

Order of the Tenancy Tribunal

Residential Tenancies Act 1986

Office of the Tenancy Tribunal

Tenancy Tribunal at Manukau**Tenancy Address**

740 Whitford-maraetai Road, RD 1, Howick 2571

Applicant

Full Name

Stuart Anthony Fitzpatrick

Tenant

Natasha Sandra Fitzpatrick

Tenant

Respondents

Full Name

Trustees Executors Ltd

Agent

Order of the Tribunal

The Tribunal hereby orders:

1. By Way of Declaration:

The 42 day notice dated 31 January 2018 is invalid and of no effect.

(Section 78(1)(a) Residential Tenancies Act 1986)

2. Trustees Executors Ltd (Agent) to pay Stuart Fitzpatrick and Natasha Fitzpatrick the sum of \$1,170.44 immediately calculated as follows:

Costs to be paid to Tenant:

Compensation for invalid notice	\$1,150.00
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Filing fee reimbursement	\$20.44
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Amount payable by Landlord to Tenant	\$1,170.44
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(Sections 78(1)(d) and 102 Residential Tenancies Act 1986)

Reasons:

1. Mr Fitzpatrick seeks an order that the 42 day notice to terminate the tenancy is a retaliatory notice and of no effect.
 2. Mr Fitzpatrick appeared for the tenants. Ms Baker appeared for the landlord. Mrs Riddick was called as a witness for the landlord.
 3. The tenancy commenced on 18 March 2015. The landlord is Trustees Executors Limited. Trustees Executors Limited is the owner of the property, as trustee for A E Robertson Trust. The tenancy agreement did not include the downstairs flat. There was a verbal agreement between Mrs Robertson's daughter, Mrs Riddick, and the tenants, that she could occasionally stay in the flat when she came over from Australia to see her mother.
 4. Mrs Riddick lived in Australia until March 2018. She would visit her mother once or twice a year, and stay with at her rest home. However, on her recent visit, in January 2018, she chose to stay in the flat at the property for 9 days, from 12 to 21 January 2018. This was of concern to the tenants as they felt it was a breach of their quiet enjoyment of the premises. They felt as though they were under surveillance by Mrs Riddick while she occupied part of the house, and had no quiet enjoyment of the property while she was living there. Mr Fitzpatrick raised the matter with the landlord, who eventually advised Mrs Riddick that she would have to leave the premises. The landlord was unaware of the verbal agreement between the parties that Mrs Riddick could stay at the property on occasion, and bring her mother out to the property when she visited.
 5. The tenants were emailed a 42 day notice dated 31 January 2018, to terminate the tenancy on 14 March 2018, on the ground that Mrs Riddick, as beneficiary under the trust, required the premises as her principal place of residence. The tenants had not provided email as an address for service in the tenancy agreement, and in any event the notice was emailed to an old address and not received by Mr Fitzpatrick. It was finally emailed to the tenants on 14 February 2018. The notice was also posted to the tenants.
 6. Section 54 of the Residential Tenancies Act 1986, (RTA), provides:

“(1) Within 28 working days after receipt of a notice terminating the tenancy, being a notice that complies with the requirements of section 51, the tenant may apply to the Tribunal for an order declaring that the notice is of no effect on the ground that, in giving the notice, the landlord was motivated wholly or partly by the exercise or proposed exercise by the exercise or proposed by the tenant agreement or by this or any other Act or any complaint by the tenant against the landlord relating to the tenancy.

(2) If, on any such application, the Tribunal is satisfied that the landlord was so motivated in giving the notice, it shall declare the notice to be of no effect ...”.
 7. Section 51(RTA provides minimum periods for the termination of a tenancy:

(1)(a) “where the owner of the premises requires the premises as the principal place of residence for the owner or any member of that owner's family, 42 days”
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8. Does the notice comply with the requirements of section 51 RTA?

For the following reasons I find the 42 day notice served on the tenants does not comply with the requirements of section 51 RTA, and is an invalid and unlawful notice:

(a) There is no ability for a company or trust to give notice pursuant to section 51(1)(a) to terminate a tenancy, as a trust or a company cannot occupy the premises as its principal place of residence, and neither can they have family members who could occupy the premises.

(b) Even if notice could have been given under section 51(1)(a), the notice failed to comply with the time requirements. No email is provided in the tenancy agreement as an address for service. The email notice was only received by the tenants on 14 February 2018, with the tenancy to terminate on 14 March 2018. The notice sent by post failed to provide the additional 4 working days required by section 136 RTA for service by post. The District Court has held that compliance with the notice requirements in section 51 is mandatory not discretionary – Charan v Barfoot and Thompson Limited, DC, CIV 2010 -092-002100. The landlord attempted to retrospectively add on the additional time required. There is no provision for a landlord to do so under the RTA, except with the consent of the tenant or by order of the Tribunal, neither of which were obtained by the landlord.

9. Compensation for wrongful and invalid notice:

The tenants vacated the premises as required by the 42 day notice – a notice that was invalid and unlawful. They have suffered the stress and inconvenience of having to find a new home in a very short period of time. I do not accept the landlord's evidence that they gave the tenants an extension of time to move out and the tenants did not accept it. The email offering the extension was sent to the tenants on the last day of the tenancy. By this date they had organised a new tenancy and the offer was worthless. It is also for the landlord issuing the notice to ensure that it complies with the RTA. It is not for the tenants to bring the matter to the attention of the landlord as suggested by Ms Baker at the hearing.

10. I determine that the tenants should receive compensation of two weeks' rent - the sum of \$1150.00 for the landlord's wrongful termination of their tenancy.

11. Was the 42 day notice retaliatory?

Mr Fitzpatrick claims that the notice was served in retaliation for their attempting to enforce their right of quiet enjoyment.

While strictly the Tribunal is not required to consider the issue of whether the notice was retaliatory, as it is not a valid notice under section 51 as required by section 54, both parties gave evidence in this regard and I have made a decision based on that evidence. I have considered carefully the evidence of Mr Fitzpatrick and Mrs Riddick, and I find that the tenants have failed to establish that the notice was a retaliatory notice. Section 38(2) RTA states that a landlord shall not cause or permit any interference with the reasonable peace, comfort or privacy of the tenant in the use of the premises. I am not satisfied that there was an interference with the tenants' quiet enjoyment of the premises. The parties had an oral agreement that Mrs Riddick could stay at the premises on occasion. While Mrs Riddick stayed at the flat for 9 nights, she was mostly absent from the property during the day, and when she did carry out maintenance at the premises, it was with the consent of the tenants.

12. Even if there were a breach of the tenants' rights under section 38(2) RTA, I am satisfied that Mrs Riddick's genuinely intended to move into the premises, and the notice was not given in retaliation for the tenants

enforcement of their right to quiet enjoyment. Mrs Riddick and her husband have moved from Australia to live in the premises. They moved in to the premises in March 2018. Their home in Australia is rented out on a fixed term tenancy until July 2018. Mrs Riddick's evidence was that they would renew the lease if the tenants wished to continue the tenancy, or otherwise relet it. Her husband is looking for work in Auckland. She intends to carry out renovation work on the premises and then continue to live at the property.

13. I am satisfied that the applicant has been largely successful in the claims brought to the Tribunal and therefore consider it appropriate that the other party pay the applicant the filing fee.