



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

**Chamber Ref: FTS/HPC/PR/23/0532**

**Re: Property at 5 Hilton Street, Aberdeen, AB24 4QT (“the Property”)**

**Parties:**

**Miss Svea Noll, 109 Leslie Terrace, Aberdeen, AB25 3XD (“the Applicant”)**

**Mr Jon Stewart, 262 Great Western Road, Aberdeen, AB10 6PJ (“the Respondent”)**

**Tribunal Members:**

**Andrew Upton (Legal Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that (i) the Respondent did not comply with his duty in Regulation 3(1)(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011, and (ii) the Respondent is liable to make payment to the Applicant in the sum of ONE THOUSAND SIX HUNDRED POUNDS (£1,600.00) STERLING, which is a sum equal to two times the amount of the tenancy deposit.**

**Findings in Fact**

- 1. The Applicant was the tenant, and the Respondent the Landlord, of the Property under a tenancy agreement dated 3 September 2022 and which commenced on 1 September 2022. A copy of the tenancy agreement is produced with the Application.**
- 2. On or around 17 September 2022, the Applicant made payment to the Respondent in the sum of £800 as a tenancy deposit, which sum was received by the Respondent on or around 20 September 2022 (“the Deposit”).**

3. The Respondent was aware of his duty under Regulation 3(1)(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the Regulations”) and intimated to the Applicant an intention to lodge the Deposit with SafeDeposits Scotland.
4. The Respondent did not lodge the Deposit with an approved tenancy deposit scheme.
5. During the period when the Respondent ought to have lodged the Deposit with an approved tenancy deposit scheme, the Respondent suffered from serious health related issues, including a cancer diagnosis and ongoing heart and lung issues. The Respondent was focused on his health, and overlooked the lodging of the Deposit.
6. On or around 1 November 2022, the Applicant intimated orally to the Respondent that she and those living with her in the Property intended to leave the Property. The Applicant followed that up with a WhatsApp message on or around 11 November 2022 intimating Notice to Leave.
7. The Respondent removed from the Property on or around 30 November 2022.
8. On 2 February 2023, the Applicant lodged this Application with the Tribunal.
9. On or around 28 February 2023, the Respondent made payment to the Applicant in the sum of approximately £450, being the Deposit under deduction of certain sums which he contended were owed by the Applicant and fell to be deducted. His right to make such deductions is disputed by the Applicant.

### **Findings in Fact and Law**

1. The tenancy agreement incorrectly describes itself as a Short Assured Tenancy, but the tenancy between the parties was a private residential tenancy.
2. The Deposit ought to have been lodged with an approved tenancy deposit scheme on or before 1 November 2022.
3. The Respondent breached his duty under Regulation 3(1)(a) of the Regulations.
4. An appropriate sanction for the purposes of Regulation 10(a) of the Regulations is a sum equal to two times the Deposit, which is £1,600.

## Statement of Reasons

1. This Application called for its Case Management Discussion by teleconference on 17 April 2023. The Parties both participated in the CMD.
2. In this Application, the Applicant contends that the Respondent failed to lodge her tenancy deposit of £800 with the administrator of an approved tenancy deposit scheme within thirty working days as required by Regulation 3(1)(a) of the Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the Regulations”). The Respondent has lodged written representations, in terms of which he admits a breach of Regulation 3(1)(a).
3. In terms of Rule 17(4) of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (“the Rules”), the Tribunal may do anything at a Case Management Discussion that it may do at a Hearing, including make a Decision. In terms of Rule 2 of the Rules, when making a Decision, the Tribunal requires to have regard to the overriding objective to deal with proceedings justly, including the need to avoid unnecessary delay.

4. In terms of Regulation 10(a) of the Regulations:-

“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”

It follows that the only matter for the Tribunal to determine is what an appropriate level of sanction is.

5. The discussion at the CMD largely centred around the content of the Respondent’s detailed written submissions. As a consequence of the discussions, the following matters were agreed:-
  - a. The Applicant was the tenant, and the Respondent the Landlord, of the Property under a tenancy agreement dated 3 September 2022 and which commenced on 1 September 2022. A copy of the tenancy agreement is produced with the Application.
  - b. The tenancy agreement incorrectly describes itself as a Short Assured Tenancy, but the tenancy between the parties was a private residential tenancy.
  - c. On or around 17 September 2022, the Applicant made payment to the Respondent in the sum of £800 as a tenancy deposit, which sum was received by the Respondent on or around 20 September 2022 (“the Deposit”).

