[2020] NZTT Christchurch 4269564

TENANCY TRIBUNAL AT Christchurch

APPLICANT: Elizabeth Richardson

Tenant

RESPONDENT: Sara Brownie

Landlord

TENANCY ADDRESS: 60 Picton Avenue, Riccarton, Christchurch 8011

ORDER

1. The landlord's termination notice dated 15 July 2020 is declared retaliatory and of no effect.
2. Sara Brownie must pay Elizabeth Richardson $320.44 immediately calculated as shown in the table below.
3. The tenant's application is otherwise dismissed.

Description	**Landlord**	**Tenant**
Exemplary damages		$300.00
Filing fee reimbursement		$20.44
Total award		**$320.44**
Total payable by Landlord to Tenant		**$320.44**

Reasons:

1. Both parties attended the hearing, and both had a support person.

2. Under the section in the application form headed “You want the Tenancy Tribunal to make an Order about something else”, the tenant refers to insulation, a retaliatory 90-day termination notice and the condition of the chimney.

3. Under “Additional Information” it refers to failure to lodge the bond, retaliatory notice, the landlord’s obligations in respect of insulation and no insulation statement.

4. The application does not expressly state what remedies the tenant seeks but the landlord understood the tenant to be seeking an order that the termination notice was retaliatory and of no effect and exemplary damages for the unlawful acts of failing to lodge the bond, not providing an insulation statement and not complying with the obligation to insulate the premises. I therefore deal with the application on that basis.

5. Serving a retaliatory notice is also an unlawful act and can attract exemplary damages of up to $4,000. But the application does not expressly seek exemplary damages for that act and it is not an obvious inference to be drawn from the application. Because it is up to the applicant to set out the remedy sought, and the respondent is entitled to fair notice of that, I am not willing to treat the application as seeking exemplary damages for the retaliatory notice.

Termination Notice

6. On 16 July 2020, the landlord gave the tenant a notice that the tenancy would end on 13 October 2020. The notice is dated 15 July 2020.

7. If the notice had been served on 15 July, the period of notice would be 90 days. Because it was served on the following day, the period of notice is one day short and so, on the face of it, the notice is invalid.

8. Section 51(7), (8) and (9) of the Residential Tenancies Act 1986 (the Act) deal with such an invalid notice and allows the Tribunal to consent to amend the notice so that it is valid.

9. I accept that the error was inadvertent and that the landlord only became aware of it on the day of the hearing when I pointed it out. The tenant was also unaware that the notice was short.

10. I do not think that it would be unfair on the tenant to amend the notice. She has been proceeding as though it was a valid notice and it is out by only one day. I therefore give consent to it being amended so that the last day of the notice is 14 October 2020. The landlord is not required to re-serve the notice.

Retaliatory?

11. For a 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 Act, or by any complaint against the landlord. See section 54(1) of the Act.

12. The notice was served the day after the tenant sent a text to the landlord on 15 October querying whether the premises were insulated and asking for a copy of the insulation statement. The landlord sought a meeting with the tenant and arranged to come to the premises at 4.30pm on 16 October.

13. The landlord arrived at the premises at that time and handed the notice to the tenant.

14. The landlord said that the notice had nothing to do with the tenant's text message. She said that she served it because she wanted members of her family, her niece and nephew, to occupy the premises. Her nephew returned to New Zealand from Sweden in March 2020 and her niece has been living in unsatisfactory accommodation for the past two years. She said that she did not serve the notice earlier due to the Covid-19 restrictions on tenancy terminations.

15. Even allowing for the Covid-19 restrictions, the timing of the notice immediately after the tenant's text message is striking. The landlord said that she was not concerned about the message because she was confident that she had complied with the relevant insulation regulations. Even if that is true, the fact that a tenant starts raising such issues can be a red flag for a landlord indicating that the tenancy may become problematic.

16. The timing of the notice also does not fit well with the circumstances of the niece who has been unhappy with her accommodation for two years. As well, if the nephew's return triggered the notice, why would the landlord not put the tenant on notice that she would be wanting the premises back. The landlord may not have been able to serve a formal termination notice but there was nothing to prevent her informing the tenant of her intention to serve a notice.

17. The restriction on serving a notice ended on 26 June 2020 and the notice was not served until 16 July. If the landlord was waiting for the restriction to end, why did she not serve the notice earlier?

18. The way the landlord served the notice is also inconsistent with her claim that she was unfazed by the test message. She gave the tenant no indication that she intended to serve the notice and simply presented the notice to the tenant at a

meeting she had arranged. That indicates to me that it is likely that the tenant's text message has caused the landlord some irritation at least.

19. The landlord also said that she wanted to carry out some renovation work on the premises. There was no evidence of why that work was necessary or why it was at that time that the landlord felt it necessary to obtain possession to do the work. I find this reason unconvincing.

20. I note also that the landlord was willing to withdraw the notice if the tenant withdrew her application which suggests she was not strongly motivated to obtain possession of the premises for the reasons she has given. She said that if the tenant had agreed those terms, she would have immediately served another termination notice. Whatever the legal effect of that would have been, that would have been an unattractive way to behave.

21. Taking all these things together, I find that it is likely that the landlord was motivated, at least in part, by the tenant's text message which involved the tenant exercising her rights under the Act. I have therefore declared it to be retaliatory and of no effect.

