FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/16UD/HNA/2022/0003**
Premises	**:**	**34 Sybil Street** **Carlisle** **Cumbria** **CA1 2DB**
Appellant	**:**	**Mr Antony Hoodless**
Representative	**:**	**N/A**
Respondent	**:**	**Carlisle City Council**
Representative	**:**	**Mr J Dees, Solicitor**
Type of Application	**:**	**Appeal against a financial penalty: Electrical Safety Standards etc Regulations 2020**
Tribunal Members	**:**	**Judge J Holbrook** **Regional Surveyor N Walsh**
Date and venue of Hearing	**:**	**2 August 2022** **Manchester – video hearing**
Date of Decision	**:**	**16 August 2022**

DECISION

DECISION

The Final Notice which is the subject of this appeal is varied so that the amount of the financial penalty imposed on Mr Hoodless is £750.

REASONS

INTRODUCTION

The appeal

1. On 26 November 2021, Antony Hoodless appealed to the Tribunal against a financial penalty imposed on him by Carlisle City Council under regulation 11 of the Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020 ("the Regulations"). The financial penalty related to alleged breaches of the Regulations in respect of premises known as 34 Sybil Street, Carlisle CA1 2DB ("the Premises").

2. To be more precise, Mr Hoodless appealed against a final notice dated 1 November 2021 given to him by Carlisle Council under paragraph 3 of Schedule 2 to the Regulations ("the Final Notice"). It imposed a financial penalty of £1,000 on him for allegedly breaching regulation 3(1)(a), (1)(b) and (1)(c) in relation to the Premises.

The hearing

3. The appeal was heard on 2 August 2022. This was an oral hearing, conducted remotely by means of HMCTS' Video Hearings Service. Mr Hoodless represented himself at the hearing and Carlisle Council were represented by its solicitor, Mr J Dees.

4. The Tribunal heard oral evidence from Mr Hoodless and, on behalf of Carlisle Council, from Scott Burns (Regulatory Services Manager) and Amelia Morphet (Principal Health & Housing Officer). Opportunity was given for each witness to be cross-examined and oral submissions were also made by both parties. In addition, the Tribunal considered bundles of documentary evidence provided by the parties in support of their respective cases.

5. The Tribunal did not inspect the Premises, but we understand them to comprise a two-storey, two bedroom residential house.

6. Judgment was reserved.

REGULATORY FRAMEWORK

Landlords' duties under the Regulations

7. The Regulations are intended to ensure that electrical safety standards are met in residential properties in the private rented sector; to prescribe how, when and by whom checks of electrical installations are carried out; and to ensure that certificates are provided confirming that standards are met. The Regulations impose various duties on private landlords in this regard and confer enforcement powers on local housing authorities.

8. The Regulations came into force on 1 June 2020 and, from 1 April 2021, they have applied to all "specified tenancies" in England, whether granted before or after the commencement date. Most residential tenancies (other than long leases) will count as specified tenancies.

9. Regulation 3(1) provides:

> *A private landlord who grants or intends to grant a specified tenancy must—*
>
> *(a) ensure that the electrical safety standards are met during any period when the residential premises are occupied under a specified tenancy;*
>
> *(b) ensure every electrical installation in the residential premises is inspected and tested at regular intervals by a qualified person; and*
>
> *(c) ensure the first inspection and testing is carried out—*
>
> *(i) before the tenancy commences in relation to a new specified tenancy; or*
>
> *(ii) by 1st April 2021 in relation to an existing specified tenancy.*

10. For these purposes, "the electrical safety standards" are the standards for electrical installations in the 18th edition of the Wiring Regulations, published by the Institution of Engineering and Technology and the British Standards Institution as BS 7671:2018. The requirement to inspect and test "at regular intervals" generally means at intervals of no more than 5 years.

11. Regulation 3 goes on to impose duties on private landlords to obtain a report from the person conducting the inspection and test which gives the results and sets a date for the next inspection and test. A copy of this must be supplied to tenants (including any new tenant before they occupy the premises) and the inspector who carries out the next test. A copy must also be supplied to the local housing authority if requested. Where the report shows that remedial or further investigative work is necessary, a landlord must complete this work within 28 days or any shorter period if specified as necessary in the report.

Enforcement, financial penalties and appeals

12. Local housing authorities have power (by issuing "remedial notices" under regulation 4) to require landlords to take remedial action where they have reasonable grounds to believe that the landlord is in breach

of their duties. They may also arrange for remedial action to be taken (under regulation 6) if a landlord fails to comply with such a notice, or (under regulation 10) in cases where urgent remedial action is required.

