

## REASONS FOR THE ORDER OF THE COMMISSIONER OF TENANCIES

### INQUIRY - 16<sup>th</sup> AUGUST 2002

This is a determination of an application dated 7<sup>th</sup> July 2002 by Landlord (“the Landlord”), seeking an order for possession and compensation pursuant to sections 104, 121 and 122 of the *Residential Tenancies Act* (NT) (“the Act”) in respect of premises being Unit 3, 42 McMinns Street Darwin 0800 in the Northern Territory of Australia (“the premises”).

A Notice of Inquiry dated 8 August 2002 was posted to the parties. The inquiry was conducted on 16 August 2002 during which evidence was taken from the Landlord’s agent, and the Tenant (“the Tenant”).

On the basis of the documentary and oral evidence before the Inquiry, I find there is a tenancy agreement within the meaning of and subject to the provisions of the Act on the following terms:

Premises:	3/41 McMinn Street, Darwin NT 0800
Commencement Date:	26 <sup>th</sup> April 2002
Period:	Six (6) months
Rent:	\$380.00 per fortnight
Security Deposit	\$760.00

I find that the rental payments due to the Landlord was more than fourteen (14) days in arrears at the time that the Landlord by his Agent issued a Notice to Remedy Unpaid Rental and Notice of Termination dated 2 July 2002 in accordance with section 87(1) of the Act (“the Notice”).

The evidence of the Landlord is that the Notice was served on the tenant by post on 2 July 2002 in accordance with section 154 of the Act. During the inquiry, I raised my concern that the Landlord had not allowed more than 7 days after the Notice was given to specify the Rent Payment Day in accordance with section 87(2)(c) of the Act. The evidence from the Tenant is that she did not receive the Notice until on or about 5 July 2002. The evidence from the Landlord is that they had previously checked with Australia Post who advised that if a letter was posted within the Darwin area it would be delivered the next day, so the Tenant should have received the Notice on 3 July 2002.

I found it necessary to ring Australia Post during the inquiry to find out when the Notice would ordinarily be received by the Tenant through the post. The outcome of my telephone conversation with Australia Post was that ordinarily if a letter was posted within the Darwin region to an address in the Darwin area, it would be delivered the next day. However Australia Post do not always guarantee the next day delivery and if it was not delivered on that day, it would be delivered the day after.

I note, section 25 of the *Interpretation Act* (NT) provides:

Where an Act authorizes or requires a document, parcel or other thing to be served by post, whether the expression “serve” or “give” or “send” or any other expression is used, service shall be deemed to be effected by properly addressing and posting it by prepaid post, and service is deemed to have been effected at the time at which the package would be delivered in the ordinary course of post.”

It seems to me, by virtue of section 25 of the *Interpretation Act*, a letter posted on 2 July 2002 within the Darwin area to a Darwin address is deemed to have been given on 3 July 2002. Accordingly, I find the Landlord has complied with section 87(2) of the Act.

The rent payment day is specified in the notice as being 11 July 2002. As rent was not paid by the rent payment date, in accordance with section 87(3) of the Act, the tenancy is terminated effective on the termination date being 12 July 2002 and in accordance with section 103 of the Act, the tenant ceases to be entitled to possession of the premises as at this date.

I am satisfied the tenancy has been validly terminated and the Landlord should *prima facie* have vacant possession of the premises.

During the course of the inquiry, I gave the Tenant an opportunity to tell me about the hardship she would suffer if a possession order was granted. I note the Tenant was visibly upset and emotional during the course of the inquiry. I explained to the Tenant how the Act operated and the Landlord’s application for compensation and I found it necessary to warn the Tenant to refrain from interjecting during the Landlord’s evidence.

The evidence of the Tenant during the course of the inquiry can be summarised as follows:

- Upon moving into the premises, Centrelink was meant to pay two weeks rent directly to the Landlord for the premises. However, this was not done and the Tenant was not notified of this by the Landlord until a week and half had passed. The Tenant says from then on, she was two weeks behind in her rent.
- The Tenant says her Centrelink payment was reduced because she started working. The Tenant works part time approximately 24 hours per week.
- The Tenant says because of her children, she works night shifts and has been living on 3 hours sleep per night as she must care for her children.
- The Tenant had tried to arrange for her to ‘catch’ up on her arrears by paying \$50.00 per week. She made this offer to the Landlord on two occasions, however this was rejected by the Landlord. The Tenant says she can only commit to paying an extra \$50.00 per week as she does not have the money to pay the full amount.
- The Tenant has two children aged 3 and 2 for which she is the sole carer. When she is at work her neighbour looks after the children.

- The Tenant has no family and no friends that can help her.
- The Tenant has made no attempt to look for alternative accommodation.
- When the Notice was issued, the Tenant says the Landlord was ringing her every 2 or 3 days telling her she had to pay the amount by Thursday 11 July 2002.
- The Tenant says, financially rent is her biggest burden.
- The Tenant says her income is as follows:
  - Wages \$198.00 – 290.00 per week net.
  - Social Security payments \$104.00 per fortnight
  - Another Social Security payment \$300.00 per week
 This calculates to an income of approximately \$440.00 per week.

