TENANCY TRIBUNAL AT Rotorua

APPLICANT: Kieran Grant Carter

Tenant

RESPONDENT: Russell Hardie Limited

Landlord

TENANCY ADDRESS: 8 Gordon Road, Western Heights, Rotorua 3015

ORDER

1. Russell Hardie Limited is to pay Kieran Grant Carter $556.00 as calculated in the table below:

Description	**Landlord**	**Tenant**
Rent arrears to 10/06/20	$244.00	
Exemplary damages: retaliatory notice		$800.00
Total award	**$244.00**	**$800.00**
Net award		$556.00
Total payable by Landlord to Tenant		**$556.00**

2. All other claims are dismissed.

Reasons:

1. Both parties attended the hearing. I authorised Mr Carter's partner, Ms Hine, to represent him at the hearing. I accepted that he lacked the confidence to effectively represent himself, although he did give evidence at the first hearing.
2. Mrs Russell represented the landlord. I have referred to her and the company interchangeably as "the landlord" depending on the context. I have referred to Mr Carter as "the tenant".
3. The matter was first heard on 11 March 2020. The hearing could not be completed because of a security lockdown. The adjourned hearing was delayed until 10 June because of the COVID-19 lockdown.

4. The tenant claims compensation and exemplary damages for numerous alleged breaches of the Residential Tenancies Act 1986. He also applied for a market rent assessment and to set aside a termination notice as retaliatory.

The landlord's claim

5. The landlord has applied for termination, possession and rent arrears. The grounds for termination and possession under the Residential Tenancies Act 1986 ("RTA"), have been amended by the COVID-19 Response (Urgent Management Measures) Legislation Act 2020 ("the COVID-19 Amendment"). The COVID-19 Amendment added a new s 145 to the RTA, which inserts a new Schedule 5. Schedule 5 sets out the circumstances in which a tenancy can be terminated during the period the COVID-19 Amendment applies.

6. The practical effect of the COVID-19 Amendment is that the 90-day termination notice served on the tenant is of no effect (clause 9, Schedule 5), and the Tribunal cannot hear a claim for termination under s 56 RTA (clause 4, Schedule 5). The landlord is therefore limited to claiming rent arrears.

7. The landlord provided records proving the amount of rent owing to the end of the rent week, an entrenched figure of $244.00 that has been owing for several months. The tenant's claim relating to the landlord's record-keeping will be addressed as part of his application.

Tenant's claim:

8. The tenant claims: compensation of $13,400.00, exemplary damages for six alleged unlawful acts (discrimination, exceeding market rent, harassment, failure to keep records, unlawful entry, and retaliatory notice) a reduction in rent to market rent, and an order setting aside a termination notice.

Was the termination notice retaliatory?

9. On 21 January the landlord served a termination notice on the tenant for the tenancy to end on 24 April 2020.

10. For a termination notice to be declared retaliatory, the tenant must prove that in terminating the tenancy, the landlord was motivated wholly or partly by the tenant exercising a right under the tenancy agreement or any enactment, or by any complaint against the landlord relating to the tenancy (s 54(1) RTA).

11. Giving a termination notice which is declared to be retaliatory is an unlawful act for which exemplary damages may be awarded, up to a maximum of $4,000.00 (s 54(2), (3) 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).

12. Landlords seldom, if ever, admit to giving a retaliatory notice. Therefore, claims of this kind usually rely on inferences that can be drawn from the timing and sequence of events:

    a. Between 31 May and 8 October 2019 the landlord sent the tenant three 14-day notices, two about cleaning and one about a small amount of rent arrears (the format of the notice is confusing, but it appears that the amount owing to the end of the rent period was about $224.00).

    b. In early December 2019 the owners received an anonymous letter from a neighbour regarding maintenance of the exterior, police callouts and altercations between the occupants.

    c. On 16 December the landlord sent a 14-day notice about lawns.

    d. On 7 January 2020 the landlord sent the tenant a notice for a property inspection on 21 January.

    e. On 21 January the tenant would not allow entry as he said he had not received the notice. A verbal agreement was made to reschedule the inspection for 23 January.

