

Residential Tenancies Board

RESIDENTIAL TENANCIES ACT 2004

Report of Tribunal Reference No: TR0518-002943 / Case Ref No: 0218-40975

Appellant Landlord:	Josie Lydon
Respondent Tenant:	Tom Kelly
Address of Rented Dwelling:	Apartment 1, Bothar Bui, Carraroe , Galway,
Tribunal:	Eoin Byrne (Chairperson) Nesta Kelly, Michael Vallely
Venue:	Hotel Meyrick, Executive Lounge, Eyre Square, Galway
Date & time of Hearing:	09 July 2018 at 2:30
Attendees:	For the appellant landlord: Dermot Kilfeather (solicitor for the appellant landlord). For the respondent tenant: Tom Kelly (respondent tenant) Karina Timothy (Threshold) Barbara Kelly (witness). stenographer/logger.
In Attendance:	

1. Background:

On 6 February 2018, the tenant made an application to the Residential Tenancies Board ("the RTB") pursuant to section 76 of the Residential Tenancies Act 2004 as amended ("the Act"). The matter was referred to adjudication, which took place on 5 April 2018. The adjudicator determined that:-

"In the matter of Thomas Kelly [Applicant Tenant] and Josie Lydon [Respondent Landlord], the Residential Tenancies Board, in accordance with Section 97 of the Residential Tenancies Act, 2004, determines that:

1. The Notice of Termination served on 24th November 2017 by the Respondent Landlord on the Applicant Tenant, in respect of the tenancy of the dwelling at Apartment 1, Bothar Bui, Carraroe, Co Galway, is invalid;
2. The Respondent Landlord shall pay the total sum of €8,000 to the Applicant Tenant within 56 days of the date of issue of the Order, being damages of €8,000 for the consequences of unlawfully terminating the Applicant Tenant's tenancy of the above dwelling."

Subsequently a valid appeal was received from the landlord by the RTB. The RTB constituted a Tenancy Tribunal ("the Tribunal") and appointed Eoin Byrne, Nesta Kelly

and Michael Vallely as Tribunal members, pursuant to sections 102 and 103 of the Act and appointed Eoin Byrne to be the chairperson of the Tribunal (“the Chairperson”).

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 9 July 2018, the Tribunal convened a hearing at 2:30pm at the Executive Lounge, Hotel Meyrick, Galway.

2. Documents Submitted Prior to the Hearing Included:

1. RTB File

3. Documents Submitted at the Hearing Included:

Determination orders from previous cases were submitted on behalf of the appellant landlord. The respondent tenant’s representative did not object to the submission of those documents and these were certified by the Chairperson as having been received on the day.

4. Procedure:

The Chairperson asked the parties present to identify themselves and to identify in what capacity they were attending the Tribunal. The Chairperson confirmed with the parties that they had received the relevant papers from the RTB in relation to the case and that they had received the RTB document entitled “Tribunal Procedures”.

The Chairperson explained the procedure which would be followed. In particular, he outlined that the Tribunal was a formal procedure but that it would be held in as informal a manner as was possible, that the person who appealed (the appellant) 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 then be an opportunity for cross-examination by the appellant. The Chairperson explained that following this, both parties would be given an opportunity to make a final submission. He reminded the parties that the hearing was a de novo hearing.

The Chairperson stressed that all evidence would be taken on oath or affirmation and be recorded by the official stenographer present and he 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 also reminded the parties that 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. All parties intending to give evidence were sworn in. The Tribunal asked the parties what matters could be marked as agreed. The Chairperson reminded the parties that it was still open to them to resolve the matters between themselves. The Chairperson outlined the benefits of the parties reaching an agreement, including the confidentiality of any agreement reached. The Tribunal rose to allow without prejudice discussions to take place between the parties. These were unsuccessful.

Prior to the start of the hearing, the Tribunal confirmed that the list of matters referred to below were noted as agreed.

5. Submissions of the Parties:

Appellant landlord's case:

The appellant landlord's solicitor confirmed that the appeal was limited to the amount of damages to be awarded to the respondent tenant. He confirmed that the appellant landlord did not dispute the adjudicator's finding that the respondent tenant's tenancy had been unlawfully terminated.

He submitted that the damages were excessive, taking into account that the respondent tenant was in arrears of rent. He asserted that even by the respondent tenant's own account, there were arrears from October. He stated that even the arrears accepted by the respondent tenant had still not been paid.

He submitted a number of previous determination orders from the RTB covering all cases from January 2017 to date where damages had been awarded for unlawful termination of a tenancy or illegal eviction. He contended that they showed that an award of €8,000 was excessive. He stated that awards should be consistent, albeit he accepted that vulnerability of a tenant was a factor to be taken account of in an appropriate case.

