

TENANCY TRIBUNAL AT [Event location suppressed]

APPLICANT: [The applicant/s]

Tenant

RESPONDENT: [The respondent/s]

Landlord

TENANCY ADDRESS: [Tenancy address suppressed]

ORDER

1. The claim is allowed as ordered below. All other claims are dismissed.
2. [The landlord/s] must pay [The tenant/s] \$8,920.44 immediately, as calculated in the table below.
3. The parties' names, the tenancy address, and any identifying particulars must not be published.

Description	Tenant
Rent refund – unlawful premises at 50 per cent	\$2,500.00
Exemplary damages: premises not in clean condition	\$250.00
Exemplary damages: failing to provide and maintain	\$500.00
Exemplary damages: inadequate cooking facilities	\$500.00
Exemplary damages: no smoke alarms	\$500.00
Exemplary damages: bond not lodged	\$750.00
Exemplary damages: interference with privacy	\$1,500.00
Exemplary damages: unlawful entry	\$650.00
Compensation: no rubbish collection bin	\$100.00
Rent refund for two days while carpet replaced	\$100.00
Compensation – emotional harm for unlawful notice	\$850.00
Bond to be repaid	\$700.00
Filing fee reimbursement	\$20.44
Total award to tenant	\$8,920.44

REASONS:

1. The tenant attended the hearing in person. The landlord did not attend. The Tribunal sent a notice of hearing to the landlord's address, so I proceed in the landlord's absence.
2. The tenant claims for:
 - a. The premises being unlawful. He seeks reduction of the rent he paid.
 - b. The landlord breaching his duties under s 45 of the Residential Tenancies Act 1986 ("**RTA**") in four separate ways. He seeks exemplary damages.
 - c. The landlord not filing the bond. Exemplary damages are sought.
 - d. The landlord interfering with his quiet enjoyment and entering the premises without consent. He seeks exemplary damages.
 - e. Not being able to live in the premises for two days while the carpet was replaced. He seeks general damages.
 - f. The landlord not providing a rubbish collection bin. The landlord had a bin but forbade the tenant from using it. The tenant seeks compensation for having to take his rubbish bags down the road every week.
 - g. The landlord unlawfully terminating the tenancy. He seeks compensation.

Background

3. The tenancy was brief, lasting only just over 14 weeks. It began on 1 November 2020 and ended on 8 February 2021. There was no written tenancy agreement.
4. The premises were a sleepout. The landlord lived nearby in the main house located on the same section.
5. The sleepout had two rooms. One room had a toilet and a shower. Everything else was in the other room. There was no oven or a proper stove; just a hotplate that didn't work well – it could barely bring a pot of water to a simmer. Power came in via extension cords plugged into power points in the main house. The plumbing was jerry built by the landlord with water coming through a pipe from the main house.
6. The sleepout was rented to the tenant as a separate dwelling but Auckland Council had not consented to it being used as a separate dwelling.
7. When the tenant moved in, he found the sleepout was dirty. Apparently, the previous tenant had moved out without cleaning, and the landlord had not cleaned either. In the kitchenette area, the hotplate was splashed with oil and the walls and cupboards were filthy. The floors had not been swept or mopped.

8. The tenant found that the carpet smelt rotten and was probably rotting - that again was a legacy of the previous tenant. Again, the landlord had not remedied the uncleanliness.
9. The landlord did however later replace the carpets. The tenant had to vacate the premises for two days while the replacement work was done.
10. The tenant says the landlord regularly came into the sleepout without permission. Most memorably, on one occasion the landlord poked his nose in the door while he was still drying himself after getting out of the shower.
11. The tenant says the landlord prohibited him from having guests over, except for his son.
12. Several times the landlord ran his race down and made derogatory comments to him.

Unlawful premises

13. The tenant says the landlord told him he had had the sleep out craned in about two years prior.
14. The tenant says the Council has told him that it has not consented to the sleepout being used as it is.
15. Under s 78A(2) of the RTA unlawful residential premises are:
 - ...residential premises that are *used for occupation for a person as a place of residence* but—
 - (a) that *cannot lawfully be occupied* for residential purposes by that person (whether generally or whether for the particular residential purposes for which that person is granted occupation); and
 - (b) where the landlord's failure to comply with the landlord's obligations under s 36 [*which requires a landlord to take all reasonable steps to ensure there is no legal impediment to the occupation*] ... has contributed to that unlawful occupation.
- (Emphasis added)
16. The premises were occupied by the tenant as a place of residence.
17. The tenant contacted Auckland Council who advised it had not issued a consent for the sleep out. Given some of the substandard features of the building such as having an extension cord running to it for its power supply and inadequate cooking facilities, the Council could not have consented to the sleep out being used as a separate dwelling.

