[2018] NZTT Porirua 4139127

TENANCY TRIBUNAL AT Porirua

APPLICANT: Heather Kearns

Tenant

RESPONDENT: Jazmine Lenniston as trustees for the J T Trust

Landlord

TENANCY ADDRESS: 71 Wellington Road, Paekakariki 5034

ORDER

1. The rent for 71 Wellington Road Paekakariki is reduced from $500.00 per week to $420.00 per week.
2. Jazmine Lenniston as trustees for the J T Trust must pay Heather Kearns $1,974.73 immediately, calculated as shown in table below.
3. The Bond Centre is to pay the bond of $825.00 (6145985-003) to Heather Kearns immediately.

Description	**Landlord**	**Tenant**
Compensation: Contribution to firewood cost		$300.00
Compensation: Stress and inconvenience		$500.00
Rent Refund		$1,154.29
Filing fee reimbursement		$20.44
Total award		**$1,974.73**
Bond		$825.00
Total payable by Landlord to Tenant		**$1,974.73**

Reasons:

1. This is a tenant application for compensation, reduction in rent and a declaration that a notice of termination was retaliatory. Although the tenant did not seek to overturn the notice as she has found alternative premises, she seeks exemplary damages.

2. Ms Kearns rented the premises from 5 April 2018. It was a periodic tenancy. The premises consist of a one bedroom house with a sleep out. The rent is $500.00 per week.
3. Ms Kearns experienced a number of difficulties with the premises.

Toilet Cistern

4. From the outset there were problems with the toilet cistern running. She gave evidence that the landlord (whom I shall refer to as Ms Lenniston and who is a trustee of the respondent landlord trust) mentioned that there was a problem, which Ms Lenniston confirmed although she added that she did not think it was much of a problem.
5. Ms Kearns attributed the problem to blocked drains, a problem which she said the previous tenants had experienced. The property has a septic tank. Ms Lenniston says that it was cleaned on 16 March 2018, but it appears from a plumber's invoice dated 6 June 2018 that the tank required emptying again and there was also a blocked pipe.
6. Notwithstanding this, it is unlikely Ms Kearns was correct. Constantly running water in a cistern can usually be traced to a failed seal or valve, and that appears to be the case in this instance. I note that the instructions to Ms Kearns were to turn the inlet tap off at the wall. The plumber's invoice refers to replacing the cistern inlet valve, as a result of which he reported the cistern as operational.
7. I agree that this is a very minor problem. Ms Kearns was concerned that she would be charged for any extra water usage. Ms Lenniston has offered to reduce the tenant's contribution to water rates from $100.000 per quarter to $50.00 per quarter, and I regard that as a satisfactory outcome. Ms Kearns agrees.

Blocked Drains.

8. As already mentioned, there were also problems with blocked drains. Ms Kearns notified a blockage on Friday 25 May. It had not cleared by the following Monday when the plumber attended and cleared the blockage.
9. Maintenance by a landlord is subject to a test of reasonableness. Unless the issue is life threatening, which I consider this issue was not, then the landlord is entitled to a reasonable time to deal with it. I do not regard 3 days, particularly taking into account an intervening weekend, as unreasonable.
10. There was also a problem with water draining from a hand basin. The waste pie was checked on 28 May and found to be operational. It was checked again on 12 June and found to require replacement. It has since been fixed.

Hot Water Cylinder

11. There were also further water issues, this time with the hot water cylinder. Ms Kearns complained that that the bath, which was a spa bath, would only fill a couple of inches before the water ran cold. Ms Lenniston claims that she was not aware of this issue previously, although Ms Kearns says that that is

contradicted by a text. This is reference to a text in which Ms Lenniston acknowledged that the hot water was “tempremamental’ (sic).

12. It appears that Ms Kearns’s brother attempted to adjust the thermostat but only succeeded in tripping a circuit breaker. This was investigated and reset by the plumber on 26 April. Ms Kearns confirmed that she could then have a bath but she still thought the hot water cylinder “dodgy”.
13. Again I do not regard the landlord response as unreasonable.