- d. The Respondent was aware of his duty under Regulation 3(1)(a) and intimated to the Applicant an intention to lodge the Deposit with SafeDeposits Scotland.
  - e. The Respondent did not lodge the Deposit with an approved tenancy deposit scheme.
  - f. During the period when the Respondent ought to have lodged the Deposit with an approved tenancy deposit scheme, the Respondent suffered from serious health related issues, including a cancer diagnosis and ongoing heart and lung issues. The Respondent was focused on his health, and overlooked the lodging of the Deposit.
  - g. On or around 1 November 2022, the Applicant intimated orally to the Respondent that she and those living with her in the Property intended to leave the Property. The Applicant followed that up with a WhatsApp message on or around 11 November 2022 intimating Notice to Leave.
  - h. The Respondent removed from the Property on or around 30 November 2022.
  - i. On 2 February 2023, the Applicant lodged this Application with the Tribunal.
  - j. On or around 28 February 2023, the Respondent made payment to the Applicant in the sum of approximately £450, being the Deposit under deduction of certain sums which he contended were owed by the Applicant and fell to be deducted. His right to make such deductions is disputed by the Applicant.
6. Having heard from the Parties, and having regard to the written submissions made by the Respondent as well as the overriding objective in Rule 2 of the Rules, the Tribunal is satisfied that it has sufficient information to make a Decision in this Application.
7. The correct approach to determining appropriate sanction in cases of this type was set out in *Jenson v Fappiano*, unreported decision of Sheriff T Welsh at Edinburgh Sheriff Court, 28 January 2015 (2015 SCEDIN 6). At paragraphs 11 and 12 of his decision, Sheriff Welsh stated as follows:-
- “11. ...I consider regulation 10(a) to be permissive in the sense of setting an upper limit and not mandatory in the sense of fixing a tariff. The regulation does not mean the award of an automatic triplication of the deposit, as a sanction. A system of automatic triplication would negate meaningful judicial assessment and control of the sanction. I accept that discretion is implied by the language used in regulation 10(a) but I do not accept the sheriff's discretion is ‘unfettered’. In my judgment what is implied, is a judicial discretion and that is always constrained by a number of settled equitable principles.*”

1. *Judicial discretion is not exercised at random, in an arbitrary, automatic or capricious manner. It is a rational act and the reasons supporting it must be sound and articulated in the particular judgment.*
  2. *The result produced must not be disproportionate in the sense that trivial noncompliance cannot result in maximum sanction. There must be a judicial assay of the nature of the noncompliance in the circumstances of the case and a value attached thereto which sounds in sanction.*
  3. *A decision based on judicial discretion must be fair and just ( ‘The Discretion of the Judge’ , Lord Justice Bingham, 5 Denning L.J. 27 1990).*
12. *Judicial discretion is informed and balanced by taking account of these factors within the particular circumstances of the case. The extent to which deterrence is an active factor in setting the sanction will vary (cf Tenzin v Russell 2014 Hous. L.R. 17 ). The judicial act, in my view, is not to implement Government policy but to impose a fair, proportionate and just sanction in the circumstances of the case.”*
8. In this case, the Respondent has demonstrated some contrition with an early admission of breach and an apology for his failure to comply with his statutory duty. His explanation for his breach is a lack of knowledge of his requirements. However, he was evidently aware of his duty to lodge the Deposit and that he had failed to do so. The Deposit was unprotected throughout the whole duration of the tenancy, short though it was. The Respondent refused to return the Deposit following removal of the Applicant from the Property on the stated premise, now apparently abandoned, that the tenancy was a Short Assured Tenancy ending on 1 March 2023. The Respondent refused to return the Deposit in full, and has deprived the Applicant of the Dispute Resolution function of an approved tenancy deposit scheme. The Respondent has had health issues which the Tribunal accepts contributed to his failure to lodge the Deposit with the Scheme in time. However, that does not excuse completely his failure to lodge the Deposit with an approved Scheme at all.
  9. In all of the circumstances, the Tribunal is satisfied that a fair, proportionate and just sanction is a sum equal to two times the Deposit, which is the sum of £1,600. The Tribunal will make an order for payment in that sum.

## **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.

Andrew Upton

17/04/2023

Legal Member/Chair

Date