



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case Reference : **MAN/OOCX/HNB/2019/0024P**

Property : **20 Shepherd Street, Bradford BD7 3DG**

Applicant : **Nabi Akbari**
Representative : **In person**

Respondent : **Bradford City Council**

Type of Application : **Appeal against a financial penalty Section
249A & Schedule 13A of the Housing Act
2004**

Tribunal Members : **Tribunal Judge J.E. Oliver
Tribunal Member S.A. Kendall**

Date of Determination : **30th June 2020**

Date of Decision : **23rd July 2020**

DECISION

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Decision

1. The Financial Penalty Notice dated 26th November 2018 is varied.
2. The Applicant, Nabi Akbari, is ordered to pay the sum of £4600 in substitution of the sum of £7026.50 as provided for in the Final Notice dated 26th November 2019.
3. The sum of £4600 is to be paid within 6 months of the date of the service of this decision upon the parties.
4. No order is made for costs.

Background

1. This is an application by Nabi Akbari (“Mr Akbari”) against a financial penalty in the sum of £7026.50 issued by Bradford City Council (“the Council”) pursuant to section 249A of the Housing Act 2004 (“the Act”) in respect of 20 Shepherd Street, Bradford (“the Property”). The Final Notice of the Imposition of a Financial Penalty (“the Final Notice”), dated the 26th November 2018, imposed a penalty for Mr Akbari’s failure to apply for a HMO licence.
2. Mr Akbari submitted his appeal application and the Tribunal issued directions providing for the filing of statements and a bundle of documents to be filed in preparation of the determination of the application.
3. The Tribunal ordered the application be dealt with by way of hearing in April 2020. However, due to the Covid 19 outbreak this hearing could not take place. Consequently, this has been a paper hearing on the papers that has not been objected to by the parties and is not provisional. A face to face hearing was not held because it was not practicable to do so and all issues could be determined on paper. The documents referred to in this decision are those contained in the papers submitted by the parties to the Tribunal.
4. The Tribunal did not undertake an inspection of the Property; it was not necessary for the determination of the appeal.

Chronology

5. On 2nd August 2018, Mrs Denise Robson, a Senior Environmental Health Officer, employed by the Council, visited the Property as part of a survey. At the visit she found it to be occupied by four unrelated occupants sharing a kitchen. The Council’s records showed the Property to be occupied by Mr Akbari and two female tenants.
6. On 19th March 2019 the Council undertook a HHSRS inspection.

7. At the inspection it was found Mr Akbari and 5 other persons, two of which comprised one household, lived at the Property. The tenants had been living at the Property for between two and four months and were each paying rent of £50 per week. Mr Akbari had confirmed that none of the tenants were related and the rent included household bills.
8. The Council determined the Property was an unlicensed HMO and on 24th April 2019 issued an informal Notification of Works Required in order to remove Category 2 hazards. On the same date Mr Akbari was notified of the need for him to attend an interview under caution on 8th May 2019. This interview did not take place because the Council considered it inappropriate due to a language barrier. It was agreed the questions would be dealt with by e-mail and Mr Akbari sent his replies on 30th June 2019.
9. On 28th August 2019 the Council served a Notice of Intention to Impose a Financial Penalty Schedule 13A(1) Financial Penalties pursuant to Section 249A of the Act, allowing Mr Akbari to respond within 28 days.
10. On 25th September 2019 the Council again visited the Property to check the compliance with the informal notification of works and found all the work had been carried out except for thumb turn locks to the front and rear doors.
11. At the further visit the Council found Mr Akbari and three other tenants resident at the Property. Mr Akbari was advised if he intended to increase the number of tenants he would need to install additional kitchen facilities.
12. Mr Akbari responded to the financial penalty notice and the Council offered to reduce the penalty by one third, to £4684, if it was paid within 28 days.
13. Mr Akbari did not accept the offer and the Final Notice was served on 26th November 2020 for the original sum of £7026.50.
14. On 22nd October 2019 Mr Akbari submitted an application for a HMO licence. This was granted on 22nd February 2020, allowing six people to occupy the Property.

The Law

15. Section 249A (1) of the Act provides that a local authority may impose a financial penalty where there has been “a relevant housing offence”.
16. Section 249 (2) sets out what amounts to a housing offence and includes at section 249(b) an offence under section 72 of the Act, namely a failure to licence a property. Section 249 (3)-(4) further provides that only one financial penalty can be imposed for each offence and that cannot exceed £30,000. The imposition of a financial penalty is an alternative to criminal proceedings.

