TENANCY TRIBUNAL AT Hutt Valley

APPLICANT:	Kayla June Driskel, Tenant
RESPONDENT:	John Zoetebier, Maria Zoetebier Landlord
RESPONDENT IN APPLICATION 4277832	Nicola Work, Guarantor
TENANCY ADDRESS:	87 Kingsley Street, Stokes Valley, Lower Hutt 5019

FINAL ORDER

1. Kayla Driskel is to pay $2,350.42 to John Zoetebier and Maria Zoetebier immediately.
2. The amount is calculated as follows:

Description	**Landlord**	**Tenant**
Rent arrears to 21 August 2020	$591.42	
Compensation for no hot water for 11 days		$280.00
Taking photographs other than during an inspection		$200.00
Exemplary damages: Failure to insulate		$500.00
Keys not returned	$39.00	
Removing cylinder, tray and shower head	$1,700.00	
Exemplary damages	$1,000.00	
Total Award	**$3,330.42**	**$980.00**
Net award	$2,350.42	
Total payable by Tenant to Landlord	**$2,350.42**	

Reasons:

1. All parties attended the hearings.
2. For the sake of completeness this order includes the reasons given in the interim order dated 24 November 2020.

The claim against the Nicola Work

3. The claim against Nicola Work, as guarantor, is dismissed because there is insufficient evidence that Ms Work agreed to become a guarantor in this tenancy. There is no signature on the tenancy agreement that she agreed to be a guarantor. The landlord cannot assume that because she was guarantor in a previous tenancy with Ms Driskel and another tenant that she would be a guarantor in this tenancy.

A. Ms Driskel's Application

Should compensation be ordered for hot water not being available for 11 days?

4. The hot water cylinder failed. There was substantial damage to the property resulting from the leaking cylinder. An insurer became involved and the landlord was advised not to do any work on the property. The result was that Ms Driskell was without hot water for the final 11 days of the tenancy. This is a significant loss of an amenity.
5. The cylinder did not fail because the landlord failed to maintain it. In normal circumstances a landlord would not be ordered to pay compensation if a cylinder was replaced within 3 days of a tenant reporting a problem. Tenants must expect that there can be some inconvenience during a tenancy. Premises do have problems from time to time. I have ordered compensation for eight days where the premises was without hot water. A full refund of rent is not appropriate because Ms Driskel still had use of all other amenities in the property. I have therefore allowed compensation of $280.00 for this loss of amenity for 8 days.

Claim for the bond at the new premises.

6. Ms Driskel has claimed $2,500.00, being the bond she had to pay at a new premises. This claim is dismissed. Ms Driskel can claim for losses. She has not lost $2,500.00. The money she has paid for a bond at the new tenancy will be able to be recovered.

Claim for moving costs

7. Ms Driskel has claimed $500.00 for moving costs. However Ms Driskel has not produced any receipts for costs relating to her removal. Costs of trips to the tip are not moving costs.

Claim for a breach of privacy

8. A landlord must not interfere with the reasonable peace, comfort or privacy of the tenant in their use of the premises. See section 38(2) Residential Tenancies Act 1986.

9. 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. See section 38(3) and Schedule 1A RTA.

10. Ms Driskel has claimed $6,000.00 for a breach of her privacy on three occasions.

11. Ms Driskel heard from a neighbour that the landlord has been walking by her house at least once a day on a reserve. Ms Driskel has no personal experience of Mr and Ms Zoetebier walking by her house as she describes. Mr and Ms Zoetebier disputed this allegation and stated that even if he and his wife walked on the reserve, only the roof of the house is visible. Therefore the claim that her privacy was breached cannot succeed.

12. Ms Driskel also claimed a breach of privacy when the landlord brought another person to the premises the day after the discovery of the failure of the hot water cylinder. The landlord gave notice regarding the entry and is permitted to take another person to assist. The situation the landlord faced was an emergency.

13. Ms Driskel also claimed a breach of privacy when Mr Zoetebier and a person she did not know, entered her driveway and then left. That is not a breach of privacy. A landlord is permitted to enter the land without notice, but not the premises. The claim for a breach of privacy is dismissed.

14. Ms Driskel also claimed that her privacy was breached when Mr Zoetebier took photographs showing that the property was untidy and that this photograph was not taken during an inspection. I accept Ms Driskel's claim that this was a breach of privacy. The landlord must be very careful about taking photographs that include a tenant's possessions. The compensation ordered for this breach is $200.00.

Claim for Harassment

15. Kayla June Driskel claims the landlord has harassed her by messages on the media. The landlord claim that Ms Driskel initiated the negative messages. The events Ms Driskel has referred in her claim happened after the tenancy ended. The Residential Tenancies Act 1986 states that a landlord must not interfere with the reasonable peace, comfort or privacy of the tenant **in their use of the premises** (my bold). See section 38(2) Residential Tenancies Act 1986.

16. For the Tribunal to make an order about a breach of quiet enjoyment and harassment, the breach must be "in the use of the premises". Because the messages were after the tenancy ended the RTA does not apply.

