

TENANCY TRIBUNAL AT Auckland

APPLICANT: The Chief Executive Ministry of Business, Innovation and Employment

RESPONDENT: Peter Russell Wheeler
Landlord

TENANCY ADDRESS: Room 5, 55 Godley Road, Green Bay, Auckland 0604

ORDER

Peter Russell Wheeler must pay The Chief Executive of the Ministry of Business, Innovation & Employment \$220.44 immediately, calculated as shown in the table below.

Description	
Exemplary damages - failure to forward Bond to Bond Centre within 23 working days	\$200.00
Filing fee	\$20.44
Total payable by Respondent to Applicant	\$220.44

Reasons:

1. Both parties attended the hearing.

2. The Chief Executive of the Ministry of Business Innovation and Employment ("the Chief Executive") was represented by counsel, Ms Mohammed. The respondent company was represented by his counsel, Mr McLean.

The application

3. This application relates to a claim that bond monies were not forwarded by the respondent to the Bond Centre as required by section 19(1)(b) Residential Tenancies Act 1986 (RTA).
4. This application was one of 64 applications brought against the respondent by the Chief Executive pursuant to section 124A RTA.
5. These 64 applications were consolidated, for the purposes of the hearing only, pursuant to section 124B(2) RTA (in accordance with an earlier order of the Tribunal).
6. All 64 applications allege a failure by Mr Wheeler (as the landlord) to forward tenants' bond monies to the Bond Centre in accordance with the requirements of section 19(1)(b) RTA.
7. Section 124A RTA permits the Chief Executive to initiate proceedings in the Tribunal, as if the Chief Executive were the tenant, if the Chief Executive is satisfied that it is in the public interest to do so.
8. I am satisfied that this application was properly brought by the Chief Executive in the name of the tenant under section 124A. It was in the public interest for the Chief Executive to initiate these proceedings pursuant to section 124A because:
 - a. There is a risk of undermining public confidence in the administration of the RTA if the conduct of any landlord who repeatedly fails to forward bonds goes without redress by way of orders from this Tribunal;
 - b. The subject tenancy is a boarding house tenancy. Boarding house tenancies often, but not always, involve some of the more vulnerable people in our society;
 - c. There is a clear public interest in ensuring that landlords comply with their statutory obligation to forward any bond monies paid to them to the Bond Centre in accordance with the requirements of section 19 RTA.

9. The relevant parts of Section 19 RTA provide as follows:

(1) Where any person pays to the landlord, or to any other person on behalf of the landlord, any amount by way of bond (whether the amount is for the whole or part of the bond), the following provisions shall apply:

...

(b) the landlord shall, within 23 working days after the payment is made, forward the amount received to the chief executive, together with a statement of particulars in the approved form signed by the landlord and the tenant.

(2) Failure to issue a receipt, or to forward any amount received, in accordance with this section is hereby declared to be an unlawful act.

10. Pursuant to section 66D(1) RTA a bond paid in respect of a boarding house tenancy where the amount of the bond is one week's rent or less need not be lodged with the Bond Centre.

11. In this application, the Chief Executive sought orders: (i) awarding exemplary damages for the landlord's breach of section 19(1)(b) RTA, (ii) that the respondent pay compensation for this breach pursuant to section 77 RTA and (iii) reimbursement of the Tribunal's filing fee, witness expenses and legal costs.

The evidence

12. For the Chief Executive, evidence was given by two Investigation Officers employed by the Ministry of Business, Innovation & Employment, Mr Toft and Mr Schmidt.

13. A copy of the tenancy agreement for the subject tenancy was produced by Mr Toft, along with data obtained by him from the Bond Centre recording the particulars of the bond held for this tenancy.

14. Mr Wheeler gave evidence as did the manager that he employs to assist him with running his boarding house business, Mr Moka.

15. Mr Wheeler owns and operates five boarding houses in two suburbs in West Auckland. He has been in the business of owning and operating boarding houses since 1986. Mr Wheeler is evidently well liked by his tenants and he appears to operate clean, safe and affordable boarding houses.
16. The Tribunal finds that the evidence given during the hearing established that:
 - (i) a bond amounting to more than one weeks' rent was paid for the subject tenancy by the tenant, (ii) this bond money was not forwarded by Mr Wheeler to the Bond Centre within 23 working days as is required by section 19(1)(b) RTA and (iii) the bond was subsequently forwarded to the Bond Centre by Mr Wheeler, but only after the Ministry of Business Innovation & Employment began an investigation concerning Mr Wheeler's failure to lodge bonds.
17. The Chief Executive proved that, by failing to lodge the bond within 23 working days of receipt, Mr Wheeler committed an unlawful act in respect of this tenancy.