Respondent tenant's case:

The respondent tenant's representative stated that there were no mitigating factors in the present case and that the respondent tenant had lost his home of over seven years. She stated that he has a number of ongoing health difficulties and requires ground floor accommodation owing to breathing trouble. She also stated that he requires a dwelling close to his ex-wife, for whom he is a registered carer. She stated that there was no appropriate accommodation available in Carraroe and that she was assisting the respondent tenant in getting on the housing list and in finding appropriate accommodation. She further indicated that his belongings had only been returned to him in May 2018, a number of months after the end of the tenancy. She contended that the notice of termination served was invalid, as there were never rent arrears. She stated that the service of the notice had to be seen in the light of the earlier 28 day notice for sale having been rejected as invalid. She asserted that the period of notice required to be given for sale was a relevant factor in assessing the level of loss suffered.

The respondent tenant accepted that rent had not been paid since August 2017. However, he asserted that he had tried to pay this but had been unable to do so. He stated that the appellant landlord would not answer his phone when he tried to contact him after the termination of the tenancy to arrange the return of his belongings. In respect of the termination, he stated that it occurred without any notice to him. He indicated that he had been with his ex-wife on that date but that when he returned to the dwelling, he found the locks had been changed, and he was unable to access the dwelling.

In cross-examination, he accepted that he only wanted into the dwelling in April to collect his belongings. However, he stated that they were rotten. He also accepted that, prior to the termination of the tenancy, he was only living in the dwelling four days a week and living with his ex-wife three days a week.

Closing submissions:

The appellant landlord's solicitor contended that the Tribunal should consider the fact that there were rent arrears in assessing the level of damages to be awarded, where the respondent tenant accepted that there were arrears. He stated that the relevant factors to be assessed were that the respondent tenant only lived in the dwelling part time and was in arrears of rent and that, in those circumstances, the amount awarded by the adjudicator was excessive. He stated that, looking at the previous awards of the RTB, the highest and lowest should be discounted, and the appropriate range was between those figures, of €500 to €4,000.

The respondent tenant's representative submitted that there were no mitigating factors in the present case and that the jurisdiction of the Tribunal was up to €20,000. She indicated that the relevant factors were the duration of the tenancy, the fact the tenant lost the protection of his Part Four tenancy, the respondent tenant's health difficulties, the absence of alternative accommodation in the Carraroe area and that the impact of the appellant landlord's had been such as to leave the respondent tenant in a very bad place. She stated that while the respondent tenant may have been willing to accept an amount less than that awarded by the adjudicator, she believed an increased award of damages was merited.

6. Matters Agreed Between the Parties

The parties agreed that the only matter in dispute between the parties was the issue of damages for unlawful termination of tenancy. The parties agreed that the tenancy had been unlawfully terminated by the respondent landlord and that the only question was the amount of damages to be awarded. They also agreed that the tenancy had commenced in September 2010 and that the appellant landlord had changed the locks on 21 January 2018. Further, they agreed that notices of termination had been served in September and November 2017, albeit the respondent tenant contested the validity of those notices. They agreed that the rent was €80 per week and that a deposit of €100 had been paid at the commencement of the tenancy, which had not been returned.

7. Findings and Reasons:

Having considered all of the documentation before it, and having considered the evidence presented to it by the parties, the Tribunal's findings and reasons therefor, are set out hereunder.

Finding: The Tribunal finds that the respondent tenant's tenancy of the dwelling was unlawfully terminated by the appellant landlord and that he is entitled to damages in the amount of €8,000 which damages should be paid inside 28 days of the date of issue of the determination order of the RTB.

Reasons: The Tribunal is satisfied that the respondent tenant's tenancy of the dwelling at Apartment 1, Bothar Buí, Carraroe, Galway was unlawfully terminated. Section 58(1) of the Act provides:-

"From the relevant date, a tenancy of a dwelling may not be terminated by the landlord or the tenant by means of a notice of forfeiture, a re-entry or any other process or procedure not provided by this Part."

There is no dispute but that the termination of the tenancy in this case was in breach of the above provision, as the appellant landlord entered the dwelling and changed the locks

of the dwelling without the consent of the respondent tenant. The appellant landlord refused to provide the respondent tenant with the new keys. It is accepted that the actions of the appellant landlord were not provided for by Part Six of the Act. There is also no dispute but that the respondent tenant suffered loss as a result of the breach of the Act by the appellant landlord. The only question is the amount of damages to be awarded.