17. Four recent decisions of the Upper Tribunal have established those questions that should be addressed when considering an appeal against a financial penalty. Those are ***London Borough of Waltham Forest v Younis [2019] UKUT 0362 (LC)***, ***London Borough of Waltham Forest v Marshall & Another [2020] UKUT 0035 (LC)***, ***IR Management Services Ltd v Salford City Council [2020] UKUT 0081 (LC)*** and ***Sutton & Another v Norwich City Council [2020] UKUT 0090 (LC)***.
18. The three questions are:
1. Has the Housing Authority followed the correct procedure when imposing the financial penalty? The procedure is set out in paragraphs 18-22 below.
 2. Has the relevant housing offence been proved to the correct standard? Here, the Upper Tribunal has confirmed a tribunal must be satisfied beyond reasonable doubt an offence has been committed.
 3. Is the amount of penalty appropriate in the circumstances? This should be considered in the light of a local authority's policy, where one exists. In ***Sutton*** it was said:

“If a local authority has adopted a policy, a tribunal should consider for itself what penalty is merited by the offence under the terms of the policy. If the authority has applied its own policy, the tribunal should give weight to the assessment it has made of the seriousness of the offence and the culpability if the appellant in reaching its own decision”.

This is referred to in paragraphs 23-30 below.

Procedural requirements

19. Schedule 13A of the Act sets out the procedural requirements a local authority must follow when seeking to impose a financial penalty. Before imposing such a penalty the local authority must give a person notice of their intention to do so, by means of a Notice of Intent.
20. A Notice of Intent must be given within 6 months of the local authority becoming aware of the offence to which the penalty relates, unless the conduct of the offence is continuing, when other time limits are then relevant.
21. The Notice of Intent must set out:
 - the amount of the proposed financial penalty
 - the reasons for imposing the penalty
 - Information about the right to make representations regarding the penalty

22. If representations are to be made they must be made within 28 days from the date the Notice of Intent was given. At the end of this period the local authority must then decide whether to impose a financial penalty and, if so, the amount.
23. The Final Notice must set out:
 - the amount of the financial penalty
 - the reasons for imposing the penalty
 - information about how to pay the penalty
 - the period for the payment of the penalty
 - information about rights of appeal
 - the consequences of failure to comply with the notice

Guidance

24. A local authority must have regard to any guidance issued by the Secretary of State relating to the imposition of financial penalties. The Ministry of Housing issues such guidance (“the HCLG Guidance) in April 2018 : *Civil penalties under the Housing and Planning Act 2016-Guidance for Local Authorities*. This requires a local authority to develop its own policy regarding when or if to prosecute or issue a financial penalty.
25. Bradford City Council has developed its own policy (“the Bradford Policy”) that follows the HCLG Guidance in setting out the criteria to be taken into account when determining any penalty that states:

“ Section 143(1) Criminal Justice Act 2003 states: “In considering the seriousness of any offence the court must consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or may foreseeably cause.” It also considers harm as encompassing those offences where harm is caused but also those where neither individuals nor the community suffer harm but a risk of harm is present.”

The Guidance states the Council will determine the level of the penalty by using the culpability and harm factors set out.

26. The Bradford Policy provides examples of a landlord’s culpability on three levels, those being high, medium and low:

High level of culpability

- They have a history of non-compliance
- Despite a number of opportunities to comply they have failed to do so
- Have been obstructive as part of the investigation
- Failure to comply results in significant risk to individuals
- They are a member of a recognised landlord association or accreditation scheme

- Are an experienced landlord/agent with a portfolio of properties who is failing to comply with their obligations
- Serious and systematic failure to comply with their legal duties

Medium level of culpability

- It is a first offence-with no high level of culpability criteria being met
- Failure is not a significant risk to individuals
- The landlord/agent had systems in place to manage risk or comply with their legal duties but they were not sufficient or adhered to or implemented.

Low level of culpability

- No or minimal warning of circumstances
- Minor breaches
- Isolated occurrence
- A significant effort has been made to comply but was inadequate in achieving compliance

27. The same categories apply to harm and the following are given as examples:

High

- Serious effect on individual(s) or widespread impact
- Harm to a vulnerable individual
- High risk of an adverse effect on an individual

Medium

- Adverse effect on an individual-not a high level of harm
- Medium risk of harm to an individual
- Low risk of a serious effect
- The Council's work as a regulator to address risks to health is inhibited

Low

- Low risk of harm or potential harm
- Limited risk of an adverse effect on individual(s)

28. Once the appropriate levels have been determined a matrix is given to fix the level of penalty. The Bradford Policy then goes onto to give examples of aggravating factors and mitigating factors from which the Council may choose to deviate from the prescribed level of penalty.