18. Therefore, I am satisfied that the premises could not lawfully be occupied as a place of residence and that the landlord did not take all reasonable steps to ensure there was no legal impediment to the occupation of the premises for residential purposes, which contributed to the unlawful occupation.
19. For these reasons I find the premises were unlawful residential premises under s 78A of the RTA.

Rent reduction

20. Where it finds unlawful residential premises under s 78A(4), the Tribunal may order the landlord to (i) repay the tenant all the rent they paid; or (ii) a lesser amount of rent repayment that it finds fair having regard to the special circumstances of the case, including the nature of the premises.
21. I consider that s 78A(4)(ii) should apply to this case because applying s 78A(4)(i) would be unfair to the landlord.
22. I must carefully weigh what amount of rent it is fair to deduct.
23. The special circumstances I must have regard to are not stated except for the nature of the premises.
24. Other special circumstances I have weighed include:¹
 - a. The landlord's motivation for renting the property, and their conduct during the tenancy.
 - b. The tenant's motivation for renting the property and bringing the claim, and the length of time he lived in the property.
 - c. The benefits the landlord received in renting the property.
 - d. The benefits the tenant received in renting the property.
 - e. The seriousness of the regulatory breaches making the premises unlawful.
 - f. Any other breaches by the landlord.
 - g. Any detriment or loss the tenant suffered.
 - h. The purpose of s 78A in ensuring landlords do not unfairly profit from unlawful premises.
 - i. The public interest in discouraging unlawful tenancies.
 - j. Any other compensation or exemplary damages that are ordered.
25. I discuss some of these factors more fully. Those I have not discussed have been considered also.

¹ See Janet Robertshawe's 2019 conference paper, *The Legacy of Anderson v FM Custodians: Section 78A Tenancies*.

26. The nature of the premises was well below an acceptable standard. The premises were unsafe due to inadequate electrical work and the lack of smoke alarms.
27. These deficiencies were due to the premises never being vetted as they would have been had the landlord followed the proper consent process and/or properly checked for compliance before renting the premises out.
28. The landlord wanted to rent out the premises for financial gain.
29. The tenant's claim is genuine. It is not made opportunistically to obtain a rent windfall.
30. I take account of the exemplary damages that I have awarded as set out in the order above.
31. In light of the special circumstances in this case, I quantify a fair rent reduction as being 50 per cent.
32. The tenant paid the landlord \$5,000 for rent for the 14 weeks 2 days he lived at the premises, so the landlord must repay the tenant \$2,500.00.

Landlord's failure to comply with s 45 of the Residential Tenancies Act 1986

33. The tenant says the landlord breached his obligations under s 45 of the RTA.
34. Under s 45, a landlord must:
 - a. provide the premises in a reasonable state of cleanliness;
 - b. provide and maintain the premises in a reasonable state of repair;
 - c. comply with all requirements in respect of smoke alarms and insulation set out in the Residential Tenancies (Smoke Alarms and Insulation) Regulations 2016; and
 - d. comply with any relevant enactment in relation to buildings, health and safety
35. Breaching any of these obligations is an unlawful act for which exemplary damages may be awarded up to a maximum of \$4,000.00. See s 45(1A) and sch 1A of the RTA.²
36. The landlord failed to provide the premises in a reasonable state of cleanliness. The premises were presented in a dirty condition and the tenant had to clean them himself at the beginning of the tenancy.

² As at the date the tenancy ended. These provisions were subsequently amended.

37. The premises were not provided or maintained in a reasonable state of repair. The carpet was rank. Power was by way of electrical extension cords. The plumbing was substandard.
38. There were no smoke alarms. The combination of poor electrics which might have created a fire hazard and no smoke alarms is to be condemned.
39. Regulation 7(1) of the Housing Improvement Regulations 1947 requires every kitchen or kitchenette to have "adequate means of preparing food and of cooking food, both by boiling and by baking". The premises had no oven. It had a two-plate hotplate, but that did not work well. Moreover, the hotplate was prone to tripping the circuit breaker because the premises' power came from the main house, and the circuits easily overloaded.
40. I find the landlord committed four unlawful acts by breaching his duties set out in paragraph 34 above.
41. The evidence proves the acts were committed intentionally.
42. 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.
43. Having regard to these factors, I set exemplary damages at \$250.00 for the failure to clean, \$500.00 for the failure to maintain, \$500.00 for the lack of cooking facilities, and \$500.00 for the lack of smoke alarms.

Interference with privacy amounting to harassment

44. A landlord must not interfere with the reasonable peace, comfort or privacy of the tenant in their use of the premises: s 38(2) of the RTA.
45. 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: s 38(3) and sch 1A of the RTA.
46. Harassment means "to trouble, worry or distress" or "to wear out, tire, or exhaust" and "indicates a particular pattern of behaviour directed towards another person". *MacDonald v Dodds* DC Hamilton CIV-2009-019-001524, 26 February 2010.
47. The landlord who lived in the adjacent main house, persistently came into the sleepout without being invited. He would tell the tenant off in various ways the tenant found insulting and demeaning.
48. Once, the tenant had bought an arcade game for his son's birthday and the landlord came in and told the tenant off for having the game there and said that it had to be removed.

