Residential Tenancies Board

RESIDENTIAL TENANCIES ACT 2004

Report of Tribunal Reference No: TR0823-006562 / Case Ref No: 0523-85403

Applicant Tenant:	Emmanuel Foley, Jeannette Afi Aboni
Respondent Landlord:	Orkstake Limited
Address of Rented Dwelling:	36 The Boulevard, Cruise Park, Dublin 15, D15CY61
Tribunal:	Michelle O' Gorman (Chairperson) Brian Murray, Louise Moloney
Venue:	Virtual
Date & time of Hearing:	11 December 2023 at 2:30 p.m.
Attendees:	Emmanuel Foley, Applicant Tenant Jeanette Afi Aboni, Applicant Tenant Michelle Savage, Home Club Ltd., Landlord`s Agent and representative.
In attendance:	RTB appointed stenographer.

1. Background:

On 13/05/2023 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 Mediation which took place on 01/08/2023.

Subsequently the following appeals were received:

Tenant : received on 08/08/2023. The grounds of the appeal: Other ; approved by the Board on 09/08/2023.

The RTB constituted a Tenancy Tribunal and appointed Michelle O'Gorman, Brian Murray, Louise Moloney as Tribunal members pursuant to Section 102 and 103 of the Act and appointed Michelle O'Gorman to be the chairperson of the Tribunal ("the Chairperson").

On 20/11/2023 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 11/12/2023 the Tribunal convened a virtual hearing via Microsoft Teams.

2. Documents Submitted Prior to the Hearing Included:

RTB Tribunal File

3. Documents Submitted at the Hearing Included:

None.

4. Procedure:

The Chairperson asked the persons present to identify themselves and to identify in what capacity they were attending the Tribunal. The Chairperson confirmed with the persons present 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; that the Applicant Tenants would be invited to present their evidence and case; that there would be an opportunity for cross examination of this evidence by the Respondent Landlord's representative; that the Respondent Landlord's representative would then be invited to present the Respondent Landlord's evidence, that there would be an opportunity for cross examination of this evidence by the Applicant Tenants and at the end of this process both Parties would be invited to make their final submissions to the Tribunal.

The Chairperson stressed that all evidence would be taken on affirmation and be recorded by the official stenographer/recording technician present, and she reminded the Parties attending 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 the hearing was a de novo hearing and 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.

Those giving evidence gave their affirmations.

5. Submissions of the Parties:

Evidence of Emmanuel Foley on behalf of the Applicant Tenants.

Mr. Foley stated that they signed a lease on the 7 October 2020 and HAP paid the monthly rent of €1940.00 rent from the 7 October 2020 to the 13 April 2023. He confirmed that on the 18 November 2021, they received a Rent Review Notice, which they sent to HAP on the 22 November 2021. His evidence was that he received no response from HAP after sending on the Rent Review Notice. Mr. Foley stated that they received a warning notice for rent arrears in the sum of €620.00 on the 21 February 2023 and that they paid the stated arrears on the 24 February 2023 and re-sent the Rent Review Notice to HAP. On the 13 April 2023 Mr. Foley stated that Homeclub (the Landlords Agents) informed them that HAP would no longer pay for the Service Charge and Carpark, as part of the rent. His evidence was that HAP were never in contact with them in relation to this issue. Mr Foley stated that it had been HAP personnel who had initially found the dwelling and he stated that they were told that they had to agree to take it and that HAP would look after the rent. The Tenant agreed that at the commencement of the tenancy the monthly rent of €1940.00 was paid and that the monthly rent sought was currently €2018.00. He indicated that the issue was between the Landlord and HAP, as HAP have decided not to pay the service charge and carpark charge. Mr. Foley asserted that it had been HAP who had initially seen the contract and that HAP informed them that they, the Tenants, would have to pay 12% of the rent. He confirmed that there were five people (three children and two adults) living in the dwelling. In response to questions from the Tribunal he said that he did not receive the warning notice addressed to Ms. Aboni, the first named Applicant Tenant, dated 15 June 2023.

Evidence of Ms. Michelle Savage, Landlords Representative.