29. The aggravating factors are given as follows:

- Previous relevant convictions and time elapsed since those convictions
- Motivated by financial gain
- Obstruction of the investigation

- Deliberate concealment of the activity/evidence
 - Number of items of non-compliance-greater the number the greater the potential aggravating factor
 - Record of letting substandard accommodation
 - Record of poor management/inadequate management provision
 - Lack of a tenancy agreement/paid in cash.
30. The mitigating factors are exemplified as follows:
- Co-operation with the investigation e.g. turns up for a PACE interview
 - Voluntary steps taken to address issues e.g. submits a licence application
 - Acceptance of responsibility e.g. accepts guilt for the offence(s)
 - Willingness to undertake training
 - Willingness to join a recognised landlord accreditation scheme
 - Health reasons preventing reasonable compliance-mental health, unforeseen health issues, emergency health concerns
 - No previous convictions
 - Vulnerable individual(s) where their vulnerability is linked to the commission of the offence
 - Good character and/or exemplary conduct
31. The Bradford Policy sets a minimum penalty of £2000 when allowing for any aggravating or mitigating factors.
32. The Bradford Policy also states:

“The statutory guidance states that a guiding principle of civil penalties is that they should remove any financial penalty that the landlord may have obtained as a result of committing the offence. This means that the amount of the civil penalty imposed must never be less than what it would have cost the landlord to comply with the legislation in the first place”.

Submissions

33. Mrs Nazima Javed, the Environmental Officer assigned to deal with the Property, filed a statement on behalf of the Council dated 6th February 2020. The statement set out the history of the Council’s involvement with Mr Akbari, both in respect of the HMO and the planning department. It also detailed the events leading up to the issue of the Final Notice as referred to in paragraphs 5 to 14 above.
34. The Council filed a copy of the inspection notes from its visit on 19th March 2019, showing that, on that date there were five other occupants of the Property, in addition to Mr Akbari. Two of those occupants formed one household and all were sharing the same kitchen facilities.

35. The Council further provided a copy of its calculation for the financial penalty showing that for both harm and culpability the assessment was low. Under the Bradford Policy, this gave rise to a penalty of £2500.
36. The aggravating factors, each given a value of 5% for the first 5 items, as also set out in the Bradford Policy, were:
- *Mr Akbari had failed to licence the property with inadequate kitchen facilities*
 - *In the category of motivated by financial gain it said “the owner has gained as the tenants have been residing at the property over 4 months.*
37. The aggravating factors increased the penalty by £250.
38. The mitigating factors, each again given a value of 5% were:
- *Mr Nabi Akbari has cooperated with the investigation and arrived for the PACE interview appointment and also returned his PACE questions.*
 - *Mr Nabi Akbari has served notice to quit on the tenants and reduced the numbers residing at the property and has stated in his answers to the PACE questions that he is in the process of completing a licence application form.*
 - *This is Mr Nabi Akbari first offence with the housing department*
 - *Mr Nabi Akbari has accepted the property was occupied by four unrelated tenants and himself residing at the property*
39. The mitigating factors reduced the penalty by £500.
40. The Council thereafter added to the penalty the fees it lost by Mr Akbari failing to apply for a licence, in the sum of £1186.50 and the rent earned by him for the four months of the tenants’ occupation, in the sum of £3840. The penalty totalled £7026.50.
41. The Council stated the failure to apply for a licence for the Property was not disputed by Mr Akbari.
42. Mr Akbari confirmed his appeal to the Tribunal was in respect of the amount of the financial penalty; he accepted he did not have a HMO licence and did not challenge this.
43. Mr Akbari stated the Property was his only property and was unaware of the need to apply for a HMO licence. He had complied with all necessary planning and Building Control and, in doing so, believed nothing further was required when letting the Property. However, once he became aware of his breach, he served the tenants with Notices to Quit and applied for a licence. He stated that until the licence was granted there were no tenants at the Property.

44. Mr Akbari confirmed that all work required by the Council in their informal Notice of Works had been completed. A HMO licence had been granted and he had the necessary Building Regulations, planning permission and electrical/gas certificates.
45. Mr Akbari confirmed he is a self-employed builder and provided the Tribunal with copies of his accounts and tax demands. He described his income as “modest”.

Determination

46. The Tribunal noted there was no dispute Mr Akbari had committed a housing offence by failing to apply for a HMO licence for the Property. He had admitted the same and his appeal did not relate to this. The Tribunal accepted the Property was a HMO, as defined by section 254(2) of the Act and an offence had been committed.
47. The Tribunal thereafter considered whether the Council had carried out the correct procedure when issuing the Final Notice and also determined that it had. The HSSR inspection took place on 19th March 2019. The Notice of Intent was issued on 28th August 2019 and served by a letter dated 2nd September 2019, within the 6 months period required by Schedule 13A of the Act. The Notice of Intent confirmed a period of 28 days to allow Mr Akbari to make representations about the penalty. This he did by a letter dated 28th September 2019. The Council offered to reduce the penalty if it was paid within 28 days. Mr Akbari did not accept this offer and consequently the Final Notice was issued on 26th November 2019 for the original sum.
48. The Tribunal determined the Council had complied with the procedural requirements set out in Schedule 13A of the Act.
49. The Tribunal then considered the amount of the financial penalty, taking into account the Bradford policy.
50. The Tribunal noted the Council had fixed both culpability and harm as low giving rise to the lowest penalty on its matrix and considered this to be fair and reasonable. In setting both matters as low, the Council recognised Mr Akbari had cooperated with Building Control and planning, had a working fire alarm in the Property and it was his first offence. The Council also noted, in setting culpability as low, that Mr Akbari “*felt he had the necessary permission to rent out the property*”.
51. When looking at the aggravating factors, the Tribunal did not accept the additional 5% levied for Mr Akbari failing “*to licence the property with inadequate kitchen facilities*”. The penalty had been given because of Mr Akbari’s failure to obtain a licence and consequently an additional penalty was not appropriate. The lack of kitchen facilities did not fall into any of the aggravating factors given within the Bradford policy. Accordingly this additional amount would be deducted from the penalty.