49. The landlord forbade the tenant from having guests over. Several times, when the tenant had friends over, the landlord intruded saying the friends had to leave.
50. One day, the tenant let a friend borrow his sleepout key to get something from the sleepout. The tenant says later that day the landlord growled at him about letting anyone come into the premises as if he was a child.
51. The landlord was repeatedly derogatory about the tenant's race. For instance, he called the tenant a "bloody Māori" and told him in front of other people to take his "Māori ass" somewhere else.
52. I find the landlord has committed the unlawful act complained of.
53. It is clear the landlord's actions were intentional.
54. Where a party has committed an unlawful act intentionally, the Tribunal may award exemplary damages where it is satisfied that 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: s 109(3) of the RTA.
55. Having regard to these factors, I set exemplary damages at \$1,500.00 in this case.

Entering premises without consent

56. As discussed, the landlord entered the sleepout with the tenant's consent on several occasions.
57. On one occasion, the tenant found that the landlord had replaced the toilet, but he had not been informed the landlord would be entering the premises for that purpose.
58. On another occasion, the landlord poked his head into the sleepout while the tenant was drying off after getting out of the shower.
59. The entries were intentional.
60. The maximum amount of exemplary damages available for such an unlawful act is \$1,000.00.
61. I am satisfied it would be just to award exemplary damages having regard to the landlord's intent, the effect of the unlawful act, the tenant's interests, and the public interest: s 109(3) of the RTA.
62. I order the landlord to pay exemplary damages of \$650.00.

Bond not lodged

63. The landlord did not lodge the bond with the Bond Centre.

64. A landlord must send any bond payment to the Bond Centre within 23 working days after the payment is received: s 19(1) of the RTA.
65. Breaching this obligation is an unlawful act for which the Tribunal may award exemplary damages up to a maximum of \$1,000.00: s 19(2) and Schedule 1A of the RTA.
66. I find they have intentionally committed an unlawful act.
67. I am satisfied it would be just to award exemplary damages having regard to the landlord's intent, the effect of the unlawful act, the tenant's interests, and the public interest: s 109(3) of the RTA.
68. I order the landlord to pay exemplary damages of \$750.00.
69. The landlord must also reimburse the tenant \$700.00 for the bond.

Unlawful notice

70. The landlord gave the tenant two weeks' notice to move out. However, the landlord was required under the RTA to give 90 days' notice without cause or 42 days' notice if there was cause.
71. As a result, the tenant had to sleep in his car for about three weeks. He then moved in with some friends temporarily for a couple of months before he found a house to move into.
72. The short notice caused the tenant considerable emotional distress and loss of dignity.
73. I award general damages of \$850.00 to compensate the tenant for emotional harm.

No rubbish bin access

74. The landlord would not let the tenant use the Council wheelie bin to put his rubbish in, so he had to take his rubbish down the road for disposal.
75. Any premises should have with it the right of the tenant to access basic facilities such as rubbish collection, where the premises have that service. I consider such a term is implied into the tenancy agreement.
76. I order the landlord to pay the tenant \$100.00 to compensate the tenant for the inconvenience of having to dispose of his rubbish in another way.

Rent refund – carpet replacement

77. The tenant could not live in the sleepout for two days while the carpet was replaced.

78. I order the landlord to refund the rent for those two days.

Filing fee

79. As the tenant has wholly succeeded with the claim I must order the landlord to reimburse him for the filing fee.

Non-publication

80. I order that the names of the parties referred to in this decision, the premises' address and any identifying details may not be published.

81. Section 95(3) of the RTA 1986 provides:

95 Proceedings usually to be in public

(3) The Tribunal may, on the application of any party to the proceedings or on its own initiative, and after having due regard to the interests of the parties and to the public interest, make an order prohibiting the publication of any report or description of the proceedings or of any part of the proceedings at any hearing before it (whether held in public or in private); but no such order shall prohibit the publication of any decision of the Tribunal.

82. I am concerned that publication of the tenant's name could have the disproportionate effect of disadvantaging them in trying to obtain rental accommodation in the future.

83. I have regard to the interests of the parties and the public interest. I bear in mind the principle of open justice. Identifying the tenant would not usefully serve the public interest. In fact, it would be against the public interest because it could result in unfair treatment to the tenant and his child.

84. For consistency, and to support the tenant's anonymity, the landlord's name is suppressed also.

R Kee
13 June 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 fesoatai mai le Tenancy Services i le numera 0800 836 262.