    f. The landlord sent the owner an email about the incident. The landlord referred to rent arrears, a leaking water main, and the lawns and said *"I am a little unsure about leaving him in place, given the new reforms which are coming out this year".* The landlord said she would report back with a recommendation after a re-scheduled inspection and said they should seriously consider a 90-day notice.

    g. On 23 January at 11:14am Ms Hine sent the landlord an email expressing concern about the 'unannounced' visit on 21 January. She claimed the visit breached the RTA and complained about the landlord's *"rude and abrupt"* behaviour. She said it was an abuse of power for the landlord to refer to the housing shortage and that the tenant would find himself in a *"sticky situation"* if things were not compliant following the inspection. She objected to the rent increase and said a Tribunal application would be filed and the media contacted. She said any inspection would have to be the following week after written notice.

    h. The landlord replied at 3:17pm that, as Ms Hine was not a tenant, she could not discuss the tenancy. She said that, due to the *"threatening nature"* of the email she would cancel the inspection, and email notice of a further inspection date.

    i. Ms Hine replied that she had the tenant's permission to email on his behalf. She repeated the need for 48 hours' written notice. She said she did not want to *"go to war"* with the landlord but wanted their rights adhered to.

    j. The landlord spoke with the owner about the email. She said she was *"too intimidated"* to inspect that day. There was a discussion about rent

arrears, lawns, the neighbour's letter and renovations. The landlord's file note records *"On top of my safety, he instructed to issue the 90 day notice".*

k. On 23 January at 3:31pm, the landlord sent the tenant a 90-day termination notice.

13. In an email dated 3 March 2020 the owners said that for some time they have intended to renovate the house. They referred to the December letter, access issues, upkeep of the property, and rent arrears.

14. For a termination notice to be retaliatory it only needs to be 'partially' motivated by the tenant exercising their rights. The landlord says the owners want to renovate. However, I am satisfied that this was not the sole reason for the notice. At the first hearing the landlord said that, had the tenant allowed her back and the house been tidy, the outcome may have been different. The obvious inference from this is that Ms Hine's email of 23 January was a material factor in notice being given before the inspection. In that email she asserted their right to written notice and objected to comments the landlord made on 21 February. Therefore, the notice was at least partly in response to a complaint the tenant made against the landlord in relation to the tenancy (s 54(1) RTA).

15. The next issue is whether the complaint was sufficiently frivolous or vexatious as to justify the giving of notice (s 54(2) RTA). There were two main issues in the email, the request for a written 48-hour notice and the reference to a shortage of housing.

16. In relation to the first issue, the landlord said she would re-schedule the inspection. Although the tenant's request for a written notice was arguably unnecessary, as he had already verbally agreed to the new inspection date, equally it was not so frivolous or vexatious as to justify a termination notice. The situation was readily resolvable without going taking that step.

17. The second issue relates to comments the landlord made to the tenant on 21 January. The landlord accepts that she spoke to him about the shortage of rental properties and said that landlords were terminating tenancies where tenants were not meeting their obligations. Those comments could be viewed differently depending on perspective and context. The landlord may have thought her remarks were a reflection of market reality. However, for someone in the tenant's position, they could be seen as carrying an implicit threat to his security of tenure. As the conversation occurred in the context of the tenant not allowing entry due to his belief he had not received notice, his concern was understandable.

18. The landlord has described Ms Hine's email as threatening. However, I do not accept that the email contained any express or implied threat to her safety. It was a request that their rights be respected, although expressed in an extravagant way. Therefore, I find that Ms Hine's correspondence did not justify the termination notice.

19. Because the notice is invalid due to the COVID-19 Amendment, it is not necessary to order that is of no effect. However, an award of exemplary damages is appropriate. Because the tenant's complaint was only part of the reason for the notice, the breach was at the low end of the scale. I have therefore awarded 20% of the maximum: $800.00.

Does the rent exceed market rent by a substantial amount?

20. The tenancy started on 29 March 2018. Rent was $420.00 per week.

21. On 6 March 2019 the landlord sent a rent increase notice increasing rent to $450.00 from 16 May 2019. On 24 September the landlord sent a notice increasing the rent to $490.00 per week from 28 November 2019.