Bond

22. A landlord must send any bond payment to the Bond Centre within 23 working days after the payment is received. See section 19(1) of the Act.

23. Breaching this obligation is an unlawful act for which the Tribunal may award exemplary damages up to a maximum of $1,000.00. See section 19(2) and Schedule 1A of the Act.

24. The rent position was not made clear to me. The tenant said that she believes that she paid two weeks rent as bond ($700). The landlord admits receiving $300 bond on 25 March 2019. She said that she did not pay it to the Bond Centre because she overlooked it. She tried to pay it in after she received the tenant's application, but the tenant did not sign the bond form.

25. The landlord has committed an unlawful act by not paying bond to the Bond Centre within 23 working days of receiving it.

26. 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. See section 109(3) Residential Tenancies Act 1986.

27. Overlooking payment of the bond to the Bond Centre does not excuse the failure. The requirement to lodge the bond is important and landlords need to ensure that they comply with it. But I accept that it was not deliberate, and the landlord has since attempted to lodge it. I pointed out that it can be lodged without the tenant's cooperation and so I would expect to be lodged without delay.

28. The breach is at the lower end of the scale and so I award $300 exemplary damages.

Insulation Statement

29. A landlord must include a signed statement in the tenancy agreement that provides the following information:

    a. whether or not insulation is installed in any ceilings, walls and floors, and

    b. details of the location, type and condition of all insulation installed.

    See section 13A(1A) of the Act.

30. Alternatively, if the landlord is unable to provide some or all of the information required, they must include a statement explaining what information cannot be obtained, why it cannot be, and that all reasonable efforts have been made to do so. See section 13A(1B) and (1C) Residential Tenancies Act 1986.

31. Breaching these obligations is an unlawful act for which the Tribunal may award exemplary damages up to a maximum of $500.00. See section 13(1F)(a) and Schedule 1A Residential Tenancies Act 1986.

32. The copy of the tenancy agreement that the tenant produced does contain an insulation statement. The statement is ambiguous about whether the sub floor space is not accessible or whether further investigation is needed. But, in my view, the statement substantially complies with the landlord's obligation in terms of the information required. If there has been a technical breach of the requirements, it would not warrant an award of exemplary damages.

Insulation

33. The tenant also claims that the landlord has breached the obligations under section 45(1)(bb) of the Act by failing to insulate the premises in accordance with the Residential Tenancies (Smoke Alarms and Insulation) Regulations 2016.

34. From 1 July 2019, all residential premises must be insulated to a minimum standard. Where the premises were insulated before 1 July 2016, the ceiling insulation must have an R-value of at least 1.9 (or 1.5 for houses of a brick or concrete block construction). The underfloor insulation must have an R-value of at least 0.9. The insulation must be in reasonable condition.

35. Where insulation is installed after 1 July 2016, the minimum R-value for ceiling insulation is 2.9 in Zones 1 and 2, and 3.3 for Zone 3 (Zone 3 covers the South Island and central North Island). The minimum R-value for underfloor insulation is 1.3.

36. There are exceptions to these requirements, for example, where it is not reasonably practicable, or where there is a habitable space above or below the ceiling or floor that would otherwise have to be insulated.

37. Breaching this obligation is an unlawful act for which exemplary damages may be awarded up to a maximum of $4,000.00. See section 45 (1)(A) and Schedule 1A RTA.

38. The tenant did not produce much evidence to support her claim. The Council Housing Health Inspection Report says that the access to the sub floor area was able to be located but it says nothing about the insulation in that area. When reading the statement in context I think that the word “not” has been omitted and that access was not located. The only comment it makes about the roof space is that the tenant understood that there was insulation there.

39. The landlord produced a very brief “Certificate” stating that ceiling insulation is compliant and that the underfloor is “too low”.

40. There was some discussion about the construction of the foundations and the space available under the floor, but it was inconclusive.

41. The tenant suggested that the landlord could have cut a hole in the floor to provide access to the underfloor space but that does not answer the question of whether there is enough space for someone to install insulation there.

42. On the basis the evidence to hand, the tenant has not proved that the landlord is in breach of the insulation requirements. On balance, I think it is more likely than not that the space under the floor is insufficient for insulation to be installed there.

Chimney

43. The tenant claims that the chimney is unsafe. It suffered earthquake damage and it was taken down to either the roof or the ceiling level. Some mortar has fallen done the chimney into the living room and the tenant is concerned that the chimney is not structurally safe.

44. The tenant produced a letter from a builder who expressed some concern about the chimney being a problem in another earthquake. He recommended that it either be removed or that an engineer be engaged to report on it.

45. The Council report sated that there was “no obvious health nuisance” from the chimney.

46. The landlord produced an email from a builder stating that the chimney appeared to be structurally sound and it did not pose any safety risk to the tenant.

47. It appears that the chimney was checked after the earthquakes and was partially removed. The evidence produced does not establish that it is in an unsafe condition now. That is a question for a structural engineer and if the tenant is concerned about it she should engage one to check it. The evidence is not sufficient for me to order the landlord to engage an engineer to check it.

Result

48. The result is that the termination notice is declared retaliatory and the landlord must pay $300 exemplary damages for not lodging the bond. The tenant's other claims are dismissed.

49. The tenant has had some significant success and I have therefore ordered the landlord to pay the filing fee.

R Armstrong
21 September 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.