Heat Pump.

14. The heat pump also malfunctioned. Ms Lenniston say that she was notified on 18 May, and a serviceman was called and attended on 22 May. He advised that a new heat pump was needed. It was installed on 17 June.
15. To exacerbate matters the fireplace malfunctioned. A tradesman’ws invoice notes that a baffle had degraded and the damper had sheared off. He attributed it to normal wear and tear and age.
16. Ms Lenniston offered to contribute $300.00 to cost of firewood used in the interim and again I regard that as reasonable compensation.

Stove

17. On 3 May Ms Kearns notified a problem with the stove. Two elements were not working. Ms Lenniston says that she was only aware of a problem with one. It appears that one of the elements related to the oven. She supplied a replacement two ring burner. The evidence was that the stove is obsolete and replacement parts are not available.

Blinds

18. Ms Kearns also complained that one of the lounge blinds was missing (stored in a shed on property) and the other did not function properly. This was fixed on or about 31 May. She says that it contributed to the issues about heating but I note that the blinds were not listed in the chattels list and there is no obligation to provide blinds.

Retaliatory Notice

19. Ms Kearns has been given notice terminating the tenancy. She claims that it is retaliatory. She has found alternative premises but seeks an order that the notice is of no effect and, on that basis, she seeks exemplary damages.
20. On 31 May Ms Lenniston sent Ms Kearns an email notifying her that there was a lot of work to be done and giving 42 days’ notice. She indicated she would accept 9 days’ notice if Ms Kearns wanted to leave earlier. A requirement to do work is not grounds for a 42-day notice, and the notice was ineffective.
21. On 1 June, she sent a corrected notice, the grounds of which were that the premises were required for the owner or a member of the owner’s family. Ms Kearns objects to the change of reasons, arguing that Ms Lenniston simply wanted to get rid of her and cast about for a reason.

22. Ms Lenniston gave evidence that she would be moving into the premises and those which she was currently occupying (also owned by the Trust) would be taken over by a family member who was returning from overseas. She produced details of the arrangement with the relative, including a tenancy agreement.

23. She also referred to her hours of work in Wellington and the benefit of being closer to Wellington and produced a schedule but I note that the hours indicated by it are 8.15 am to 6.15 pm and the schedule, dated 1 July, is for 9 July to 12 August, a month after the notice was given.

24. The landlord is a trust. In *Wheeler v. Davis* [2000] NZTT 290, the Tribunal held that a family trust is a separate legal entity, like a company, and therefore s.51(1)(a) cannot apply as it cannot have a family or members of a family. In *Campbell & Ors (Scott Campbell Trust) v. Fraser* I expressed the view that *Wheeler* was too broad in its ambit if taken to represent a general proposition, and declined to follow it. I also rejected the analogy drawn with a company.

25. As in *Campbell*, the person seeking to occupy the premises in this case is a trustee – and presumably also a beneficiary - something which distinguishes *Wheeler*. As a trustee, Ms Lenniston is legally (if not beneficially) an owner of the property: her name will appear on the title to the property. On that basis, I am prepared to find that s.51(1)(a) can apply.

26. On the basis that the first notice was not an effective notice, s.51(6) does not apply: an ineffective notice does not need to be revoked. Nor does s.51(7) apply in this case: the landlord was not seeking to amend the notice period.

27. I am nevertheless not satisfied that the notice is valid:
    a. There is the factor of the initial invalid notice and the reasons given, including preparedness to accept shorter notice even though it seems the relative did not return from overseas until 2 July 2018;
    b. Supporting evidence for the tenancy of the other property was an email from the relative dated 2 July 2018, a month after the notice was given;
    c. I attach minimal weight to the employment evidence.

    It may have been something of a Freudian slip but the inference which I draw is that the reason for the notice was that originally given. If the alternative (and valid) ground had been available, it is reasonable to assume that it would have been used from the outset.

28. However, on the basis that it was of no effect, I do not have to consider whether it was retaliatory, and breach of s.51 is not an unlawful act which attracts exemplary damages. It may, however, justify an award of compensation.

