the tenant vacated she did not know whether her bond would be returned. This would have caused her some anxiety.

21. The maximum award of exemplary damages is reserved the most serious, repeat breaches. Normally with a first breach the Tribunal will award about one-third of the maximum. This will increase for further breaches, depending on the surrounding circumstances.

22. There are two separate elements to the breach, and this is the second time the landlords have failed to meet their obligations. Because of the aggravating factors I have awarded exemplary damages of $750.00.

Unlawful entry

23. The tenant says there were several occasions when the landlord failed to give sufficient, or any notice, of entry. Sometimes all the tenants received notice, sometimes only one of them did.

24. A landlord may not enter the premises during the tenancy except with the tenant's consent, in an emergency, or after giving the required notice for inspections or repairs and maintenance (48 hours for inspection and 24 hours for repairs: s 48(1) and (2) RTA). Breaching this obligation is an unlawful act for which exemplary damages may be awarded up to a maximum of $1,000.00 (s 48 (4)(a) and Schedule 1A RTA). Because the tenants all had separate tenancies they were all entitled to notice (s 136(4) RTA).

25. On 20 February the landlords sent the tenants a text message asking them not to dry their clothes inside. The tenant says they could not have known about the washing by looking into the house from the outside, so someone must have been unlawfully inside the house. Her evidence is confirmed by her two witnesses; therefore I find that one or both of the landlords entered the house without notice.

26. During the first two months of the tenancy the tenants discovered a car belonging to the landlords in the (separate) garage. The landlords say the garage was for the shared use of both the landlords and tenants. However, there is no evidence of any contractual term to that effect. The landlords told the tenant in a text message dated 27 January *"There is a garage key for you all to use keep [i]t somewhere central".* The text message implies that the garage was for the shared use of the tenants and makes no mention of the landlords also using it.

27. I find that the landlords unlawfully entered the garage, and also breached the tenant's right to quiet enjoyment by taking up space in the garage for the exclusive use of the tenants.

28. On 29 April at 2:39pm the tenants were given notice that the electrician would be at the house at 8:30am the following morning (18 hours). The tenant was concerned that the electrician would be there without anyone being home, and that he was given the access code to enter the house and could enter at any time.

29. The tenant claims that on 4 July the electrician went to the house twice without notice. On the first occasion, a tenant who was home says she was "quite panicked" and had to hurriedly dress. The repair invoice shows two labour charges for that day; however that could be for two electricians attending at the same time. Therefore, there is insufficient evidence of a second entry.

30. The tenant says Mr Christensen entered the house without notice while one of the other tenants was still in occupation. This happened after she vacated, so is not relevant to her claim.

31. The landlords say it was difficult to arrange for tradesman. I accept there can be practical issues with giving 24 hours' notice for tradesmen. However, the legal requirement is clear; and there was no excuse for not giving notice on 4 July. Because the incident with the electrician on that day did not directly affect the tenant, I have not considered compensation or exemplary damages in that instance.

32. There were two occasions where the landlords entered without consent, once into the house and once into the garage. They are separate incidents and entering the house was the more serious of the two. I have awarded $350.00 for the house incident and $150.00 for the garage, totalling $500.00.

33. I have also awarded the tenant compensation of $100.00 for partial loss of use of the garage.

Breach of quiet enjoyment

34. The tenant says the landlords tried to charge them for extra electricity costs. On 26 June the landlords sent a text saying that their power bill was $389 and that their rent only covered power to $300.00. They were asked to pay an additional $20.00 each.

35. Because the four tenancies were separate, power usage could not be exclusively attributed in any particular proportion to any particular tenant. Therefore the tenants could not be required to pay any of the outgoings (s 39 RTA).

36. Asking the tenants to pay extra money they were not required to pay breached several provisions of the RTA: s 39, their right to reasonable peace comfort or privacy under s 38(2), and probably also s 137 RTA. The tenants did not make the extra payment, so there was no financial loss. However, a small award of $50.00 is appropriate for the stress caused, which is equivalent to 2 days' rent.

Inadequate notice

37. On 21 July the landlords sent a text message to say they were selling the house and would most likely list the house in two weeks' time when two of the flatmates had moved out. The tenant said she would move out after receiving 42 days' notice. The landlords replied that she would have to be out before then, suggesting 1 month from that date. When the tenant insisted on receiving 42 days' notice the landlords replied:

> Actually as a flatmate we only have to give you two weeks' notice shall we make it two weeks and we will be moving in as well after the others have moved. Thanks.

38. The tenant moved out on 4 August. On 20 August the property was listed on Trademe to rent.

39. In most cases a landlord must give the tenant at least 90 days' notice to end the tenancy (s 51(1)(d) RTA). Landlords can give a shorter 42-day notice where they have an unconditional sale agreement for the property, or where the premises are required for a family member (s 51(1)(a) and (c) RTA).

40. The tenant says that, when she asked Mr Christensen what would happen if she did not move out, she was told they would move in and this was not something she would want to happen. She says the short notice period and veiled threat was very stressful for her work and medical studies.

41. The landlords provided evidence that they inquired with an agent about selling the house in May 2019. I have no reason to doubt the agent's evidence. However that inquiry did not entitle the landlords to give less than 90 days' notice. Even if they had a genuine intention to move back in, which is doubtful given the subsequent re-listing to rent, they had to give the tenant at least 42 days' notice.

42. The short notice period breached the tenant's rights under s 55 RTA, and her right to quiet enjoyment under s 38(1) RTA. As a starting point, I have calculated compensation based on the two weeks' rent payable for the period she remained at the property after receiving notice. The threat that accompanied the short notice was a serious aggravating feature which breached her right to reasonable peace, comfort or privacy under s 38(2) RTA. Because of this I have increased the compensation to $750.00.

Filing fee

43. Because the tenant has largely succeeded with her claim I have reimbursed the filing fee.

J Smith
01 October 2019

Please read carefully:

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

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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.