52. The second aggravating factor was given for Mr Akbari being motivated by financial gain by having tenants in the Property for “*over 4 months*”. The Tribunal determined this to be overly harsh when the Council had accepted Mr Akbari had believed he did not require a licence because he had cooperated with Building Control and the planning department. In accepting this to set culpability as low, the Council could not then state it to be an aggravating factor. According this further ley of 5% is to be removed from the penalty, reducing it to the sum of £2500 before mitigating factors.
53. The Tribunal accepted the four mitigating factors, as stated as paragraph 38 above, given by the Council as reasonable thereby reducing the penalty by £500. This reduces the penalty, before other additions, to the minimum of £2000.
54. The Council had included within the penalty the cost of applying for a licence in the sum of £1186.50, this being the amount the Council lost by Mr Akbari’s failure to apply for a licence. The Tribunal noted that Mr Akbari applied for a licence on 22nd October 2019. This was after the Notice of Intent but before the Final Notice was issued. The Tribunal determines this amount should be removed from the penalty given Mr Akbari has paid the appropriate application fee and there is no loss to the Council.
55. The penalty included the sum of £3840 being the rental income received by Mr Akbari for the four months there were tenants at the Property. The Tribunal accepted Mr Akbari should not have any financial gain by his failure to comply with the law. However, the Tribunal noted that when the Property was inspected on 19th March 2019 not all the tenants had been in occupation for 4 months. It is shown on the inspection notes that two tenants had been there for 4 months, but one had only been there for 2 months and the other for 3 months. Consequently it appeared to the Tribunal the rent calculation was incorrect and the amount levied overstated the rent received. The Tribunal was not aware the Council had challenged this information.
56. The Council calculated the rent received to be 16 weeks multiplied by the total rental income from four households at £240 per week, giving the total sum of £3840. It appeared to the Tribunal this was based upon the information given by Mr Akbari in his PACE interview when he stated the rental income was £60 per week for each household. In the same interview also confirmed only 2 of the tenants had been in the Property for 4 months. He further stated that one of the people present at the inspection worked for him and was not a tenant, only staying at the Property when working.
57. The Tribunal, having considered the evidence, preferred the contemporaneous notes made at the time of the inspection on 19th March 2019. These appeared to the Tribunal to be an accurate reflection of the circumstances in the Property at that time. On that occasion 5 people, comprising 4 households, were in occupation of the Property, each household paying rent of £50 per week. It therefore appeared the person said by Mr Akbari not to be a tenant, was in occupation and paying rent to

him. Consequently, the Tribunal determined he was a tenant for the purpose of calculating the Rent Repayment Order.

58. Accordingly, the Tribunal calculated rent of £2600 is to be repaid, this being 16 weeks for 2 households, 12 weeks for 3 households and 16 weeks for 4 households. This is based on 5 people living at the property, 2 of whom formed one household, paying rent of £50 per week.
59. The inspection notes stated the rent included bills but Mr Akbari did not provide any further information in respect of this.
60. The total penalty payable by Mr Akbari is therefore in the sum of £4600.
61. The Tribunal considered the financial information received from Mr Akbari and accepted that his income is modest. He did not provide any details of his outgoings. However, it was noted the Property had no mortgage or other lending secured against it and can therefore be used to fund borrowing to pay the penalty, if necessary. The Tribunal also took into account Mr Akbari now has a licence for the Property and should have additional rental income available to him.
62. The Tribunal considered the period in which payment of the penalty should be made and recognised the Covid 19 pandemic may have affected Mr Akbari's income as a self employed builder. In those unusual circumstances the Tribunal has determined a longer period than 28 days, asked by the Council to pay the penalty, should be extended. The Tribunal determined the sum of £4600 is to be paid within 6 months of the service of this decision upon the parties.

Costs

63. There was no application by either party for costs arising from the proceedings before the Tribunal. Accordingly no order for costs is made.

J. E. Oliver
Tribunal Judge
23rd July 2020