The evidence of the Landlord during the course of the inquiry can be summarised as followed:

- The Landlord is seeking immediate possession of the premises.
- In relation to the Tenant's allegation that she had not been notified of the Centrelink payment being received until a week and a half had passed, the Landlord says as soon as the Tenant is 7 days in arrears a standard letter is sent to the Tenant.
- The Tenant had arranged to come in to pay some money on various occasions, but did not show up as arranged. The Tenant always had "stories" for not showing up. The Landlord needs to be reassured that the rent payments would be up to date.
- The Tenant did offer to pay an extra \$50.00 per week on top of her rent payments of \$190.00. However the landlord did not reject the offer. The Landlord says they told the Tenant they would take the money but needed more money so the Tenant could catch up. The Landlord would not have rejected the money, as 'any money from the Tenant would be better than none'. In any event, the Tenant did not pay the extra amount.
- The Landlord needs the rental income, as at the date of the inquiry, the Tenant is 31 days behind in her rent.
- The Landlord produced file notes which indicate on 22 June 2002, the Tenant had agreed to pay an extra \$200.00 per week until she had caught up with her rental payments. The file note dated 22 June 2002 is signed by the Tenant.

The evidence of the Tenant in reply is that:

- The Landlord said specifically her offer to pay an extra \$50.00 per week was “rejected”. The agent had told her she had to pay full amounts equivalent to her rental payments. The Tenant says she was “forced” to sign the file note from the Landlord dated 22 June 2002.
- The Tenant says she cannot afford to pay the rent outstanding, she knows what she can afford and she could only afford \$50.00 extra per week, although even paying that amount would not have been easy.
- The Tenant concedes that there were times she had arranged to meet the Landlord, but on the occasions that she did not show up she rang the Landlord to let them know as she knew if she did not ring them, they would have rung her. The Tenant says more often than not, she was unable to make it to pre arranged appointments with the Landlord, because she had to work.
- The Tenant says that during the period of the tenancy from April to August 2002, she had to go to the Salvation Army and St Vincent De Pauls for food vouchers as she could not afford food for her children. The Tenant says they were only able to help her to a maximum of three times during an eight week period.
- The Tenant says her rental arrears has put her under considerable financial strain and she has not had so many financial problems before.
- In relation to her liabilities, the Tenant says she has a car payment of \$88.00 per week (which is her share of a car loan from an ex-relationship) and payments to a medical fund, HIF of \$17.00 per week.
- I specifically asked the Tenant what she did with her income, because according to my calculations, her income was approximately \$440.00 and her liabilities totalled \$105.00, which means she had \$335.00 per week to apply to her rent and other expenses. The Tenant’s response is that most of her money is spent on food and as she does not have a car, she must catch shuttle buses and taxis home when she finishes work at 4am.
- I also asked the Tenant why she did not pay the extra \$50.00 per week to catch up on her arrears notwithstanding the offer had been rejected by the Landlord. The Tenant says she did not make the extra payments as she received the letter dated 8 August 2002 from the office of Consumer Affairs notifying her of the inquiry.
- The Tenant also expressed concern that her name would be entered on a Tica Database and she would be “black-marked” so that if she was evicted she would not be able to find alternative accommodation for herself and her children.
- The Tenant says she ‘does not walk away from her obligations and that respect, honour and her reputation are the only things she has.’ The Tenant says the Landlord ought to ‘try living in her life for a day’ to see how difficult things are for her.

The evidence from the Landlord in relation to the Tica Database is that it is a national database of tenants who have abandoned premises, broken leases and not returned keys. The criteria for putting a tenant's name onto this database is that they have a debt owing. Whether or not a tenant is put onto this database is at the Landlord/agent's discretion. The database is Australia wide. The Landlord does not know if other Landlords use this database, but they use it. When tenant's apply for premises, the database is checked, although even if the tenant is not on this database, Landlord's when doing reference checks would call the previous agent in any event and can find out the Tenant's history this way.

Section 105 of the Act enables me to suspend the operation of the possession order for up to 90 days if certain matters are taken into account. Section 105 provides, my emphasis:

105. Commissioner or court may suspend order for possession
- (1) If the Commissioner or a court is satisfied that the landlord is entitled to an order for possession of the premises but that the **making of an order for immediate possession of the premises would cause severe hardship to the tenant**, the Commissioner or the court may –
    - (a) **suspend the operation of the order for up to 90 days; and**
    - (b) **extend the operation of the tenancy agreement until the landlord obtains vacant possession of the premises from the tenant or the tenant fails to pay rent within 7 days after the rent is due.**
  - (2) The **Commissioner or a court may only make an order under subsection (1) –**
    - (a) if the following matters are taken into account:
      - (i) whether the tenant has, during the tenancy, caused a nuisance or threatened or harassed neighbouring residents or visitors within the locality of the premises to which the tenancy relates or caused damage to their property;
      - (ii) incidents relating to the tenancy that have occurred during the period of the tenancy agreement;
      - (iii) the seriousness of the breach entitling the landlord to the order for possession;
      - (iv) whether an unacceptable risk would be posed to neighbouring residents or visitors within the locality of the premises to which the tenancy relates, or the property of the residents or visitors, if the order for possession was to be suspended; **and**
    - (b) **if satisfied that there are no circumstances that make it likely that the tenant will be unable to pay all outstanding and future rent in relation to the premises.**
  - (3) In extending the operation of the tenancy agreement, the Commissioner or the court may make modifications to the agreement that the Commissioner or the court thinks fit, other than modifications that reduce the tenant's financial obligations under the agreement.
  - (4) If a tenancy has been extended under this section and a tenant fails to pay rent within 7 days after the rent is due, the landlord may give not less than 7 days notice of termination to the tenant.
  - (5) A tenant who receives a notice under subsection (4) must, on the date specified in the notice, give up possession of the premises to the landlord.

In my view, it was obvious during the inquiry that the Tenant would be in a position of hardship if a possession order was made. That being said, I find it difficult to see how her residual income of approximately \$335.00 the Tenant has not been able to catch up on the initial two weeks of arrears unpaid by Centrelink. Even if the Landlord rejected the Tenant's offer to pay an extra \$50.00 per week, it was incumbent on the Tenant to try to catch up the rental arrears in any manner she saw fit. The tenant had agreed in her tenancy agreement to pay her rent two weeks in advance and I note from the Landlord's rental ledger irrespective of the fact Centrelink may not have paid the Tenant's first two weeks rent, the Tenant was consistently in breach of her obligation to pay two weeks rent in advance under her tenancy agreement. In addition, the ledger indicates the last rent payment made by the Tenant was on 1 August 2002 and she is approximately 31 days in arrears of her rent.

Although I have considerable empathy for the Tenant I also empathise with the Landlord who is entitled to have payment of rent for his premises. On balance, based on all the evidence before the inquiry, I am not satisfied an immediate possession order would cause "severe hardship" to the Tenant for the purpose of section 105 of the Act. In particular, by the Tenant's own evidence she cannot afford to pay the rent outstanding and can only afford to pay an extra \$50.00 per week. Section 105(2)(b) provides I can only suspend an order if I am satisfied there will be no circumstances that the Tenant will be unable to pay all outstanding and future rent for the premises. I am not satisfied, based on all the evidence before the inquiry that the Tenant will be able to pay all outstanding and future rent under the tenancy agreement.

Accordingly, I find I am unable to suspend any order for possession pursuant to section 105 of the Act. I am satisfied the tenancy has been terminated and I order that the Landlord should have vacant possession of the premises effective as at 4pm on Monday, 26 August 2002.

During the course of the inquiry, I requested the Landlord provide an undertaking by consent that the Tenant would not be entered into this Tica database. I made it clear during the inquiry, I did not think I had any power to order such an undertaking, but in the circumstances would be seeking the Landlord's consent to the undertaking so that the Tenant would not be put in any further hardship than she was already in. Ms Kathopoulis, the Landlord's agent, indicated she would speak to the Landlord about the issue and would fax a response to the Office of Consumer Affairs. I note as at the date of these reasons for judgment, I have received no response from the Landlord to my request.

I note in passing, it concerns me that Landlord's maintain such a database of tenant's particularly if tenant's are "black marked" so that they would have great difficulty in securing alternative accommodation. I am unsure precisely how the data base works, but it seems to me that such a database could be open to abuse particularly in circumstances where entry onto the database is discretionary and there may be very valid reasons as to why a Tenant has breached a tenancy agreement so as to result in a debt owing.

In relation to the Landlord's claim for compensation pursuant to sections 121 and 122 of the Act, I find the tenant has failed to pay rent in accordance with the tenancy agreement and as at the date of the inquiry remains in possession of the premises. The amount of rent payable from 26 April to 16 August 2002 inclusive amounts to \$3067.10 (rounded down to the nearest decimal point). Of this amount, the tenant has paid rent up until 8 June 2002 inclusive to a total of \$2,230.00.

Therefore, I find the amount of  $(\$3,067.10 - \$2,230.00 =) \$837.10$  is owed by the Tenant to the Landlord in compensation, being unpaid rent and rent that would have been payable to the Landlord from the termination of the tenancy up to and including the date of the inquiry.

Accordingly I order that:

1. The Landlord have possession of the premises effective at 4 pm on Monday, 26 August 2002; and
2. The Tenant is to pay the Landlord compensation in the amount of \$837.10.
3. That the matter of compensation under section 122 of the Act be adjourned to a date to be fixed upon further application of the Landlord.

Dated this 19<sup>th</sup> day of August 2002

Penny Turner  
Delegate of the  
Commissioner of Tenancies