22. *Substantial amount:* Section 25 RTA provides that the Tribunal may order that rent be reduced to market rent where the rent payable exceeds market rent by a *"substantial amount"*.

23. The term 'substantial' is not defined in the RTA. Some of the older Tribunal cases have suggested a 'rule of thumb' of 10% over market rent. In my view that is not a helpful guideline. Where rents increase at a rate above inflation, rent will eventually assume a greater proportion of household incomes. This will in turn reduce the availability of income for other household expenditure. In these circumstances, it is arguable that even a relatively modest increase over market rent could have a substantial effect.

24. *Market rent:* Market rent is defined as the amount *"a willing landlord might reasonably expect to receive and a willing tenant might reasonably expect to pay for the tenancy, taking into consideration the general level of rents … for comparable tenancies of comparable premises in the locality or in similar localities and such other matters as the Tribunal considers relevant."*

25. The concept of 'market' rent is not completely unfettered. It is constrained by the requirement that both parties be 'willing', and that the rent meets their 'reasonable' expectations.

26. *Willing:* The term 'willing' is not defined in the RTA. Relevant dictionary definitions include *"having a ready will; disposed to consent or comply; ready to do (what is specified or implied) without reluctance"* (Oxford English), and *"done, borne or accepted by choice without reluctance ... of or relating to the will or power of choice"* (Merriam Webster). Both dictionary definitions imply a readiness to do something without reluctance.

27. *Reasonable:* This term is also not defined either. Dictionary definitions include *"having sound judgement; sensible ... not asking for too much ... not extravagant or excessive; moderate"* (Oxford English), and *"not extreme or excessive ... moderate, fair"* (Merriam-Webster).

28. The Tribunal must have regard to (1) the general level of rent for comparable tenancies in the same or similar localities and (2) any other matter it considers relevant.

29. *Comparable rents:* This usually involves comparing the premises to advertisements for similar premises in the locality. This approach has its limitations: although advertisements usually list the essential features of the property advertised (e.g. number of bedrooms, living rooms, bathrooms, garage etc.), there is often limited information to compare the relative quality and condition of the premises.

30. In addition, the fact that a property is advertised at a particular rent does not necessarily mean the asking rent is 'market rent', even where a tenant signs an agreement to take the property for that amount. Section 25 RTA refers to the *"rent payable or to become payable"* exceeding market rent. So, a tenant could theoretically agree to pay an excessive rent, and then apply to reduce it in line with market rent.

31. *Tenancy Services statistics:* It is also common for parties to refer to the 'market rent' statistics published by Tenancy Services. The landlord believes the Tenancy Services statistics effectively set market rent. In my view this is not correct; and this information has its limitations. Rents can vary within the broad areas listed, and it can be difficult to determine where a property sits in relation the other properties covered by the statistics (although they do include 'median' as well as 'lower quartile' and 'upper quartile' rents).

32. There is also a potential problem if rents are fixed primarily by reference to the Tenancy Services market rent statistics, as this has the potential to create a 'positive feedback loop' in which landlords increase rents in response to what other landlords are doing without reference to what is objectively reasonable.

33. *Other relevant matters:* The Tribunal may also consider *"such other matters as [it] considers relevant"* to market rent. There is very little case law about what can be considered. In *Housing New Zealand v Hobman* (DC Lower Hutt, TT89/97, 27 November 1997) the Court said the phrase must be considered *"ejusdem generis"* with the words that precede it, i.e., additional factors must be similar to the previously listed factors relating to market rent. In that case the Court found that the phrase did not allow the Tribunal to take into consideration the tenant's personal circumstances (especially as this is specifically prohibited).

34. It is arguable that the phrase is intended to cover any anything relevant to the reasonable expectations of a willing landlord or tenant. This could include factors such as a reasonable return on investment, and the rate of increase in relation to the consumer price index. A 'proper return' on investment was a factor that Rent Appeal Boards could consider when setting an 'equitable rent' under the Rent Appeal Act 1973 (a predecessor of the RTA). Although that wording was not carried over to s 25 RTA, it arguably relevant to reasonable expectations.

35. *Applying the principles to the evidence:* The tenant provided minimal supporting evidence at the first hearing. Between the two hearings evidence was provided on the tenant's behalf that the median rent for 4-bedroom rentals was $560.00 in February 2020.

