

Residential Tenancies Board

RESIDENTIAL TENANCIES ACT 2004

Report of Tribunal Reference No: TR0619-003826 / Case Ref No: 0319-52981

Appellant Tenants:	Andrzej Czernek, Marta Czernek
Respondent Landlords:	Anna Healy, Lillian Healy
Address of Rented Dwelling:	14 Distillery Court, The Maltings, Ballincollig, Cork, P31XH01
Tribunal:	Healy Hynes (Chairperson) Eoin Byrne, Suzy Quirke
Venue:	Comittee Room 1, Cork City Council, Anglesea Street, Cork
Date & time of Hearing:	08 August 2019 at 2:30
Attendees:	Andrzej Czernek (Appellant Landlord) Anna Healy (Respondent Landlord) Lillian Healy (Respondent Landlord) Eoin McDonald (Landlord Representative)
In Attendance:	Stenographers

1. Background:

On 14/03/2019 the Tenant made an application to the Residential Tenancies Board ("the RTB") pursuant to Section 78 of the Act. The matter was referred to an Adjudication which took place on 09/05/2019. The Adjudicator determined that:

1. The Notice of Termination served on 19 May 2018 in respect of the tenancy of the Dwelling at 14 Distillery Court, The Maltings, Ballincollig, Cork is valid and the tenancy of the Dwelling terminated on 14 July 2018.
2. The Respondent Landlords have lawfully retained the amount of €422.00 from the deposit and the balance of €528.00 has already been repaid to the Applicant Tenant.
3. The Applicant Tenant's complaint under section 56 of the Act in respect of the tenancy of the above Dwelling is not upheld.

Subsequently the following appeal was received.

The RTB constituted a Tenancy Tribunal and appointed Eoin Byrne, Healy Hynes and Suzy Quirke as Tribunal members pursuant to Section 102 and 103 of the Act and appointed Healy Hynes to be the Chairperson of the Tribunal ("the Chairperson").

On 16 July 2019 the Parties were notified of the constitution of the Tribunal and provided with details of the date, time and venue set for the hearing.

On 08/08/2019 the Tribunal convened a hearing at Committee Room 1, Cork City Council, Anglesea Street, Cork.

2. Documents Submitted Prior to the Hearing Included:

RTB File

3. Documents Submitted at the Hearing Included:

None.

4. Procedure:

The Tribunal began the hearing and the Chairperson asked the Parties present to identify themselves and to identify in what capacity they were attending the Tribunal. The Appellant Tenant confirmed he had the authority to act on behalf of all tenants in the property. The Chairperson informed the Parties that the hearing was a public hearing. As a result of the Hearing that day, the Board would make a Determination Order which would be issued to the Parties and could be appealed to the High Court on a point of law only. The Chairperson explained the procedure which would be followed; the Party who appealed (the Appellants) would be invited to present their case first; that there would be an opportunity for cross-examination by the Respondent; that the Respondent would then be invited to present their case, and that there would be an opportunity for cross-examination by the Appellants. The Chairperson stressed that all evidence would be taken on oath or affirmation and be recorded by the official stenographer present and reminded the Parties that knowingly providing false or misleading statements or information to the Tribunal was an offence punishable by a fine of €4,000 or up to 6 months imprisonment or both. The Chairperson confirmed with the Parties that they had received the relevant papers from the RTB in relation to the case being the one case file circulated in advance of the hearing. The Tribunal confirmed with the Parties that they had received and understood the RTB document entitled "Tribunal Procedures". The Tribunal then offered the Parties the opportunity to enter into discussions as to reaching an agreement in the matter. The Parties did not wish to do so. The Tribunal thanked the Parties and proceeded with the matter. All Parties giving evidence then took the oath.

5. Submissions of the Parties:

Appellant Tenants:

Andrzej Czernek's Evidence

The Appellant Tenant made specific reference to the electricity bills submitted in evidence by the Respondent Landlord in the matter. The Appellant Tenant stated that over the 6-7 months of the bills, there was only 1 unit of gas and 73 units of electric used. The only payments on the bills were standing charges; specific reference was made to the months of September & November. The Appellant Tenant continued to say that as the bills were largely estimates and refunds were made to the Respondent Landlord when actual