Ms. Savage, on behalf of the Landlord stated that €2,372.00 in arrears of rent was owed, as of the date of the hearing and she said that this arrears sum included the December rent. She referred the Tribunal to the statement of rent contained at page 41 of Casefile 3. She indicated that the Tenants have been in arrears of rent since March 2022 and that the majority of the rent owed related to the service charge and the carpark charge. She stated that the Tenants were currently paying €77.50 a month when they should be paying €374.00 a month. Her evidence was that the Tenants were at all times aware of the break down of the rent, as per the lease and that HAP would only pay the base rent, net of charges. In relation to the Rent Review, she said that the rent review was a review of the rent only and not of the service charge or the car parking fees. Her evidence was that the initial monthly rent was €1550.50 and that the new monthly rent was to be €1644.00. Ms. Savage stated that the Rent review was served prior to the 2% rent cap being introduced via the The Residential Tenancies (Amendment) Act 2021 and that the method of calculating the new rent at the time involved calculating general inflation levels by reference to HICP values. When questioned about the comparable dwellings contained in the Rent Review Notice, Ms. Savage indicated that a report from Geowox, a valuation software, was also sent with the Rent Review Notice and the URL for the daft ad of each dwelling would have been contained within this report. She confirmed that the new rent calculations were not served/sent with the Notice of Rent Review. Ms. Savage confirmed that the Respondent Landlord was not seeking to enforce the Notice of Termination served on the 20 July 2023 and she stated that they just wanted the arrears to be paid.

Mr. Emmanuel stated that where they lived, they did not know of anyone paying for a carpark space and service charge and that the Applicant Tenants do not have a car. Ms. Savage stated that the carpark space was part of the dwelling and that the dwelling was advertised to include a car park space.

6. Matters Agreed Between the Parties:

1.The tenancy commenced in October 2020.

2. A deposit of €1,940.00 was paid.

3.The dwelling is within a Rent Pressure Zone.

4.The monthly rent under the tenancy was set at €1,940.50 prior to the service of the rent review notice (comprising as set out in the Tenancy Agreement between the Parties €1,555.50 for rent, €85.00 for a service charge and €300.00 for a car parking space)

5.The rent review notice was served on the 18 November 2021, seeking to increase the monthly rent for the dwelling to €2018.00, with an effective date of 2 March 2022.

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 1.

The Notice of Rent Review served by the Respondent Landlord on the Applicant Tenants and dated 18 November, 2021, is invalid.

Reason:

The dwelling is in a rent pressure zone and therefore the rent can only be reviewed every 12 months, in accordance with the Act.

The technical requirements for a valid Rent Review Notice are set out in Section 22 and include the following requirements:

22.—(1) The setting of a rent (the “new rent”) pursuant to a review of the rent under a tenancy of a dwelling and which is otherwise lawful under this Part shall not have effect unless and until the condition specified in subsection (2) is satisfied.

(2) That condition is that, at least 90 days before the date from which the new rent is to have effect, a notice in the prescribed form is served by the landlord on the tenant stating the amount of the new rent and the date from which it is to have effect and the matters specified in subsection (2A).

Section (2A) states that the notice referred to in subsection (2) shall—

(f) where the dwelling is in a rent pressure zone (within the meaning given in section 19(7)), state how the rent set under the tenancy was calculated having regard to section 19(4) or, where section 19(4) does not apply, state why it does not apply.

It is accepted by all parties that the Rent Review Notice was served on the 18 November 2021. The Residential Tenancies (No.2) Act 2021 (the 2021 Act), which was enacted in July, replaced the previous 4% per annum cap on rent increases in RPZs. From 16 July to 10 December the 2021 Act capped rent reviews at general inflation levels by reference to HICP values (Section 6 of the 2021 Act). Calculations were based on the RTB Rent Pressure Zone Calculator producing a percentage increase in HICP values between the date the previous rent was set and the date the new rent was set and applying that percentage to the current/ most recent rent amount, to produce the maximum permissible rent increase in line with any HICP inflation (S19 (4B) as inserted by Section 6 of the 2021 Act. To assist in these calculations the RTB established a rent pressure zone calculator in accordance with the method set out in subsection 4B of the 2021 Act.

Section 2 (A) (f) requires any rent review to state how the rent was calculated having regard to Section 19 (4), this is a mandatory requirement. The prescribed form also requests that the relevant calculation is attached to the Rent Review (page 7, Casefile 1). The calculation of how the Landlord arrived at the amount of the ‘new rent’ is not stated in the Rent Review, the Rent review simply states the new rent as €1644.00 (€2018.00, after the service and parking charges are included as per the lease). While an extract of the HIPC index is included in the Rent Review Notice, there is no indication of how the rent was calculated having regard to Section 19 of the Act. Section 22 (2A) (f) is an important requirement for a rent review notice given the consequences of such a notice for Tenants. The Legislation intends that Tenants can understand and assess the method of calculating of the new rent. The Tribunal also notes that such a requirement was important for tenants, as the laws in relation to rent reviews had recently changed, and indeed were to change again December 2021 pursuant to section 3 of the 2021 (Amendment) Act.

Accordingly, the Tribunal is of the view that the Respondent Landlord did not comply with the obligation to " state how the rent set under the tenancy was calculated having regard to section 19(4)" of the Act and therefore the Rent Review is not valid.

Further, Section 22(2A)(d) mandates the Landlord is required to set out in the Rent Review Notice the rent sought for three dwellings of a similar size, type and character and situated in a comparable area.