29. Even if I am wrong on that point and an invalid notice can be retaliatory, I would not be prepared to find that the notice was actually retaliatory. To do so I would have to find that Ms Lenniston was motivated, in whole or in part, by the exercise by Ms Kearns, of any right or remedy conferred by her. To be

retaliatory, the notice must, at least in part, be a reaction to the exercise of the right or remedy. The evidence is that Ms Lenniston responded appropriately to the notifications from Ms Kearns: she organised tradesmen and repairs. It was the overwhelming accumulation of issues, and the need to address them, that I conclude led to the notice. In this sense, Ms Kearns is a victim of her own success.

Market Rent

30. Ms Kearns also seeks a reduction of rent. To succeed, she must establish that the rent exceeds the market rent by a substantial amount.
31. The premises are a one bedroom house with a sleep out. For comparative purposes, I will treat them as a two-bedroom dwelling. The house was provided largely furnished.
32. Photos produced by Ms Lenniston indicate a dwelling reasonably attractive in appearance, elevated with sea views, and with a reasonably high standard of fitout. However, in assessing a market rental I also need to consider the actual standard of the property and here the complaints of the tenant are relevant, as is the remark of Ms Lenniston in her original notice, that the property needed a lot of work to be done. In short order Ms Lenniston experienced blocked drains and septic tank, a leaking toilet cistern, a blocked hand basin, a defective stove (for which parts are not available), a heat pump that did not work, and a fireplace that was damaged. This is not a case where a picture is worth a thousand words.
33. A landlord is obliged to comply with all requirements in respect of buildings health and safety under any enactment so far as they apply to premises. This imports the Housing Improvement Regulations 1947 and, among other things, these require –
    a. Adequate means of preparing and cooking food, both by boiling and baking;
    b. Every living room to be provided with a fireplace and chimney or other approved form of heating (by implication, in working order);
    c. An adequate drainage system for waste matter connected to an adequate sewage tank or other adequate means of disposal.

    During periods of the tenancy, these requirements were not met.

34. There is a dearth of rental evidence available for Paekakariki. Ms Kearns suggest that the consensus is that a property of this type would attract a rental of $420.00. Ms Lenniston suggests $420 - $470 for a property without a view, and higher for a property with.
35. Rental statistics submitted by Ms Kearns from the Tenancy Services website, and Quotable Value statistics, indicate a median rental for a two-bedroom house in Paraparaumu/Raumati, the nearest residential areas, to be $370.00. For lower quartile, it is $347.00.

36. However, I consider the Paremata/Mana/Pukerua Bay areas to be closer in character to Paekakariki. For Paremata/Mana/Pukerua Bay, the figures are $430 and $392 respectively.
37. I attach limited significance to views, which I consider is taken into account in the higher rentals for the Paremata/ Mana/ Pukerua Bay area. I agree that some allowance should be made for the standard of fitout but against that must be balanced the failings of the property. Balancing those factors, I consider the estimate of $420.00 to be a fair assessment of market rental for these premises.
38. I regard a 20% difference to be a “substantial amount” and grounds for a reduction under s.25 to be made out.

Compensation

39. To this point I have had little to say about compensation. This is because, in assessing compensation, it is a basic principle of damages that a person should not recover twice for the same thing. There is overlap between the remedies sought.
40. For example, Ms Kearns has sought both a reduction for rent for the condition of the property and a review to market rent. In reaching my conclusion on market rent, I have taken into account the condition of the premises, and I do not consider that additional compensation is justified.
41. Water rates and the cost of firewood qualify as special or specific damages, and I allow those sums.
42. While I do not allow exemplary damages, it is clear that Ms Kearns has been put to some stress and inconvenience as a result of the early termination of her tenancy, and I award the sum of $500.00, which I note Ms Lenniston had been prepared to offer anyway by way of settlement.
43. I also award Ms Kearns her application fee.

Bond

44. On the basis that the bond is extant, I order its return to Ms Kearns.

THE SEAL OF THE TENANCY TRIBUNAL

A Henwood
23 July 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.