

IN THE UPPER TRIBUNAL (LANDS CHAMBER)



**Neutral Citation Number: [2019] UKUT 363 (LC)
Case No: RRO/5/2019**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

***HOUSING – RENT REPAYMENT ORDER – MISCONDUCT – FINDINGS ABOUT
CREDIBILITY AND THE NEED FOR A HEARING***

**IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE
FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)**

BETWEEN:

MISS ALEXANDRA WILSON

Appellant

- and -

MR GARETH CAMPBELL

Respondent

**Re: Room at 39 Beatrice Road,
Newcastle,
NE6 5RJ**

Elizabeth Cooke, Upper Tribunal Judge

Determination on written representations

Introduction

1. From 31 March 2017 until 31 July 2018 the appellant, Miss Alexandra Wilson, rented a room at 39 Beatrice Road, Newcastle from the respondent, Mr Gareth Campbell. In November 2018 the appellant applied to the First-tier Tribunal (“the FTT”) for a rent repayment order pursuant to section 41 of the Housing and Planning Act 2016 on the basis that the property was a house in multiple occupation and was unlicensed. Neither party requested a hearing before the FTT and the application was determined on the papers. The FTT made a rent repayment order against the respondent in the sum of £1, and the appellant appeals that decision.

2. The applicant asked the Tribunal for an oral hearing of the appeal in order to avoid the need, if her appeal succeeded, for the FTT to re-hear the matter. Bearing in mind the location of the property I took the view that it would be best for the parties for me to decide the appeal on written representations and then if necessary to remit the matter for a hearing to be conducted locally, which will be easier for the FTT to arrange than for the Tribunal.

3. The appellant’s grounds of appeal were drafted by Ms Alice Richardson of counsel, and the respondent has provided written grounds of opposition.

The FTT’s decision

4. It was not in dispute before the FTT that the property had been an HMO and had not been licensed while the appellant was a tenant; the respondent accepted a caution on 31 August 2018. An HMO licence was issued to him on 19 October 2018.

5. The appellant’s evidence was that she did not know when she moved in that the property was an unlicensed HMO. She had concerns throughout her occupation about safety and the condition of appliances. Eventually in February 2018 she and her fellow tenants raised all their concerns with the respondent on the house WhatsApp group chat. His response was to give them all notice to quit in early June. After meeting with the Newcastle City Council he retracted the notices; the appellant moved out at the end of July.

6. The respondent in his submission to the FTT said that he had been unaware of the need for a licence, but that the appellant informed him in November 2017 that an HMO licence was required. He said that he “began working with the council” to regularise the situation in March 2018 and that due to his readiness to carry out works and his remorse he was issued with a caution rather than being prosecuted. As to the notices to quit, he sent these when he became aware of the need for a licence, because he wanted to regularise the position and to sell the property. He supplied brief written statements from two tenants who said that they had been content with the

standard of the property and with the respondent's conduct as landlord, and did not intend to apply for rent repayment orders. He supplied details of his outgoings in relation to the property and stated that he had had to borrow money in order to comply with HMO requirements.

7. The respondent pointed out that the appellant was a Senior Environmental Health Technician for Newcastle City Council; he said that she must have been aware of the need for a licence, and that fact that there was no licence, when she moved in. Yet she asked for a friend to be able to rent a room when one became vacant. He said that she "made an informed decision to continue residing in a property that she was aware was unlicensed with the sole intention of being able to apply for a rent repayment order."

8. The FTT referred to the provisions of sections 40, 41, 43 and 44 of the Housing Act 2016, which set out the conditions necessary for the imposition of a rent repayment order and the matters that the FTT must "in particular" take into account when deciding the amount to be repaid. Section 44(3) states that these are:

- “(a) the conduct of the landlord and the tenant,
- (b) the financial circumstances of the landlord, and
- (c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.”

9. It also referred to the decision of the Tribunal in *Parker v Waller* [2012] UKUT 301 (LC) where the President (George Bartlett QC) discussed the purposes of a rent repayment order, and observed that there is no presumption that the landlord should be ordered to repay the whole of the rent.

10. The FTT found that the conditions necessary for the making of the order had been made out (since the respondent did not dispute that he had committed the offence). It then turned to the matters that it had to take into consideration. It found that the respondent had been unaware of the need to have an HMO licence and that he had been "open with the enforcement authority and the tribunal" and had co-operated and achieved licensing standards.

11. By contrast it found that the appellant had been "less than forthright" in her submission to the FTT, in that she had not mentioned that she was an employee of the enforcing authority. It looked at her LinkedIn profile, supplied by the respondent and noted that she worked with landlords and tenants, prepared reports under the Housing Act 2016, compiled prosecution files and gave evidence in court where necessary; it also noted that a former role in Norfolk included HMO inspections. It found that it would have been apparent to the appellant when she decided to rent accommodation at the property that it fell short of licensing requirements, and that she then chose to continue living at the property and introduced a friend to rent a vacant room despite knowing that the property was unlicensed and despite having expressed concerns about its condition. The FTT concluded that "the Applicant chose to live in premises that fell short of legal requirements, possibly with the intention to apply for a rent repayment order in the future".

12. In conclusion the FTT decided that a rent repayment order should be made and determined that the amount should be £1.

The appeal

13. The appellant in her grounds of appeal says, first, that the FTT made an error of law in taking into account an irrelevant consideration, namely her professional role and her failure to tell the FTT about it. Ms Richardson observes that in *Parker v Waller* [2012] UKUT 301 (LC) the President said at paragraph 26 that only misconduct by the tenant might justify the reduction of an amount that was otherwise reasonable, and she argues that there was no misconduct here,

14. The appellant also argues that there was a breach of natural justice because the appellant was not given the opportunity to explain why she did not mention her job in her application; that insufficient weight was given to various factors relating to the offence itself (the category 1 fire hazard found at the property, the poor conditions of which the respondent was aware, and the notices to quit sent in response to the tenants' concerns); and that the repayment was excessively low.

15. The respondent in his grounds of opposition to the appeal states that the FTT took into account all relevant circumstances, that the appellant in being "less than forthright" had been guilty of misconduct, and that this was a relevant matter in determining the amount of the repayment ordered.

16. I agree with the appellant that there was a breach of natural justice. The FTT made an adverse finding about her credibility and motivation without having conducted a hearing, and without giving her the opportunity to comment on what the respondent said about her or about why she did not mention her job to the FTT. It was not open to the FTT to reject her evidence that she was unaware at the start of the tenancy that the property was unlicensed without that being put to her in cross-examination; nor, for the same reason, was it open to it to make findings about her motivation for staying on at the property. This was not a fair procedure and on that ground alone the decision must be set aside and remitted to the FTT for a re-hearing.

17. I also agree that there are significant concerns about other aspects of the decision. The FTT was swayed by the appellant's failure to mention her job to the FTT, her alleged knowledge that the house was unlicensed, and her alleged motivation for staying on. Those latter two points have not been proved on the balance of probabilities in a fair procedure; but even if they had been, it is not clear that any of those three factors amounted to misconduct. No consideration was given to that issue by the FTT. Moreover, the FTT's decision does not give adequate reasons for the reduction of the award to £1, and in the absence of any explanation it would appear that the appellant's evidence of misconduct on the part of the landlord has been ignored.

18. Accordingly the appeal is allowed on all the grounds and the matter remitted to the FTT for a re-hearing.

Upper Tribunal Judge Elizabeth Cooke
19 November 2019