[2023] NZTT 4612929

TENANCY TRIBUNAL - New Plymouth | Ngāmotu

APPLICANT: Blair Anthony Schlager-Reay

Tenant

RESPONDENT: Melanie Anderson

Landlord

TENANCY ADDRESS: 13 Glenpark Avenue, Frankleigh Park, New Plymouth 4310

ORDER

1. No suppression orders apply to this decision.
2. The tenant's claims relating to compensation for a lack of power, Healthy Homes, vermin and mould are withdrawn.
3. The tenant's claim for compensation relating to the failure to maintain a fridge is dismissed.
4. Melanie Anderson must pay Blair Anthony Schlager-Reay $580.00 immediately.

Reasons:

1. Both parties attended the hearing. The landlord had a support person.
2. The Tribunal must deal with an application by the tenant for the refund of his bond and a claim for compensation relating to a period when he was without a fridge.

Is the tenancy excluded from the Residential Tenancies Act 1986 by virtue of the landlord's principal place of residence exception?

Facts

3. The tenant occupied the downstairs area of the landlord's home. The landlord lived upstairs. A "flat share agreement" was entered into between the parties.

4. The landlord explained that the tenant's area was about 45m^2 and that there were no shared areas other than the driveway. The tenant had his own kitchenette, bathroom and bedroom area and also had exclusive use of the laundry that was downstairs. Power and internet was included in his weekly rent of $290.

5. Access to the tenant's home was separate via his own outside door and there was no internal access via the landlord's home.

6. The landlord explained that she gave notice when entering the tenant's area. I heard how sometimes the landlord invited the tenant to share a meal with friends.

7. The landlord accepted that the tenant and the landlord were separate households.

Law

8. The Tenancy Tribunal only has jurisdiction to hear disputes between landlords and tenants where the dispute is in relation to a residential tenancy.

9. Section 4 of the Residential Tenancies Act 1986 ("RTA") provides that:

> This Act applies to every tenancy for residential purposes except as specifically provided.

10. The exceptions to the RTA are contained in s 5. Relevantly, s 5(1)(n) provides that the RTA does not apply:

> Where the premises, not being a boarding house, continued to be used during the tenancy principally as a place of residence by the landlord or the owner of the premises or by any member of the landlord's or owners' family

11. Section 2(1) RTA sets out that premises includes (other than in relation to a boarding house tenancy, in which case the definition in s 66B applies) - <u>(a) any part of any premises</u>; and (b) any land and appurtenances, other than facilities; and (c) any mobile home, caravan, or other means of shelter placed or erected upon any land and intended for occupation on that land (My emphasis).

12. It is axiomatic that simply calling an agreement a "flat share agreement" does not make it so. In order to decide whether this was indeed a genuine flat house sharing agreement, all of the relevant factors relating to the nature of the agreement and the arrangements between the parties need to be examined by the Tenancy Tribunal, not just the fact that the parties have chosen to use the words "flat share agreement" to describe their agreement.

13. The issue is therefore whether, despite the label on the agreement[1], the area rented to the tenant is in substance residential premises for the purposes of the RTA or if the residential premises is the whole house.

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[1] See *Musson v Dobrisek and others* DC Lower Hutt, CIV 2006 032 36, 16.2.06

14. If the downstairs area is a separate 'premises' then s 5(1)(n) cannot apply because the owner is not using the tenanted premises as a place of residence during the tenancy.

15. The interpretation of s 5(1)(n) was considered in the High Court decision of *Harding v Caroto and Ors [2021] NZHC 1265.* There the main dwelling consisted of an upstairs area occupied by the landlord and a self-contained downstairs area (referred to as a fully self-contained granny flat) occupied by the tenant.

16. The Court emphasised:

> First... that the natural and ordinary meaning of "premises" contemplates that there may be more than one premises within a larger premises" and "Second, the definition of residential premises means "any premises used or intended for occupation by any person as a place of residence.

17. The Court upheld the Tribunal's decision that the tenancy was a residential tenancy relying on the following:

> In my view, the decisive factor in this case must be the self contained character of the granny flat, its exclusive use by the respondent occupiers and the exclusive use of the rest of the dwelling by the appellant and her family. There were no communal living or shared spaces but two separate and distinct household units within the dwelling.

18. There are a number of previous cases that have come before the Tenancy Tribunal and the District Court where this question has been considered.