readings were made, the usage was significantly less than his. The Appellant Tenant stated that his gas usage was between €100-€150 for a typical 2 month period, and electricity was the same. When it was pointed out to the Appellant Tenant in cross examination that his family was larger than that of the Respondent Landlord, the Appellant Tenant stated that the fridge alone would use more electricity than the bill for the periods provided. In respect to the loss associated with the termination, the Appellant Tenant stated that his wife had to take unpaid leave and had returned to Poland with their 3 children as they could not source accommodation. This was a drop of €40,000 per annum in household income. The Appellant Tenant had himself been staying with a friend as he looked for accommodation for himself and that house had now been sold. When questioned as to new accommodation, the Appellant Tenant stated that there were very few places to live and that rents were in the region of €1200 - €1400 per month; it was difficult to find a family home. The Appellant Tenant made reference to the fact that the property was in an RPZ and had now been rented at €1,300 per month a 30% increase in the rent. The Appellant Tenant stated that it was his belief the tenancy was terminated so the Respondent Landlords could get a higher rent. The Appellant Tenant said that he kept an eye on the property as he drove past on his way to work and friends lived in the vicinity. In December he contacted the Respondent Landlords as he believed the property was empty to see about reoccupation, but got no reply. He later contacted the Respondent Landlord, Lillian Healy, to see if any post had shown up and got no reply. The Appellant Tenant went on to say that he spotted the property up for rent on 11 April 2019 and contacted the Respondent Landlord, Lillian Healy about re-renting it and got no reply. He then went to Threshold who advised he open a case with the RTB. On cross examination it was pointed out to the Appellant Tenant that the Respondent Landlords, as stated by them, did not require the property until the end of September when they were to commence work on the property. He was subsequently asked why he did not stay longer than the 10th July 2019. He responded by saying that he had intended to go to Poland on holidays regardless and did not see the point in paying an additional 6 weeks rent. The Appellant Tenant was then asked why he did not contact the number listed on the advertisement for rent. The reply was that he had always dealt with Respondent Landlord, Lillian Healy in the matter.

Respondent Landlords:

Lillian Healy Evidence

The Respondent Landlord gave evidence that she was living in Cashel with her husband when the Notice of Termination was issued on the property. She stated that the house they were living in had been sold, she found out she was pregnant and moved to the apartment while her husband stayed in Cashel. She gave evidence that she spent very little time in the apartment; spending time with friends and family and attending the hospital. When questioned as to the low gas and electricity bills, Ms. Healy stated that she tended to shower at the local swimming pool and stayed in bed a lot. She also made reference to the new insulation added to the property which made it warmer and stated that being pregnant she generated her own heat. The Respondent Landlord continued in evidence to say that twins were born in December and she spent time with her nearby family and went back to Tipperary. The Respondent Landlord continued to say that her husband supervised the construction of a new home in Tipperary during this time. The property had gone sale agreed in June, they had closed the sale in October and works were completed by the end of February. This was when she vacated the property to which the tenancy relates.

Anna Healy Evidence

The Respondent Landlord Anna Healy gave evidence that she took over the management of the letting when her sister became pregnant. She says that when the property went up for rent she received around 50 emails, 60 calls but received no text from the Appellant Tenant.

Respondent Landlord Representative Summary

In summary, the Respondent Landlord's Representative stated that it was his client's case that she was entitled to move back to the property. It was acknowledged that she did not live there 7 days a week and travelled a lot. It was denied that the notice was issued to get vacant possession in order to increase rent and that in fact the property would have been re-offered to the Appellant Tenant if they had got in contact through the proper channels.

6. Matters Agreed Between the Parties

Dwelling Address: 14 Distillery Court, The Maltings, Ballincollig, Cork.

Tenancy commenced: 01/06/2015.

Rent: €950.00 per month at the commencement and €990 at the end of the tenancy.

Deposit of €950.00 was paid.

Notice of termination Issued: 19 May 2018 citing a termination date of 14th July 2018 on the grounds that Lillian Healy required the property for her own use.

Tenancy terminated: 10 July 2018.

€528 of the deposit was repaid with the balance lawfully retained.

The property was re-let in March 2019.

7. Findings and Reasons:

Finding:

The Notice of Termination as served on 19 May 2018 is invalid

Reason 1:

The gas bills show actual meter readings of 7518 on 25 July 2018 and 7519 on 21 March 2019 and thus 1 unit of gas was used in that period of approximately eight months. The estimated gas bills show an estimated usage of 2087 units from 25 July 2018 to 19 January 2019, based on previous usage. That is effectively an estimated usage in the region of 350 units per month; the actual usage for that period was effectively nil. The electricity bills show actual meter readings of 62066 on 26 September 2018 and 62120 on 20 March 2019 and thus 73 units of electricity were used in that period of approximately six months. The estimated electricity bills show an estimated usage of 89 units from 25 July 2018 to 26 September 2018 and an estimated usage of 64 units between 22 November 2018 and 21 January 2019. That is effectively an estimated usage of between approximately 32 to 45 units a month; the actual usage for that period was in the region of 12 units per month. Considering that the majority of the seven month period was a winter period, particularly a winter where newly born twins were in residence, the Tribunal does not find the evidence of the Respondent Landlord, Lillian Healy, to be credible. References to pregnancies