Claim for unlawful entry

17. Ms Driskel claims the landlord has entered the premises without consent or notice.

18. 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. See section 48(1) and (2) Residential Tenancies Act 1986.

19. Breaching this obligation is an unlawful act for which exemplary damages may be awarded. See section 48 (4)(a) and Schedule 1A Residential Tenancies Act 1986.

20. The occasions where the landlord entered the premises followed the hot water cylinder leak. The text from Ms Driskel indicated that he was free to go into the premises because she and her husband would not be home. The landlord did enter the premises, saw the damage and entered twice more. I am satisfied that Ms Driskel gave permission for Mr Zoetebier to enter that day and that he was not limited to entering once only. The hot water cylinder issue was a serious issue and Ms Driskel could have expected that Mr Zoetebier and others needed to enter the premises on several occasions on that day. The claim regarding this event is dismissed.

Failure to insulate the premises

21. Ms Driskel claims that the landlord has breached the obligations under section 45(1)(bb) of the Residential Tenancies Act 1986 by failing to insulate the premises in accordance with the Residential Tenancies (Smoke Alarms and Insulation) Regulations 2016.

22. 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.

23. 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.

24. 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.

25. 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.

26. The landlord was aware that part of the premises was not insulated and was required to insulate that area. The landlord cannot use as a defence that the tenant did not request it be done. I find that the landlord did commit an unlawful act.

27. 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) RTA.

28. Having considered section 109, I am satisfied that there should be an order for exemplary damages. This is at the lower end of the maximum because there is no other evidence of similar unlawful acts by the landlord. Higher amounts are reserved for repeat offenders.

Termination of the tenancy

29. Ms Driskel has claimed that Mr and Mrs Zoetebier incorrectly terminated the tenancy. However the time to make that claim was when the notice was given. The Tribunal could then have ascertained whether the premises was uninhabitable. From the damage discovered after the tenancy ended it was appropriate that the landlord ended the tenancy. However the short termination period may impact on whether Ms Driskel is found liable for the full cost of cleaning. A normal notice period of 90 days gives a tenant much more time for cleaning. Ms Driskel had other worries in the eleven days after the notice, such as where to live.

B. Mr and Ms Zoetebier's Application

The claim for rent

30. Mr and Ms Zoetebier have claimed rent arrears at the end of the tenancy and have provided a rent record to prove the amount claimed. Therefore $591.42 is ordered for rent arrears.

Mr and Ms Zoetebier's claim for damage to the floor

31. Mr and Mrs Zoetebier have claimed compensation for the cost of repairs to the floor following the leak from the hot water cylinder. The tenants did not cause the leak. Much time was spent during the hearing considering whether Ms Driskel

and her husband knew there was a leak but failed to inform the landlord. The suspicion was raised because Ms Driskel sent an email stating that the h/w cylinder was leaking "again". Ms Driskel explained that other work had taken place on the cylinder earlier in the tenancy and she understood that to be a replacement element associated a leak.

32. I can find no reason why Ms Driskel would not tell the landlord if the cylinder was leaking as soon as she found out. Relationships between her and Mr and Mrs Zoetebier were good. The premises were not being used for illegal purposes. There was nothing to hide.

33. On the evidence to date there is insufficient proof that Ms Driskel and her husband delayed informing the landlord about leak in the cylinder.

34. It also difficult for Mr and Mrs Zoetebier to prove the amount of damage caused if Ms Driskel did fail to tell the landlord about a leak. That is because substantial damage could have happened to the floor before the leak in the cylinder was discovered.

35. For these reasons I do not find it possible to make an order against Ms Driskel for damage to the floor.

Mr and Ms Zoetebier's claim for the cylinder tray and shower head removal from the property.

36. Mr and Ms Zoetebier paid $1,700.00 to Ms Driskel's husband, Chris Lorenz, for materials to replace a hot water cylinder, tray and shower rose. Mr Lorenz was not a tenant at the property. The materials were purchased and the H/W cylinder had been installed at the property. Problems with the floor meant that the cylinder had to be uninstalled. At the end of the tenancy the items were taken by a person that Ms Driskel permitted to be at the property. Section 41(1) of the RTA states that a tenant shall be responsible for anything done or omitted to be done by any person who is in the premises with the tenant's permission if the act or omission would have constituted a breach of the tenancy agreement had it been the act or omission of the tenant.

37. The items should not have been removed from the property. Any dispute that Mr Lorenz had with Mr and Ms Zoetebier about payment for his work was a matter for the Disputes Tribunal.

38. Ms Driskel is liable for the goods that were removed by a person she allowed to be at the property.

Mr and Ms Zoetebier's claim for cleaning

39. The claim for cleaning has been withdrawn because of work being carried out at the property after the tenancy terminated.

Mr and Ms Zoetebier's claim for key replacements

40. There is insufficient evidence that Ms Driskel returned the door keys. She said that she left them in the letterbox. It is her burden to prove that this was done and that has not been proved. $39.00 is ordered for the key replacement.

Mr and Ms Zoetebier have claimed exemplary damages for unlawful acts.

