

**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/21/2116

Re: Property at 31/3 Prince Regent Street, Edinburgh, EH6 4AR (“the Property”)

Parties:

Miss Abbie Paterson, 18/1 Great Michael Rise, Edinburgh, EH6 4JB (“the Applicant”)

Miss Amy McAfee, 2/5 Annfield, Edinburgh, EH6 4JF (“the Respondent”)

Tribunal Members:

Gillian Buchanan (Legal Member) and Elizabeth Currie (Ordinary Member)

Decision

A Hearing took place on 14 December 2021 by telephone conference. At the Hearing the Applicant was in attendance and represented by Mr Andrew Wilson of Community Help & Advice Initiative, Edinburgh. The Respondent was also in attendance.

Background

Previously a Case Management Discussion (“CMD”) had taken place on 27 October 2021. At the CMD the Respondent accepted that she was in breach of her duties under The Tenancy Deposit Schemes (Scotland) Regulations 2011 (“the Regulations”) and the following issues had been identified for determination at the Hearing:-

1. Did the Respondent register the Security Deposit with Safe Deposits Scotland on or around 30 August 2020?
2. Did the Respondent attempt to pay the deposit to Safe Deposits Scotland on or around 30 August 2020?
3. Did the Respondent advise the Applicant that she had protected the deposit and that it had been lodged with Safe Deposits Scotland.

At the Hearing the Tribunal also required to make a decision on sanction under and in terms of Regulation 10 of the Regulations.

Prior to the Hearing the Tribunal issued a Direction to the parties dated 12 November 2021 for production of a complete and signed copy of the Private Residential Tenancy Agreement (the Tenancy Agreement”) between the parties relative to the Property. Neither party provided a copy of the Tenancy Agreement.

Prior to the Hearing the Tribunal also received additional representations from the Applicant’s representative, Mr Wilson, by email dated 7 December 2021.

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that:-

Findings-in-Fact

The following factual matters were agreed by the parties:-

- i. That the parties previously entered into the Tenancy Agreement which commenced on 3 August 2020.
- ii. That on or around 29 July 2020 the Applicant paid to the Respondent a deposit of £700 by bank transfer.
- iii. That the Respondent opened an account with Safe Deposits Scotland (“SDS”) on 4 August 2020.
- iv. That on 5 May 2021 the Applicant issued to the Respondent a Notice to Leave.
- v. That the Tenancy Agreement ended on 2 June 2021.
- vi. That on 30 June 2021 the Respondent paid the deposit of £700 to SDS.
- vii. That the Applicant received a full refund of the deposit from SDS.
- viii. That the Respondent is in breach of her duties under the Regulations.

Following the Hearing the Tribunal made the following findings-in-fact:-

- i. That the Respondent registered the tenancy with SDS on 4 August 2020.
- ii. That the Respondent did not make payment of the deposit to SDS on 4 August 2020 or at any time prior to 30 June 2021.
- iii. That the Respondent was advised by the Applicant that the deposit had not been timeously lodged.
- iv. That the Respondent did not provide to the tenant in writing or in full the statutory information required to be provided in terms of Regulation 42 of the Regulations.
- v. That the Respondent’s tenancy with the Applicant was her first commercial let.
- vi. That the Respondent managed the tenancy with the Applicant.
- vii. That the Respondent is remorseful for her failure to lodge the deposit with SDS.

The Hearing

Evidence heard from the Applicant

Mr Wilson stated that he did not require to lead any evidence from the Applicant. In response to a query from the Tribunal relative to the suggestion that the Applicant had

suffered hardship as a consequence of the delay in her deposit being refunded, Mr Wilson stated that the Applicant had required to incur debt relative to her current tenancy but that the most significant impact on her was an emotional one. He described the conditions from which the Applicant suffers and stated that the issues with the deposit added to her poor health and caused additional stress. The Tenancy Agreement with the Respondent was the Applicant's first time renting in Scotland living independently.

Evidence heard from the Respondent

The Respondent gave evidence and stated as follows:-

- That the Respondent first opened an account with SDS when the Applicant moved into the Property on 4 August 2020.
- That on the same date she registered the details of the Tenancy Agreement.
- That on opening the account and registering the tenancy she received an e-mail from SDS thanking her for opening the account. She had that e-mail.
- That the SDS process then allowed the Respondent to make a card payment for the deposit to transfer it to SDS and she believed she had made that payment.
- That she believed the acknowledgement she had received by e-mail from SDS covered everything including payment of the deposit to SDS.
- That the payment was made using her debit card.
- That she did not check her bank statement to ensure that the payment to SDS had been made. The Respondent explained that she did not use that bank account all the time and did not check it often.
- That she had a screenshot from her bank, Royal Bank of Scotland, confirming that payment had been successful. That explained why she never bothered to check her bank account.
- That she only discovered the deposit had not been lodged when the Applicant was leaving the Property when the Applicant intimated that the deposit had not been lodged. This was a couple of weeks after the Applicant had moved out. The Applicant intimated the position to the Respondent in an exchange of texts.
- That the Respondent lodged the deposit with SDS as soon as she found out that it had not previously been lodged.
- That with regard to the information that required to be provided to the Applicant in terms of the Regulations, she spoke to the Applicant by telephone on 4 August 2020 or the following day to tell the Applicant that her deposit had been lodged with SDS. During that call she confirmed the amount of the deposit paid and the date on which the deposit was received and the date upon which the tenancy deposit was paid to SDS. The Respondent stated that the address of the Property to which the deposit related was contained within the Tenancy Agreement and that she also provided to the Applicant her Landlord registration number by text message on 29 July 2020. During the telephone call on 4 August 2020 or the following day the Respondent also provided to the Applicant the contact details for SDS.
- That's she accepted that she did not provide to the Applicant details of the circumstances in which all or part of the tenancy deposit might be retained by

her at the end of the tenancy and that she had therefore failed to comply fully with the provision of required information under the Regulations.

