

TENANCY TRIBUNAL - [Event location suppressed]

APPLICANT: [The applicant/s]
Tenant

RESPONDENT: Nicholas (Nick) Kulavovsky, Natalya Kulakovska
Landlord

TENANCY ADDRESS: 154 Barrack Road, Mount Wellington, Auckland 1060

ORDER

1. An application for suppression has been made in this case, and the Tribunal orders suppression of the Tenant's name and identifying details.
2. Nicholas (Nick) Kulavovsky and Natalya Kulakovska must pay [The tenant/s] \$500.00 immediately.
3. The tenant's claims for breach of quiet enjoyment and providing a termination without lawful reason are dismissed as not proven
4. The tenant's claim for retaliatory notice is outside time and therefore is struck out.

Reasons:

1. Both parties attended today's hearing.
2. The tenancy began in 2019 and ended on the 21 May 2023.
3. The tenant claims that the landlord:
 - a) Unlawfully entered the property on or about the 1 January 2023 (s48)
 - b) Breached her quiet enjoyment by coming to the property on multiple occasions without telling her and by his conduct on the 1 January. (s38)
 - c) Gave a notice to terminate the tenancy without valid reason on the 18 January 2023. (s60AA)

d) Gave a retaliatory notice to the tenant on the 18 January 2023. (s54).

4. The tenant claims exemplary damages for the alleged breaches.

Did the landlord unlawfully enter the premises?

5. 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.
6. A landlord does not need to give notice if they are only going to the property to do something outside of the premises. See s48(7)
7. Breaching this obligation is an unlawful act for which exemplary damages may be awarded up to a maximum of \$1,500.00. See section 48 (4)(a) and Schedule 1A Residential Tenancies Act 1986.
8. The landlord went to the property on about the 1 January 2023 (the landlord says that it is the 3 January- the text correspondence supports the tenant's claim that it was the 1 January 2023) following a report from his selling agent that there was water ponding in the basement area. The basement area has a separate entrance and had been prone to flooding in the past. The landlord had recently renovated the basement and thought that he had remedied the flooding problem. He says that he was concerned as to why the basement was flooded again.
9. I am satisfied that the landlord did not give notice to the tenant as the tenant texted the landlord and said someone was at the property, to which the landlord confirmed it was him. The landlord did not obtain the tenant's consent to go into the basement. I find he has committed an unlawful act.
10. 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.
11. I am satisfied that the landlord acted with intention in that he intended to go into the basement. The landlord was aware that the tenant expected the landlord to give her notice as can be seen in the following text exchange on the 12 November:

[The tenant/s]: Nick, please before you come send me a text about your arrival. It's scary when someone walks under the house and around the property. Two people have robbed our cars under the carport, stolen the lawn mower and climbed into our basement on two occasions. The girls don't like you walking around the property either. Thanks for understanding, [The tenant/s].

Nick: [The tenant/s], I'm so sorry it happened. I went right after work to check the basement after the rain. Next time I will definitely inform you, Nick.

12. The tenant tells me that having the landlord at the premises was stressful and unsettling.
13. I accept that the landlord was apologetic about coming to the property without notice and was doing so as he thought it was an emergency, but he should have been careful to tell the tenant that he was coming to the property and the purpose of his visit before he did so.
14. It is in the public interest that when a landlord breaches this obligation that an award of exemplary damages is made and taking into account all of the factors outlined above, I consider a modest award of \$500.00 to be the appropriate award of damages for this act.

Did the landlord breach the tenant's quiet enjoyment?

15. 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.
16. 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 \$3,000.00. See section 38(3) and Schedule 1A RTA.
17. 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*, CIV-2009-019-001524, DC Hamilton, 26 February 2010.
18. The tenant claims that the landlord's frequent entry to the basement was a breach of quiet enjoyment. Whilst I agree that the landlord's entering the premises in breach of s48 is also a breach of the tenant's quiet enjoyment, the courts have made it clear that the same act cannot be sanctioned twice. In other words that I cannot award two lots of damages for the same event. *Manage My Rental Limited v Baxter [2015] NZDC 12011*

I do not think it right to further censure the landlord by way of exemplary damages for the fact that those failures also resulted in an unlawful act under a different provision.[27]

19. Therefore, the tenant's claim for breach of quiet enjoyment in respect of the unlawful entry on the 1 January is dismissed.
20. The tenants have claimed that there were many occasions that the landlord came to the property unannounced. The tenant has not given dates or specifics for those other occasions apart from the 12 November. As mentioned, there was a serious issue with ponding in the basement that the landlord was trying to remedy. He tells me that he enjoyed a good relationship with the tenants until he put the house on the market, and he would call around after rain to check if the basement had leaked. He said he usually texted or called the tenant beforehand. He thought that the tenant was happy with him doing this until he received the tenant's text of 12 November.