Exemplary damages

18. As noted above, section 19(2) RTA provides that a failure to forward to the Bond Centre any bond monies received (as provided for in section 19(1)) is an unlawful act.
19. Section 109 RTA provides that the Tribunal may award exemplary damages where: (i) it is established that a party to a tenancy agreement has committed an unlawful act and (ii) the Tribunal is satisfied that the unlawful act was committed intentionally and an award of exemplary damages would be "just" having regard to those factors listed in section 109(3) RTA.
20. In the context of section 109 RTA, "exemplary damages" are a form of statutory penalty, rather than the ordinary common law meaning of these words (an amount intended solely to punish the defendant for outrageous conduct).
21. Mr McLean submitted that Mr Wheeler's breach of section 19(1) RTA was not intentional because: (i) he believed, based upon what was said to him by an Adjudicator during a Tenancy Tribunal hearing in 2013, that money held by

him as a 'rent credit' beyond one weeks' rent would not have to be sent to the Bond Centre as it was not a bond and (ii) he was not aware of the requirement to lodge bonds but "at some point in time" he became aware of the need to lodge bonds.

22. I do not consider that either argument assists Mr Wheeler.

23. Firstly, it is simply not credible that someone who has been in the business of providing residential rental accommodation in New Zealand since 1986 (the date of assent for the RTA was 17 December 1986) would not know of the need to forward tenant's bond monies to the Bond Centre. In his written statement of evidence Mr Wheeler states that "from about" December 2013 he created a new tenancy agreement that gave the tenant the option of providing a bond that would be sent to the Bond Centre or providing a 'rent credit' that would be held "in trust" by Mr Wheeler. Indeed, viewed in this context, when Mr Wheeler then goes on to state in his evidence that it was only after Mr Moka started working for him in April 2015 that he became aware of the need to forward bonds to the Bond Centre, such evidence becomes obtuse and inconsistent.

24. Secondly, it is not credible that anything that the Adjudicator said in the 2013 case provided Mr Wheeler with any proper basis for his later view that a 'rent credit' amount (being a tenant's money and not being weekly rent) paid to him did not have to be sent to the Bond Centre. Indeed, I consider that Mr Wheeler's own evidence as to the 2013 proceedings is instructive.

25. These earlier proceedings apparently involved a claim by a tenant for the return of her bond after the end of her tenancy. This bond had not been sent to the Bond Centre. Mr Wheeler resisted the tenant's claim for the return of her bond money on the grounds that she owed him three weeks rent and he maintained that there was no bond to be returned to her as it was offset by the rent owed to him. Mr Wheeler states that the Adjudicator asked him if he had received written authority from the tenant to use her bond monies for rent and Mr Wheeler said that he had not. The Tribunal then ordered Mr Wheeler to pay the bond money that he held back to the tenant (I interpolate here that, as Mr Wheeler had not filed his own application setting out his counterclaim, the

Tribunal appears to have done no more than correctly apply section 22B(2) RTA in respect of the tenant's application).

26. There was in my view no reasonable or rational basis for Mr Wheeler (or for any landlord) to take, from what Mr Wheeler says occurred in the 2013 case, that the Tribunal had stated that a payment by a tenant of a 'rent credit', instead of a bond, meant that any tenant's money so paid did not need to be forwarded to the Bond Centre.
27. I consider that it is more probable than not that the 'rent credit' arrangement implemented by Mr Wheeler as an alternative to a bond was, at least in part, a device intended to avoid the need to forward bond money to the Bond Centre (and, possibly, to avoid future scrutiny by this Tribunal of the withholding by Mr Wheeler of a tenant's bond money).
28. In light of my findings as above, I am satisfied that Mr Wheeler knew that the bond monies (or monies in the nature of a bond, not a payment of rent) of more than one week's rent had to be forwarded to the Bond Centre within 23 working days of receipt.
29. In a case such as this where the Chief Executive has proved that the failure to forward the subject bond to the Bond Centre was in fact part of a larger, systemic failure to forward bond money by the owner of five boarding houses, section 109 would be stripped of all utility if the party committing an unlawful act could escape liability under that section by simply saying that they did not intend to commit the unlawful act. In the present case, I am satisfied that Mr Wheeler knew he had to forward bond monies and he failed to do so.
30. I am also satisfied that, particularly having regard to the obvious and considerable public interest in ensuring that the owner of five boarding houses does not breach his obligations under the RTA in respect of the proper handling of a tenant's bond money, an award of exemplary damages in respect of the respondent's unlawful act is "just". In so finding, I have also taken into account: (i) whilst he held onto the tenant's bond money in its' own account Mr Wheeler had the use of that money, (ii) there is usually (but not always) a power imbalance between landlords and boarding house tenants which may mean that some tenants feel inhibited in seeking redress where her

or his bond has not been forwarded to the Bond Centre and (iii) the integrity of the regime for the handling bond monies under the RTA, under which a tenant's bond monies are to be held by an independent third party (the Bond Centre), is important.