- That she has a separate account into which the rent was paid and in to which the deposit was paid. She had not noticed that the deposit monies were still sitting in the account.
- That the Tenancy Agreement with the Applicant was her first time acting as a landlord. The Property was purchased to rent out. It was bought around 3 years ago and her partner carried out renovations. The Property was advertised for rent on Gumtree. The Respondent managed the Property herself. She applied to be registered as a landlord just before the Tenancy Agreement was signed and when she placed the advert on Gumtree. Since the Applicant moved out, the Property has not been rented and is now unoccupied and on the market for sale due to a change in the Respondent's personal circumstances.

Under cross examination the Respondent stated:-

- That she had not provided to the Applicant the evidence referred to in her text messages with the Applicant to substantiate her belief that the deposit had been timeously lodged. She didn't do so as she had been advised by the Applicant that the matter had been put into the hands of the Citizens Advice Bureau. The Respondent apologised for not having sent that evidence.
- On being challenged by Mr Wilson that the Respondent had not provided any information to the Applicant over the telephone, he asked why vital information had not been put in writing. The Respondent answered that because of the relationship she had with the Applicant at the outset of the tenancy she spoke to the Applicant a lot and it was only at the end that she realised the deposit had not been lodged. She made a genuine mistake.

Late Production

During the Hearing the Respondent explained that she had not recently been living in Edinburgh and had suffered 2 family bereavements. Accordingly, she had not received the paperwork sent to her by the Tribunal and was unaware of the deadline for lodging documentation. She invited the Tribunal to allow her to lodge a screenshot to vouch her belief that payment of the deposit had been made on 4 August 2020.

Mr Wilson opposed the late production. He referred to the Applicant having been asking for evidence since July and to screenshots having also been discussed during the previous CMD. He objected to due process not being followed by the Respondent.

After adjourning to consider the position the Tribunal determined that the Respondent should be allowed to lodge the late production in the interests of justice.

After various adjournments the Tribunal received a screenshot from the Respondent and heard brief representations thereon from Mr Wilson.

Submissions

For the Applicant

Mr Wilson referred to the written submissions and associated paperwork that he had lodged in advance of the Hearing.

He said that the tribunal had received no evidence to confirm the deposit having been paid over. He disputed that the Respondent had provided to the Applicant the information required by the Regulations. He said that the Applicant had phoned around the various deposit schemes to try to find out where her deposit might be held and SDS was her second call.

He referred to the tenancy being a commercial concern for the Respondent and submitted that the tribunal should not believe that she took no notice of the funds in the bank account. He said the Respondent's evidence showed at best a "willing ignorance" of the process and her evidence only went towards mitigating the two "offences". He suggested the Tribunal should take into account the effect of what had happened on the Applicant although he also accepted that the Regulations are not designed to provide compensation to a tenant affected.

With reference to the caselaw produced, Mr Wilson accepted the cases were illustrative only and not binding. He also accepted that the tribunal required to reach a fair, just and proportionate decision.

By the Respondent

The Respondent stated that she did not deny being in breach of the Regulations but she made a genuine mistake for which she has apologised. She did not intend to cause the Applicant stress and she submitted that any such effect should not be taken into account by the Tribunal.

Reasons for Decision

The Tribunal takes a landlord's failure to comply with the Regulations very seriously. In terms of Regulation 10 of the Regulations it is stated:-

"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 3 times the amount of the tenancy deposit;"

Having admitted a breach of the Regulations the Tribunal is obliged to make an order against the Respondent. In exercising its discretion as to the penalty to be imposed the Tribunal must act in a fair and just, and proportionate manner.

In determining the amount payable by the Respondent to the Applicant, the Tribunal takes into account the following:-

- i. That the Respondent had not previously been a commercial landlord.
- ii. That despite the Tenancy Agreement being the Respondent's first foray into commercial lettings, she had elected to manage the Property and the tenancy herself and she therefore ought to have ensured that she fully appraised herself of the legal requirements in terms of the Regulations and complied with them.
- iii. That the Respondent opened an account with SDS and registered the tenancy.
- iv. That the Tribunal saw no evidence that the Respondent had attempted to pay the deposit to SDS.
- v. That the Respondent did in fact ultimately pay the deposit to SDS on 30 June 2021.
- vi. That the deposit was recovered by the Applicant in full.
- vii. That the deposit was, however, unprotected for the entire duration of the tenancy.
- viii. That the Respondent was genuinely remorseful for and apologetic in respect of the situation that had arisen.
- ix. That the Respondent did not provide to the Applicant in full the information required to be provided under regulation 42 of the Regulations.
- x. That the Respondent was in breach of Regulation 3(1)(a) and (b) of the Regulations.

The Tribunal does not take into account the effect of the deposit not having been lodged on and the apparent resultant stress caused to the Applicant, these considerations not being relevant ones having regard to the terms of the Regulations.

Having regard to the foregoing the Tribunal determined that it is fair, just and proportionate that the Respondent pay to the Applicant a sum of £1,400 by way of a penalty for her failure to comply with the Regulations.

Decision

The Tribunal orders the Respondent to pay to the Applicant a sum of £1,400 under and in terms of regulation 10 of the Regulation.

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.

Legal Member: Gillian Buchanan

Date: 14th December 2021