generating their own heat and showering at sports centres rather than their own home over a 6 month occupation seem to the Tribunal to be retrospectively formed to support the lack of more obvious occupation. The Tribunal is mindful of the decision in *Duniyva -v- Residential Tenancies Board* ([2017] IEHC 578). In this case Justice Barrett examined s. 34 of the Act, in particular where it provides that a tenancy can be terminated where: "The landlord requires the dwelling or the property containing the dwelling for his or her own occupation or for occupation by a member of his or her family" Justice Barrett, in the ruling of 12th October 2018 stated "the court considers that the use of the third-person singular form of the verb 'to require' in para.4 of the Table to s.34 has the result that a landlord must 'need' the dwelling in issue, which has the effect that termination of the tenancy must be essential or very important to him (or her), rather than just desirable." Regardless of whether or not the Tribunal accepts the Respondent Landlord's evidence that she was in occupation in the property for the Tribunal to find the notice valid it must first find that the Respondent Landlord in the matter, "required" rather than "desired" occupation in the property in question. The Tribunal finds that as effectively no utilities were consumed during the course of the period from September 2018 to March 2019 and as the Respondent Landlord herself stated she travelled a lot, the Tribunal finds that the termination was served on the basis of a desire not a requirement. Regardless of the Appellant Tenant's assertion that the Respondent Landlord was not in residence, even if she was, in fact, in occupation of the dwelling, the gas and electric usage are such as to show that she did not "require" the dwelling, in the meaning of that term as defined in *Duniyva*. Even if the Tribunal were satisfied that the Respondent Landlord did occupy the dwelling, the Tribunal is not satisfied that she ever required the dwelling, in the sense of it being objectively essential or very important to her. Whilst it may have been desirable to have occasional use of the dwelling, the evidence is clear that she stayed, regularly, with her husband in Tipperary and with her own family. That level of utilities usage is not consistent with usage at a level by a person who required the dwelling, as opposed to one who merely desired having occasional use of it. In the matter of damages associated with the invalid termination of the tenancy the Tribunal firstly finds that the Appellant Tenant would now have to pay €1,300 per month for a similar property (being the rent achieved for the property in April 2019).

For the avoidance of doubt the Tribunal notes that the question as to whether or not the property has been re-let in accordance with the Rent Pressure Zone regulations is not before it, simply how much it would cost the Appellant Tenant to remedy the breach. The loss in the present case was the loss of the remaining part four tenancy, up to 30 June 2019. At that stage, the part four tenancy would have been at an end in any event. The Appellant Tenants vacated approximately one year prior to the end of the part four tenancy. Given the nature of the rental market, the Appellant Tenants were unable to find alternative accommodation for their family for a similar price. While some of the loss suffered may have occurred in any event a year later, nonetheless the Tribunal must endeavour, as best they can, to put to the Appellant Tenants in the position they would have been in had they not been unjustly deprived of possession of the dwelling by the Respondent Landlords. The Tribunal must also have regard, however, to the fact the Appellant Tenants took minimal steps to mitigate their own losses. Given that the evidence shows that alternative accommodation ought to have been available for approximately €400 more per month, it is appropriate to award damages approximately equivalent to that sum of a period of twelve months, while also having regard to the general distress caused by the early termination of the part four tenancy, giving a total figure of €5,000. Had the Appellant Tenants been more proactive, they ought to have been able to source alternative accommodation, even if more

expensive or in a different area. While market conditions are undoubtedly difficult, in particular for families, it should nonetheless have been possible, within a reasonable period, to find alternative accommodation; the Tribunal cannot award damages for loss beyond that which ought to have been mitigated. In respect of the period to be provided for payment of this sum, the Tribunal is satisfied that it is appropriate to allow 42 days, given the length of time that has passed since the termination of the tenancy and the right of the Appellant Tenants to a prompt remedy.

8. Determination:

In the matter of Andrzej Czernek and Marta Czernek, Appellant Tenants and Anna Healy and Lillian Healy, Respondent Landlords, the Tribunal, in accordance with Section 108(1) of the Residential Tenancies Act, 2004, determines that:

1. The Notice of Termination served on 19 May 2018 served by the Respondent Landlords on the Appellant Tenant in respect of the tenancy of the Dwelling at 14 Distillery Court, The Maltings, Ballincollig, Cork is invalid.
2. The Respondent Landlords shall pay the total sum of €5,000 to the Appellant Tenants, within 42 days of the date of issue of this Order, being damages for the Respondent Landlords breach, in respect of the tenancy of the dwelling at 14 Distillery Court, The Maltings, Ballincollig, Cork.

The Tribunal hereby notifies the Residential Tenancies Board of this Determination made on 23/08/2019.

A handwritten signature in black ink, appearing to read 'Healy Hynes', written over a horizontal line.

Signed:

Healy Hynes Chairperson

For and on behalf of the Tribunal.