In assessing the loss suffered, the Tribunal must have regard to the position between the parties prior to the end of the tenancy. On the respondent tenant's own evidence, there were some rent arrears, albeit the respondent tenant disputed the amount and the efforts he had made to pay the rent. However, whether there were or were not rent arrears, the actions of the appellant landlord were in breach of the Act. The fact there may or may not have been arrears of rent does not change the unlawful actions of the appellant landlord in changing the locks without notice. It does not change the loss suffered, nor the foreseeable nature of that loss. The fact that there were arrears did not make it foreseeable, from the respondent tenant's perspective, that the appellant landlord would change the locks, and terminate his tenancy, without any notice that he was going to do so. If the appellant landlord wished to terminate the tenancy and re-take possession for arrears of rent, his remedy was to serve appropriate notices, to bring a case to the RTB and, if necessary, to seek enforcement of an order for possession, if he obtained one. It was not to take matters into his own hands and change the locks without notice. The Tribunal's role in the present case is only to assess the level of damage suffered as a result of the unlawful termination of the tenancy. The respondent tenant could not have foreseen that the locks would be changed and his tenancy terminated. For those reasons, whether there were or were not arrears of rent is not relevant to assessing the level of loss suffered by the respondent tenant.

In those circumstances, it is for the Tribunal to assess the level of the loss suffered. There are significant factors exacerbating the loss in the present case, increasing the loss suffered by the respondent tenant. The respondent tenant is an elderly man with clear health difficulties. The appellant landlord was clearly aware of those issues. The locks to the dwelling were changed without any notice to the respondent tenant. The respondent tenant was summarily evicted from his home of over seven years. The respondent tenant has been unable to source appropriate, permanent, alternative accommodation for a number of months. There is a deficit of appropriate, permanent accommodation in the area. The respondent tenant was deprived of a number of his belongings for a number of months. It is not disputed but that when they were returned, an amount of them were damaged. Each of these factors have increased the loss and inconvenience suffered by the respondent tenant. Each of those factors was clearly foreseeable by the appellant landlord. Each was clearly caused by the actions of the appellant landlord in unlawfully terminating the tenancy of the dwelling.

A number of awards of damages in other cases for unlawful termination were submitted to the Tribunal by the appellant landlord's representatives. However, without full sight of the reports in each case, and an opportunity for the respondent tenant's representative to consider those reports and address the Tribunal on them, only limited weight can be assigned to them. Each case falls to be decided on its own merits. The factors in the present case, identified above, have significantly increased the loss suffered by the respondent tenant.

The jurisdiction of the Tribunal is to award damages of up to €20,000, under section 115(3)(a) of the Act. In the present case, the loss suffered by the respondent tenant is in

the middle to upper range of unlawful terminations. Significant loss was suffered by him, such as ought to be recognised by an award of damages towards the higher end of the Tribunal's jurisdiction. However, from there, the Tribunal must also take into account the obligation on the respondent tenant to mitigate his losses and the steps taken by him in this respect. The respondent tenant is now living with his ex-wife on an ongoing basis. While this is not ideal for him, it nonetheless represents an appropriate step on his part to mitigate his losses, even if he is unable to live there on a permanent basis. As such, taking account of the manner in which the respondent tenant has mitigated his own losses, and the factors identified above, in all the circumstances the Tribunal is satisfied that the sum of €8,000 damages is appropriate. For the avoidance of doubt, as Tribunal hearing are de novo hearings, the Tribunal would have been entitled to award an amount above, below or the same as that awarded by the adjudicator. However, assessing each relevant factor in the present case, the sum of €8,000 is appropriate.

In respect of the payment of the damages due, the Tribunal is satisfied that these should be paid inside 28 days of the date of issue of the determination order of the RTB. The respondent tenant is entitled to a prompt remedy and, in light of the ongoing nature of the loss suffered, the Tribunal is satisfied 28 days is an appropriate period in the present case. It is not in dispute but that his tenancy was unlawfully terminated. Having regard to the size of the sum due and the nature of the loss suffered by the respondent tenant, the Tribunal is satisfied it is appropriate to allow 28 days for payment of sum of damages due.

8. Determination:

Tribunal Reference TR0518-002943

In the matter of Josie Lydon (Landlord) and Tom Kelly (Tenant) the Tribunal in accordance with section 108(1) of the Residential Tenancies Act 2004, determines that:

The appellant landlord shall pay the total sum of €8,000 to the respondent tenant within 28 days of the date of issue of the determination order of the Board, being damages of €8,000 for the consequences of unlawfully terminating the respondent tenant's tenancy of the dwelling at Apartment 1, Bothar Buí, Carraroe, Galway.

The Tribunal hereby notifies the Residential Tenancies Board of this Determination made on 10 July 2018.

Signed:



Eoin Byrne Chairperson

For and on behalf of the Tribunal.