19. In *Whitelock v McConway*[2]*,* the subject premises were a sleepout, contained in a building which also contained the family shower and laundry room. The facilities within the sleepout where the tenant lived were limited in that there was no kitchen or sitting room. The tenant was expected to share the shower and laundry with the family. It was found that the exclusion in s 5(1)(n) applied and so the Tribunal did not have jurisdiction to hear the claim.

20. In *Watson v Watson*[3], the exclusion in s 5(1)(n) did not apply, in a case where the premises were exclusive to the tenant and fully separate from the landlord's premises.

21. In *Dempsey v Barnett*[4] the exclusion did not apply. The room occupied by the tenant was furnished with a couch, drapes, a table, bed, drawers, a cupboard, crockery and some linen. The room had a power supply which the tenant used to heat meals and a microwave oven. The room had a fridge and a cooktop. There was no water supply to the room and the tenant had to wash dishes in the kitchen of the main house. He was given a key to the back door to enable

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[2] DC Christchurch, CIV 2010 0092030
[3] DC Christchurch COV 2010 0092030, 14 September 2010
[4] DC Auckland, TT 790/93, 12 November 2003

him to use the toilet and shower in the house. At times he used the lounge in the house but only did so when invited in by the landlord and, apart from the water supply and toilet facilities, the tenant was self-contained.

22. More recently, the Tribunal has found that the exclusion in s 5(1)(n) did not apply in:

    a. *Nie v Zhao*[5], where the premises were a separate area located beneath the landlord's residence which contained a bedroom, a makeshift kitchen, living space and a separate entry next it. A door from a corridor leading upstairs was locked preventing the tenant's access. Other than using the laundry and two rooms downstairs for storage, the landlord did not share the house with the tenant.

    b. *Bailes v Nalini*[6], where the tenant exclusively occupied a cabin located at the back of the main residential premises. The cabin was a small freestanding bedsit arrangement with a lounge below and a bedroom above and included a hot plate but no bathroom or toilet facilities. The tenant was able to enter the main house to use the bathroom and toilet.

    c. *Zhang v Gao*[7] where the landlord rented the upstairs level of two-story house and the tenant exclusively occupied the downstairs level. All living, cooking, sleeping and bathing arrangements were separate.

    d. *McCaughan v Nasseri*[8] where the landlord lived upstairs and the tenant lived in a self-contained area on the ground floor. She had her own separate access and even though meals were sometimes shared, she lived independently of the landlord and her own space.

23. Themes running through these cases are:

    a. the extent of any sharing of living facilities (such as cooking, bathroom, sitting room and laundry);

    b. the extent of any free and unimpeded access by the tenant to premises occupied mainly by the landlord;

    c. the nature of the tenant's area and whether it is fully or partly self-contained and whether it is exclusive.

Analysis

24. My finding is that the exclusion in section 5(1)(n) does not apply to this tenancy because:

    a. 'Premises' can include part of any premises.

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[5] [2020] NZTT North Shore 4277894
[6] [2020] NZ TT North Shore 4261603, 4268721
[7] [2021] NZTT North Shore 4298016, 4297675
[8] [2022] NZTT Waitakere 4209883

b. I find that the relevant ‘premises’ here is the self-contained downstairs area.

c. The downstairs area is a physically separate space from the landlord’s home. It has its own entrance and its own facilities.

d. The tenant and the landlord were operating as independent households.

e. The landlord did not freely enter into the tenant’s area and the tenant had exclusive use of downstairs. There was no suggestion the tenant was free to use any part of upstairs.

f. Having a shared driveway and sharing the power supply and internet is insufficient to establish that the ‘premises’ is the entirety of the whole house.

25. The evidence is clear that this was a residential tenancy and not a flat sharing situation.

26. In view of that finding, I therefore have jurisdiction to deal with the tenant’s claim.

Bond refund

27. The tenant has applied for refund of the bond.

28. The landlord has not filed a claim against the bond with Tenancy Services.

29. The agreement between the parties dated 3 October 2022 shows that a bond of $580 was expected. The tenant provided bank records showing a payment of $580 which is recorded as having the reference ‘Blair bond 2 weeks’. It was paid on 3 October 2022.

30. The landlord agrees that the tenant had paid a bond but says that the tenant moved in early and so the bond had been used up in rent.

31. The landlord says that the agreement sets out that the tenant would move in on 14 October 2022 but that he collected the key on 2 October 2022. The tenant says that he collected the key then but that he did not start sleeping at the property until 10 October 2022.

32. I am satisfied that the amount paid on 3 October 2022 was intended to be the bond. This is supported by the reference on the bank statement, the amount the tenant paid and the timing of the payment.