21. Having heard the evidence and submissions of both parties I am satisfied that the landlord did not go to the property for any other purpose but to check for leaks, and that apart from the unlawful entry on the 1 January 2023, he did not enter the property without first giving notice after the tenant had sent her text of the 12 November 2022.
22. The tenant also claims that the landlord breached the tenant's quiet enjoyment on the 1 January by the manner in which the landlord spoke to the tenant and the text messages between the tenant and landlord. Having heard the evidence from both parties it appears that the tenant thought that the landlord was accusing her of flooding the basement. I disagree with that interpretation. The landlord tells me that he was voicing his frustration to the tenant that he did not know what had caused the leaks and that he thought he had resolved the water problem.
23. I do not consider the tone of the written correspondence to be that of harassment and I do not think that it was the landlord's intention that the texts or conversation on the 1 January be to trouble, worry and distress the tenant.
24. I am not satisfied that the interaction with [Redacted] was a breach of the tenant's quiet enjoyment. The landlord had never met [Redacted] before and he was quite correct to say he wanted to speak to the tenant not to [Redacted], as he did not know if [Redacted] was talking to him on behalf of the tenant or not.
25. The tenant's claims for breach of quiet enjoyment are dismissed.

Was the notice given on the 18 January 2023 retaliatory?

26. On the 18 January 2023, the landlord gave the tenant a notice ending the tenancy on 18 April 2023. The tenant claims the notice is retaliatory.
27. 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) Residential Tenancies Act 1986.
28. An application for retaliatory notice must be brought within 28 working days of receipt of the notice. The tenant filed her claim on 9 July 2023, well after the time for filing a claim for retaliatory notice had expired. The Tribunal has no jurisdiction to hear this claim as it has been brought outside of time.

Did the landlord give a termination notice on the 18 January 2023 knowing that they were not entitled to do so?

29. Under Section 60AA a landlord must not give a notice to terminate the tenancy or apply to the Tribunal for such an order, knowing they are not entitled to do so.
30. Breaching any of these obligations without a reasonable excuse is an unlawful act for which exemplary damages may be awarded up to a maximum of \$6500.00. See section 60AA and Schedule 1A Residential Tenancies Act 1986.

31. On the 18 January 2023 the landlord gave the tenant a termination notice which stated the following reasons for termination:
- a) The premises are to be put on the market for sale.
 - b) The landlord is intending to carry out extensive alterations, refurbishment, repairs or redevelopment of the premises and that it would not be reasonably practicable for the tenant to live there whilst the work is being done.
32. There is no dispute that the property was on the market for sale at this time.
33. The tenant says that the landlord stating that they intended to carry out extensive alterations was giving notice knowingly that they are not entitled to do so.
34. Having heard and considered the evidence submitted I am not satisfied that the landlord gave a notice on the 18 January knowing that they were not entitled to do so, for the following reasons:
- a) The landlord was entitled to give notice to end the tenancy legitimately as the property was on the market for sale.
 - b) The landlord told me that he had been advised by the selling agent that he needed to give notice in order to make the sale more attractive to buyers.
 - c) The landlord says that he thought that he had to tick the 'extensive renovations or redevelopment' box as a purchaser may want to do renovations.
 - d) English is the landlord's second language and I accept that he did not understand that he only needed to tick the sale box.
 - e) In any event the landlord appointed a letting agent, who on the 20 January 2023 rescinded the notice making it of no effect.
35. As the tenant has been partially successful, I grant the tenant name suppression.
36. As the tenant has not been wholly or substantially successful, I do not award the filing fee.

T Prowse
11 September 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.