36. At the first hearing the landlord provided statistics for 4-bedroom houses:

    a. May to October 2019: Holdens Bay/Owhata $621.00, Kuirau/Hillcrest/Glenholme $595.00, Ngongotaha/Koutu/Pleasant Heights $522.00, Pukehangi/South Springfield $570.00

    b. July to December 2019: $632.00, $515.00, $550.00, $560.00.

37. For the second hearing the landlord provided comparative rent information for two properties it manages:

    a. Steeles Lane, Western Heights: capital value $266,000.00, land area 1,011m^2, house 126m^2, 3 bedrooms and second lounge used as 4th bedroom, 1 bathroom, 2 car spaces, average condition, weekly rent $540.00.

    b. Ngongotaha Road: capital value $340,000.00, 4 bedrooms, good condition, land area 631m^2, house 132m^2, weekly rent $530.00.

38. The details for the property in this case are: capital value $293,000.00, land area 1,092m^2, house 100m^2, 4 bedrooms, 1 bathroom, 1 car space, roof and exterior average condition.

39. The evidence provided by both landlord and tenant points to the conclusion that the rent increase is broadly in line with rents for other 4-bedroom houses.

40. The possible arguments to the contrary are that (1) the gross return on capital of 8.7% may be excessive in the current market and (2) the percentage increase of 16.7% over the relevant period substantially exceeds housing inflation of 5.9% for a similar period (www.rbnz.govt.nz/monetary-policy/inflation-calculator).

41. If the return on investment and rate of increase is found to objectively excessive, then the question is whether this can support a finding that the rent exceeds market rent even where there is evidence that it is in line with other rents in the locality. In *Residential Tenancies: The Law and Practice* (David Grinlinton 4th Ed) the author states:

> It is not the Tribunal's function to set standards for the community. If rents in a locality are generally high, then it seems that they will still be the main basis for the determination of market rent, no matter how much hardship is imposed on the tenant/applicant and no matter how much hardship those high rents impose on other tenants in the locality.

42. Grinlinton does not cite any authority for this proposition, and does not discuss in any detail what other 'relevant matters' could be considered in determining reasonable expectation.

43. A cumulative rent increase of 16.7% could potentially create hardship. The return on capital may also be excessive. The landlord argues that it would be unfair if the landlord could not charge a similar rent to the rents charged by other landlords for similar properties. However, fairness, as it relates to the issue of reasonableness, applies to both landlords and tenants.

44. The burden of proof is on the tenant to prove the claim on the balance of probabilities. Market rent claims are often difficult for tenants to establish due to the lack of quality evidence. Here there is evidence that the rent charged is broadly in line with other rents for similar properties and, although there may be a theoretical argument to the contrary, the tenant has not provided persuasive evidence that the rent increase exceeds market rent by a substantial amount. Therefore, the claim is dismissed.

Did the landlord discriminate against the tenant?

45. A landlord must not discriminate against a tenant in relation to the grant, renewal, variation or termination of a tenancy, in contravention of the Human Rights Act 1999 (s 12(1) and 109(3) RTA). Section 21 of the HRA specifies the prohibited grounds of discrimination, which include sex, marital status, religious or ethical belief, race or ethnicity, disability, age, political opinion, employment status, family status, and sexual orientation.

46. Breaching this obligation is an unlawful act for which the Tribunal may award exemplary damages up to a maximum of $4,000.00 (s 12(1) and Schedule 1A RTA).

47. The claim relates to a comment the landlord made to the owner about the tenant's rent arrears in the email of 21 January. The landlord said the tenant *"fobbed off"* arrears to WINZ, whilst also claiming to be working six days a week. While the tenant may feel disparaged by this remark, there is no obvious connection between the landlord's comment about his employment status and the decision to terminate the tenancy. The claim is not proved.

Did the landlord harass the tenant?

48. A landlord must not interfere with the reasonable peace, comfort or privacy of the tenant in their use of the premises (s 38(2) RTA). Breaching this obligation in circumstances that amount to harassment is an unlawful act for which exemplary damages may be awarded up to a maximum of $2,000.00 (s 38(3) and Schedule 1A RTA).