33. Where a bond is paid but the landlord considers the tenant has fallen into arrears (sometimes immediately) a landlord cannot unilaterally decide not to lodge the bond with the Bond Centre and decide to take it to cover rent costs instead.

34. In any event, the landlord did not provide a rent summary to evidence all of the rent paid throughout the duration of the tenancy by the tenant to support her

position. This means that even if the $580 could be applied to rent owed I have no way of knowing if this has been correctly done.

35. While the landlord suggested issues arising with curtains, section 22B(2) RTA provides that, where a tenant applies for refund of the bond, and the landlord seeks payment from the bond, the landlord must file an application setting out the details of the counterclaim.

36. The landlord has not filed a counterclaim for rent arrears, the curtain or any other issue.

37. Because the landlord has not filed a counterclaim and I am satisfied a bond has been paid the bond is refunded in full to the tenant.

Fridge

38. Under section 45, RTA a landlord must provide and maintain the premises in a reasonable state of repair.

39. The tenant says that a fridge was provided as part of the tenancy and the landlord did not dispute this.

40. The tenant claims that the landlord failed to provide a replacement fridge when the fridge he had in the premises stopped cooling. The tenant says that he reported the problem on 4 March 2023 and that no replacement fridge was provided until 18 March 2023.

41. The landlord says that she checked the fridge on the same day and it did not appear to be cooling as it should.

42. Her position was that there was some movement between her and the tenant going backwards and forwards as to whether the fridge was working. She provided a copy of a text message dated 11 March 2023 from the tenant that sets out that the fridge appeared to be cooling again.

43. Her position is that she had a fridge in the garage that the tenant could have used but he did not seem bothered about getting that. In the end she decided to just get on with it, so she went ahead and cleaned the fridge in her garage and put it in the premises on 18 March 2023. On the same day the tenant found a fridge on Facebook and the landlord picked that up for the tenant as well.

44. There is very little evidence about extent of the problem with the fridge. The tenant sent a message to the landlord on 5 March 2023 (2.30am) saying how he had noticed that the fridge seemed to be having problems and that he might need to throw things out if it wasn't sorted by Wednesday but that there was really anything important so it "isn't really an issue if you can't". The landlord's position that there was some discussion backwards and forwards about the fridge is supported by the tenant's message dated 11 March 2023.

45. On balance I find there has been no failure to maintain. A landlord is afforded a reasonable opportunity to investigate a problem and a reasonable period of time to provide a replacement. Items break down or have problems from time to time. On 11 March 2023 the tenant indicated the fridge seemed to be working again.

46. On the basis of the evidence presented, I consider the period involved in replacing the fridge not to be unreasonable. I therefore find there has been no failure to maintain and therefore compensation is not awarded.

47. The tenant's application is dismissed.

Withdrawn claims

48. The Tribunal heard evidence in relation to compensation for loss of power but the tenant withdrew this part of the application once he had heard the landlord's evidence.

49. The tenant also withdrew claims made on his application relating to Healthy Homes, vermin and mould.

Filing fee

50. I consider that the tenant has not been substantially successful. He has had his bond refunded but he has not been awarded any of the compensation claimed. I therefore decline to award the filing fee (s102, RTA).

Suppression

51. The Tribunal must, on the application of a party that has wholly or substantially succeeded in proceedings, order that the party's name or identifying particulars not be published, unless the Tribunal considers that publication is in the public interest or is justified because of the party's conduct or any other circumstances of the case (s 95A(1), RTA).

52. I consider that the tenant has not been substantially successful in the context of the overall application. While he has been successful in the refund of his bond he has not been successful in relation to his compensation claim.

53. I have considered if I should grant a name suppression order for the tenant having regard to the interests of the parties and public interest (s95A(4), RTA).

54. I am mindful that open justice is a fundamental principle in our legal system the issue here I need to consider is whether suppressing the tenant's name and identifying details outweighs the interest of the open justice reporting principle. In my view, the application for name suppression ought to be declined for the following reasons:

    a. it is common for parties appearing before the tribunal to seek suppression orders. This is in itself not a sufficient reason to make the order;

b. the dispute before me was not unusual or anything other than the ordinary business of the Tribunal;

c. the open justice principle requires the outcome of the adjudication to be available to the public; and

d. weighing up the interest of the parties and the public interest, the public interest outweighs the parties' interest.

55. The application for suppression is declined.

56. The landlord did not request name suppression, so I have not considered this.

M Kemp
15 August 2023

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.