

Housing and Property Chamber
First-tier Tribunal for Scotland



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Regulations 9 and 10 of the Tenancy Deposit Schemes (Scotland) Regulations 2011. (“the 2011 Regulations”)

Chamber Ref: FTS/HPC/PR/19/1513

Re: Property at 4/5 East Pilton Farm Place, Edinburgh, EH5 2QN (“the Property”)

Parties:

Mr Najeeb Kabawa, 28/9 Salamander Court, Edinburgh, EH6 7JP (“the Applicant”)

Mrs Lavanya Xavier Raj, 159 Craigleith Road, Edinburgh, EH4 2ED (“the Respondent”)

Tribunal Members:

G McWilliams (Legal Member) and E Shand (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that an order for payment by the Respondent to the Applicant of the sum of £1500.00, in terms of Regulation 10(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the 2011 Regulations”), should be made.

Background

1. This Application, dated 16th May 2019, was brought in terms of Rule 103 (Application for order of payment where Landlord has not paid the deposit into an approved scheme) of the First-Tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended (“the 2017 Regulations”).

Case Management Discussion

2. A Case Management Discussion ("CMD") was held on 16th July 2019 at George House, 126 George Street, Edinburgh EH2 4HH. The Applicant, his representative Mr A Wilson and the Respondent's her representative, her husband Mr M Jesuarul, attended. At the CMD, there were certain points agreed between the parties, and other matters noted to be in dispute, and these are referred to in the Notes on the CMD. A Hearing was assigned in order that the parties could bring witnesses and lodge other documentation in support of their positions.

Hearing

3. A Hearing took place at George House, 126 George Street, Edinburgh EH2 4HH on 5th September 2019. The Applicant and Respondent attended with their representatives Mr Wilson and Mr Jesuarul. The Applicant brought a witness Mr Amjad Hassan.
4. During the Hearing the Respondent acknowledged that she had not resided in the Property during the Applicant's tenancy. Her representative acknowledged that the Property was not his only or main residence. The Respondent and her representative stated that their main residence was at 159 Craigleith Road, Edinburgh EH4 2ED, where they live with their children aged 8,6 and 4. The Respondent acknowledged that she had signed tenancy agreements with other persons who became tenants at the Property. The Respondent's representative stated that he wanted to have a "lodger agreement" with the Applicant and for that reason the Applicant's deposit was not lodged in an approved scheme. He said that he kept belongings at the Property and came in and out and stayed for up to an hour. The Applicant and his witness stated that the Respondent's representative sometimes entered the Property without their consent. The parties agreed that the Respondent's representative arranged access for repairs. The Respondent stated that she had been unaware of Regulations and legislation affecting Landlords. The Respondent's representative submitted that he was previously unaware of such provisions but had now received training, had become a registered landlord and had lodged a deposit in an approved scheme.

Findings in Fact

5. The Applicant was the tenant of the Property between October 2017 and around May 2019. The Respondent was the Landlord in the parties' Tenancy Agreement.

6. The Applicant paid a deposit of £750.00 to the Respondent in October 2017 in respect of the tenancy.
7. The Respondent had not resided in the Property during the Applicant's tenancy. The Property was not the main residence of the Respondent or her representative.
8. The Respondent was not exempt from lodging the Applicant's deposit in an approved scheme. The Applicant's deposit was not lodged in an approved scheme. The deposit was repaid to the Applicant, with an agreed deduction, in May 2019.

Reasons for Decision

9. The Application was brought timeously in terms of regulation 9(2) of the 2011 Regulations.
10. Regulation 3 of the 2011 Regulations (which came into force on 7th March 2011) provides as follows:
“(1) A landlord who has received a tenancy deposit in connection with a relevant tenancy must, within 30 working days of the beginning of the tenancy—
(a) pay the deposit to the scheme administrator of an approved scheme; and
(b) provide the tenant with the information required under regulation 42.”
11. The Respondent, as landlord, was required to pay the deposit into an approved scheme. This was not done.
12. Regulation 10 of the 2011 Regulations provides as follows:

“If satisfied that the landlord did not comply with any duty in regulation 3 the First-tier Tribunal -
(a) must order the landlord to pay the tenant an amount not exceeding three times the amount of the tenancy deposit; and
(b) may, as the First-tier Tribunal considers appropriate in the circumstances of the application, order the landlord to—
(i) pay the tenancy deposit to an approved scheme; or
(ii) provide the tenant with the information required under regulation 42.”
13. The Tribunal was satisfied that the Respondent did not comply with his duty under Regulation 3, and accordingly had to make an order that the Respondent pay the Applicant an amount not exceeding three times the amount of the tenancy deposit.

14. In the case of *Jenson v Fappiano* 2015 G.W.D 4-89, Sheriff Welsh, in relation to Regulation 10(a) of the 2011 Regulations, was of the opinion that there had to be a judicial analysis of the nature of the non-compliance in the circumstances of the case and a value attached to reflect a sanction which was fair, proportionate and just given those circumstances. Sheriff Welsh was of the opinion that, when determining the sanction value, the starting point was not the maximum award to be discounted by mitigating factors. He considered that this would be inconsistent with the exercise of balanced, judicial discretion.
15. In the case of *Tenzin v Russell* 2015 Hous. L. R. 11, the Court of Session reiterated that the amount of any payment in terms of Regulation 10(a) of the 2011 Regulations is the subject of judicial discretion after careful consideration of the circumstances of the case.
16. In determining a fair, proportionate and just sanction in the circumstances of this Application, the Tribunal considered and weighed all of the evidence and factors. The Respondent did not comply with the relevant Regulations. The deposit was not paid into an approved scheme. She and her representative submitted that they were exempt from the relevant provisions. They acknowledged, however, that the Property was not their only or main residence. Accordingly they were not exempt. However the Applicant's deposit was repaid to him shortly after the end of the tenancy. The Respondent stated that she had been unaware of Regulations and legislation affecting Landlords. The Respondent's representative submitted that he was previously unaware of such provisions but had now received training, had become a registered landlord and had lodged a deposit in an approved scheme.
17. The Tribunal found that whilst the Respondent's ignorance of the terms of the relevant Regulations is no excuse or defence, and the deposit monies had not been protected in an approved scheme for some twenty months, there was mitigation in that the Respondent's representative had now received training, had become a registered landlord and had lodged a deposit in an approved scheme.
18. Having exercised their judicial discretion, the Tribunal found, on a balance of probabilities, that the sum of £1500.00 (being twice the amount of the tenancy deposit) was an appropriate sanction to impose. The Tribunal found that this sum fairly, proportionately and justly reflected a sanction in respect of the Respondent's non-compliance with the Regulations. Accordingly the Tribunal determined that an order for payment by the Respondent to the Applicant of the sum of £1500.00, in terms of Regulation 10(a) of the 2011 Regulations, should be made.

Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

G McWilliams

5th September 2019

Legal Member