49. Harassment means *"to trouble, worry or distress"* or *"to wear out, tire, or exhaust"* and *"indicates a particular pattern of behaviour directed towards another person"*. *MacDonald v Dodds,* CIV-2009-019-001524, DC Hamilton, 26 February 2010.

50. The landlord has served several notices on the tenant about cleaning, rent arrears and the lawns. The landlord has also made a couple of unannounced visits to the property. Landlords are entitled to contact their tenants about rent

arrears and other breaches. This can involve serving notices, phoning them, or speaking to them face to face. It is only if the nature or frequency of the contact is objectionable or excessive that harassment can arise.

51. Except for the incident discussed in relation to retaliatory notice, there is nothing objectionable about the landlord's contact with the tenant. The events of 21 January have already been considered in relation to the retaliatory notice, and that sufficiently deals with the issue. Therefore the claim is dismissed.

Did the landlord enter the premises unlawfully?

52. 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 and repairs and maintenance (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).

53. The tenant's complaint relates to the landlord coming onto the property without notice, rather than entering the house itself. The restriction in s 48 does not prevent a landlord from coming onto the property and knocking at the front door to speak with the tenant: into only prevents entry into buildings on the property. There is no allegation of entry into the premises; therefore the claim is dismissed.

Did the landlord fail to keep records?

54. A landlord must keep proper business records showing details of all rent payments and any bond paid by the tenant (s 30(1) RTA). Breaching this obligation is an unlawful act for which the Tribunal may award exemplary damages up to a maximum of $200.00 (s 30(2) and Schedule 1A RTA).

55. The tenant provided bank records allegedly inconsistent with the landlord's rent summary. However, a comparison of the records showed they are consistent. As there is no evidence of any payments not being recorded in the rent summary, the claim is dismissed.

Filing fee

56. As both parties were only partially successful with their claims, I have not reimbursed either filing fee.

THE SEAL OF THE TENANCY TRIBUNAL

J Smith
10 June 2020

Please read carefully:

Visit justice.govt.nz/tribunals/tenancy/rehearings-appeals for more information on rehearings and appeals.

Rehearings

You can apply for a rehearing if you believe that a substantial wrong or miscarriage of justice has happened. For example:

- you did not get the letter telling you the date of the hearing, **or**
- the adjudicator improperly admitted or rejected evidence, **or**
- new evidence, relating to the original application, has become available.

You must give reasons and evidence to support your application for a rehearing.
A rehearing will not be granted just because you disagree with the decision.
You must apply within five working days of the decision using the Application for Rehearing form: justice.govt.nz/assets/Documents/Forms/TT-Application-for-rehearing.pdf

Right of Appeal

Both the landlord and the tenant can file an appeal. You should file your appeal at the District Court where the original hearing took place. The cost for an appeal is $200. You must apply within 10 working days after the decision is issued using this Appeal to the District Court form: justice.govt.nz/tribunals/tenancy/rehearings-appeals

Grounds for an appeal

You can appeal if you think the decision was wrong, but not because you don't like the decision. For some cases, there'll be no right to appeal. For example, you can't appeal:

- against an interim order
- a final order for the payment of less than $1000
- a final order to undertake work worth less than $1000.

Enforcement

Where the Tribunal made an order about money or property this is called a **civil debt**. The Ministry of Justice Collections Team can assist with enforcing civil debt. You can contact the collections team on **0800 233 222** or go to 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.

If you require further help or information regarding this matter, visit tenancy.govt.nz/disputes/enforcing-decisions or phone Tenancy Services on 0800 836 262.

Mēna ka hiahia koe ki ētahi atu awhina, kōrero ranei mo tēnei take, haere ki tenei ipurangi tenancy.govt.nz/disputes/enforcing-decisions, waea atu ki Ratonga Takirua ma runga 0800 836 262 ranei.

A manaomia nisi faamatalaga poo se fesoasoani, e uiga i lau mataupu, asiasi ifo le matou aupega tafailagi: tenancy.govt.nz/disputes/enforcing-decisions, pe fesootai mai le Tenancy Services i le numera 0800 836 262.