31. Taking into account Mr Wheeler's evidence, mitigating factors are: (i) Mr Wheeler's age (he is 77) and has suffered from poor health from time to time, (ii) it was confirmed by counsel (in a joint memorandum filed after the hearing) that all bonds, including the subject bond, were forwarded to the Bond Centre prior to the date of hearing, (iii) the positive letters of support from a large number of the current tenants of Mr Wheeler's boarding house that were produced and (iv) Mr Wheeler's frank and open co-operation with the Chief Executives' investigators and his participation in this proceeding means that I consider it unlikely that he will fail to lodge any bonds into the future.
32. The Chief Executive sought exemplary damages in the sum of \$1,000 - the maximum amount of exemplary damages that may be awarded for a breach of section 19(1)(b) RTA (see Schedule 1A RTA). I consider that this maximum amount must be reserved for those cases involving the most egregious or worst possible breaches (or where the Tribunal is provided with evidence that the party concerned is a 'repeat offender' in terms of previous Tribunal orders made against that party in respect of the same unlawful acts).
33. There is also the issue of proportionality that arises in cases such as this where, although involving entirely separate applications and different tenants, exemplary damages are contemporaneously sought against the same landlord for their multiple breaches of one of the requirements of the RTA. Proportionality means that I must consider the overall burden, allowing for a deterrent factor, upon the party against whom fifty-six awards of exemplary damages, including the present one, are made (I have dismissed eight of the sixty-four applications brought by the Chief Executive against Mr Wheeler).
34. Proportionality was an issue that I had to consider in each of the 54 applications that were before the Tribunal in *Chief Executive of Ministry of Business Innovation and Employment v Strathvale Investments Limited* [2016] NZTT 4080581 (and other application numbers) and again in each of the 116

applications before the Tribunal in *Chief Executive of Ministry of Business Innovation and Employment v The Rent Centre* [2018] NZTT 4128965 (and other application numbers). Both *Strathvale* and *The Rent Centre* also involved applications by the Chief Executive arising out of recurrent failures to forward bonds to the Bond Centre.

35. I have considered the approaches adopted to proportionality, albeit in entirely different jurisdictions and under different statutory regimes, in *Borsboom v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143 and *Worksafe New Zealand v Electrix Limited* [2017] NZDC 20855. The first of these cases involved penalties under the Employment Relations Act 2000 while the second involved fines under the Electricity Act 1992.

36. No evidence, by way of financial statements or otherwise, was provided by Mr Wheeler as to his ability to pay exemplary damages. He continues to carry on the business of owning and operating five boarding houses.

37. In the particular circumstances and taking into account the overall burden imposed upon the respondent as a result of the determination of the 58 separate applications, I determine that the respondent should pay exemplary damages in the sum of \$200.00 for the breach of section 19(1)(b) RTA in respect of this tenancy.

38. I record here that, but for the cumulative total of the amounts ordered to be paid across the 56 separate applications (\$12,344.64 including filing fees), the above award of exemplary damages would have been significantly higher if the issue of exemplary damages had been considered solely in respect of the subject tenancy and without regard to the other orders made in the applications brought at the same time by the Chief Executive.

Compensation – section 77 RTA

39. Section 77(1)(n) provides the Tribunal with jurisdiction to order “...that the landlord or the tenant under any tenancy agreement...to pay to the other party such sum by way of damages or compensation as the Tribunal shall assess in respect of the breach of any express or implied provision of the tenancy agreement or any provision of this Act.”

40. No proper claim for damages or compensation of the sort contemplated by section 77(1)(n) was established by the Chief Executive in respect of this application. In any event, I consider that the award of exemplary damages made (and the cumulative amount of exemplary damages across all of the applications) is an appropriate remedy for the proven breach by the landlord of the requirements of section 19(1) RTA.

Filing fee and costs

41. As the applicant has been successful, an order that the other party must pay the filing fee paid for the application is appropriate.

42. The Chief Executive, in bringing this application pursuant to section 124A RTA, was entitled to be represented by counsel (see section 93(2)(c) RTA). Ms Mohammed, who is an 'in-house' lawyer employed by MBIE, did not provide details of any costs sought by the Chief Executive, nor were details of any witness expenses provided to the Tribunal.

43. If the Chief Executive wishes to pursue an application for costs or witness expenses in respect of this application, a memorandum in this regard is to be filed within 7 days of the date of this order. Mr McLean will have a further 7 days to file any memorandum in response.



M Benvie
12 March 2019

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.