41. Exemplary damages may only be ordered where a tenant or landlord intentionally commits an unlawful act. The RTA sets out the breaches that are also unlawful acts.

Mr and Ms Zoetebier's claim for exemplary damages for the number of residents exceeding the maximum allowed?

42. It is important that tenants observe the limits to the number of residents agreed in the tenancy agreement. Premises are more likely to be damaged with overcrowding. Hence the Residential Tenancies Act's requirement that tenants adhere to the number of occupants agreed in the tenancy agreement. Exemplary damages up to $1,000.00 can currently be ordered for this breach.

43. In the parties' tenancy agreement the maximum number of residents specified is two. From the evidence I am satisfied that there were more than two people that Ms Driskel allowed to reside at the property.

44. In considering this claim the evidence is that Ms Driskel had asked permission for her uncle to be able to stay in the premises because he had nowhere to stay. This was to be a temporary arrangement. The landlord's submission is that the uncle used the premises as a permanent base. The landlord provided evidence of the property being the uncle's mailing address and materials added to the garage to make it more comfortable for sleeping in. Ms Driskel said that her uncle stayed at the property infrequently.

45. Mr and Ms Zoetebier knew that the uncle was staying in the garage because a few months after Ms Driskel's request for the uncle to stay, Ms Driskel sent another message to Mr and Ms Zoetebier stating that her uncle was sleeping in the garage because the house was too noisy. Mr and Ms Zoetebier did not issue a 14 day breach notice to Ms Driskel about their concern that the Ms Driskel's uncle was sleeping in the garage. In August 2020 they noticed a bed in the garage. They still did not object to the uncle being accommodated there. Their failure to question or object to the relative using the garage can be seen as them agreeing to him being there.

46. Mr and Ms Zoetebier also mentioned a fourth person, Mr Lorenz resided at the property. Ms Driskel was married during the tenancy. Mr and Ms Zoetebier knew that Ms Driskel had a new partner. They used his trade services at the property.

No complaint was made to Ms Driskel about Mr Lorenz possibly staying at the premises. Ms Driskel said that Mr Lorenz had his own property and did not use 87 Kingsley Street as his primary place of residence.

47. In summary, although the tenancy agreement recorded that there were to be "two occupants" only, Mr and Ms Zoetebier, by their conduct, can be understood to have agreed to others occupying the property. If they wanted to make occupancy an issue they should have done so during the tenancy and not waited until the end of the tenancy. It is not reasonable to order exemplary damages in these circumstances.

Mr and Ms Zoetebier's claim for exemplary damages for subletting

48. Mr Lorenz or Ms Driskel's uncle may have helped Ms Driskel with her expenses. That could be expected. When Mr and Ms Zoetebier did not raise any objection to him being at the property, they could expect he might be helping with expenses. I do not consider that Ms Driskel was subletting.

Mr and Ms Zoetebier's claim for exemplary damages for failing to observe the tenant's duties upon termination.

49. Section 40 RTA sets out a tenant's responsibilities. These include duties on termination of a tenancy (ss 40(1)(e)(i to v). S40(3A) refers to unlawful acts. Although a tenant has several responsibilities on termination of a tenancy, only "the failure to quit the premises" is listed as an unlawful act. (s40(1)(e)(i).

50. Ms Driskel did not fail to quit the premises on termination.

51. Therefore Mr and Mrs Zoetebier's claim for exemplary damages for failing to clean, failing to leave chattels and failing return keys at the end of the tenant is dismissed because these are not unlawful acts in the RTA.

Mr and Ms Zoetebier's claim for exemplary for intentional damage to a washing workbench.

52. Section 40(2)(a) states that a tenant shall not intentionally or carelessly damage the premises. However once again, Section 40(3A) does not refer to a breach of s40(2)(a) as being an unlawful act.

Mr and Ms Zoetebier's claim for exemplary damages for interfering with the means of escape from fire.

53. Mr and Mrs Zoetebier have based their claim on s66K of the RTA. Section 66 is in Part 2A of the Act. Part 2A applies to Boarding Houses. This was not a boarding house tenancy.

54. The section that does apply to this tenancy is s40(2)(ab). Contravention of this section is an unlawful act.

55. At the end of the tenancy the smoke alarms were left on the windowsill. They should not have been removed from where they were meant to be in the premises. They are to be left in place to effectively warn about fire. Ms Driskel had not contacted Mr and Mrs Zoetebier about any problem with the smoke alarms during the tenancy.

56. It is important that tenants do not breach their responsibilities regarding smoke alarms. This is reflected in the maximum penalty being $3,000.00 for this unlawful act.

57. I am satisfied that Ms Driskel did commit an unlawful act regarding interference with the smoke alarms. The unlawful act was intentional. It could have led to serious consequences. It could have led to loss of life and extensive property damage. Interfering with alarms can affect a landlord's insurance. It is in the public interest that tenants respect the requirements around smoke alarms in premises.

58. Taking into account that there are no other similar breaches by Ms Driskel regarding smoke alarms, $1,000.00 of the maximum $3,000.00 is ordered.

B M Smallbone
Monday, 1 February 2021

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.