The requisite "prescribed form" under Section 22 (2) is set out in SI 287/2019 the Residential Tenancies Act 2004 (Prescribed Form) Regulations 2019. Inter alia, that provides at Article 5:

"5. In that regard, please see specified below the amount of rent sought for 3 dwellings of similar size, type and character to the dwelling the subject of your tenancy and situated in a comparable area to that in which the dwelling the subject of your tenancy is situated.

Dwelling 1 [insert amount of rent sought and briefly specify the associated dwelling]

Dwelling 2 [Insert amount of rent sought and briefly specify the associated dwelling]

Dwelling 3 [insert amount of rent sought and briefly specify the associated dwelling]"

Part E of the Respondent Landlord's Notice of Rent Review set out, inter alia, as follows:

"The amount of rent sought for 3 dwellings of similar size, type and character to the dwelling subject to tenancy and situated in a comparable area is set out below….

The landlord must provide the details of each comparable dwelling below (size, type, character and address) and specify the amount of rent sought.

Dwelling 1 Details: 2 The Avenue, Hansfield Wood, Ontario, Dublin15, Ongar, Dublin 15 is for rent on Daft.ie Rent: €2600

Dwelling 2 Details: 1 Aspen Lawn, Clonsilla, Dublin 15 is for rent on Daft.ie Rent: €2373

Dwelling 3 Details: 7 Archerswood, Clonee, Dublin 15 is for rent on Daft.ie Rent: €2400"

Part E of the Rent Review Notice does not specify the size, type, and character of the provided comparators.

The Landlords Agent submits that a Geowox report was also attached to the Rent Review and that set out the details of the comparator dwellings.

Geowox is valuation software is a computer program that is designed to help real estate professionals and appraisers determine the value of a property. The software uses various data points and algorithms to analyse the property's characteristics, location, and market conditions to provide an estimated value.

The Respondent Landlord submitted that the attachment of a Geowox report to the Rent Review satisfies the requirement of providing information on the size, type and character of comparator dwellings. However, the Geowox report is not on the three casefiles provided to the Tribunal and was only vaguely referred to in the Landlord`s agent`s direct evidence to the Tribunal. The Rent Review Notice submitted to the Tribunal does not reference a Geowox report nor is there any indication on the Rent Review form that there is any document attached to the Form and the Tribunal cannot be satisfied that this document was served with the Notice of Rent Review. While the Notice of Rent Review contained the general location of the comparator dwellings- such that it enabled an assessment as to the comparable area, there was no specification, brief or otherwise, in the Notice of Rent Review, of the actual dwellings themselves. It was not stated whether the properties were apartments or houses. The Notice of Rent Review submitted to the Tribunal was devoid of any information as to the size, type and character of the dwellings and, as such, in the

absence of other evidence, the Tribunal cannot be satisfied that the Landlord has complied with 22(2A)(d) of the Act.

For the foregoing reasons, the Tribunal is satisfied that the Notice of Rent Review is not valid and that the operative and valid rent at all material times was €1940.50 per month as per the lease signed by the parties on the 8 October 2020.

A rental statement for the period 1 November 2021 up to 29 November 2023 has been submitted (page 40, Casefile 3). The payments received from the Tenants from 2 March 2022 (the date the 'new rent' would have been effective from were the Rent Review Valid) to the 29 November 2023 amounts to € €40,300.97. The valid rent was €1940.50 per month and therefore the rent and charges that were due between 2 March 2022 and the 29 November 2023 amounts to €38,810 (€1940.50x 20 months). The Landlord has been overpaid to the sum of €1490.97 and the Tribunal directs that the Landlord return this sum to the Tenants within 21 days of the issue of the determination order.

The Tribunal has not included in its calculations any period for the month of December 2023, as no figures for December 2023 have been submitted to the Tribunal. Further, the Tribunal also notes that the HAP payments are paid, in arrears, at the end of each month.

8. Determination:

In the matter of Jeanette Afi Aboni and Emmanuel Foley, (Applicant Tenants) and Orkstake Limited, (Respondent Landlord) the Tribunal in accordance with section 108(1) of the Residential Tenancies Act 2004 that:

1. The Notice of Rent Review dated 18 November 2021, in respect of the tenancy of the dwelling at 36 The Boulevard, Cruise Park, Dublin 15, D15CY6, is invalid.

2. The Respondent Landlord shall pay the total sum of €1490.97 to the Applicant Tenants, within 28 days of the date of issue of the Determination Order, being overpayment of rent and charges in respect of the tenancy of the above dwelling.

The Tribunal hereby notifies the Residential Tenancies Board of this Determination made on 11/01/2024.

Signed: 

Michelle O' Gorman, Chairperson
For and on behalf of the Tribunal.