13. In addition, by virtue of regulation 11, where a local housing authority is satisfied, beyond reasonable doubt, that a private landlord has breached a duty under regulation 3, the authority may impose a financial penalty (or more than one penalty in the event of a continuing failure) in respect of the breach. The penalty may be of such amount as the authority determines, but must not exceed £30,000.

14. Schedule 2 to the Regulations sets out the procedure which local housing authorities must follow in relation to financial penalties imposed under regulation 11. Before imposing such a penalty on a private landlord, the local housing authority must give them a notice of intent explaining the action it proposes to take. This must be done within a prescribed period of time and the landlord must be given opportunity to make representations in response. The local housing authority must then decide whether to impose a financial penalty and, if a penalty is to be imposed, its amount. The penalty is imposed by the local housing authority giving the landlord a final notice containing prescribed information.

15. A final notice issued under the Regulations is subject to the right of appeal to this Tribunal (under paragraph 5 of Schedule 2). Such an appeal may be made against the decision to impose the penalty, or the amount of the penalty. It must be made within the period of 28 days beginning with the day after that on which the final notice was served. The final notice is then suspended until the appeal is finally determined or withdrawn.

16. The appeal is by way of a re-hearing of the local housing authority's decision, but may be determined by the Tribunal having regard to matters of which the authority were unaware. The Tribunal may confirm, quash or vary the final notice. However, the Tribunal may not vary a final notice so as to make it impose a financial penalty of more than £30,000.

Relevant guidance

17. The Department for Levelling Up, Housing & Communities has issued non-statutory guidance to assist local housing authorities in the exercise of their enforcement functions under the Regulations.[1] Whilst local authorities are not legally obliged to follow this guidance, it is good practice to do so. The guidance states:

[1] Guide for local authorities: electrical safety standards in the private rented sector (updated 7 October 2021).

> "Local housing authorities should develop and document their own policy on how they determine appropriate financial penalty levels. Generally, we would expect the maximum amount to be reserved for the very worst offenders. The actual amount levied in any particular case should reflect the severity of the offence as well as taking account of the landlord's previous record of offending."

18. The guidance also states that, when developing their policy, local housing authorities may wish to consider the policy they previously developed for civil penalties under the Housing and Planning Act 2016 and the related government guidance.

19. In recognition of the expectation that local housing authorities will develop and document their own policies on financial penalties, including financial penalties issued under the Regulations, Carlisle Council have adopted a Private Sector Housing Enforcement Policy ("Carlisle's Policy"), which sets out the council's policy framework for dealing with the enforcement of housing legislation. We make further reference to Carlisle's Policy later in these reasons.

BACKGROUND FACTS

20. Mr Hoodless is the owner of the Premises: it is a house in Carlisle which has been continuously let to a residential tenant since about 2011. It is not disputed that Mr Hoodless is a "private landlord" or that the Premises have been occupied under an "existing specified tenancy" at all material times.

21. On 11 August 2021, Carlisle Council asked Mr Hoodless to provide them with a copy of the most recent electrical installation condition report ("EICR") in respect of the Premises. In response, Mr Hoodless provided a copy of an EICR dated 21 August 2021. That report, prepared by J Etheridge Electrical, noted that the Premises had last been inspected on 23 November 1993 and indicated that the present condition of the electrical installations in the Premises was unsatisfactory due to a number of potentially dangerous faults, as well as additional items requiring further investigation. In particular, the report noted eight items which were potentially dangerous, and which required urgent remedial action.

22. On 25 August 2021, Carlisle Council issued Mr Hoodless with a remedial notice under regulation 4 requiring him to ensure that the necessary remedial action was taken within 28 days. Mr Hoodless has not appealed against the remedial notice and, indeed, it is accepted by Carlisle Council that he complied with its requirements in September 2021.

23. In the meantime, however, Carlisle Council asked Mr Hoodless to provide them with a copy of any earlier EICR relating to the Premises because they wanted to know whether he had complied with the duty to ensure that the electrical installations were inspected regularly and that

a first inspection had been carried out by 1 April 2021. In response, Mr Hoodless informed the Council that an EICR had been obtained in 2016, but that he no longer had a copy of that report because it had been destroyed in a fire.

24. On 30 September 2021, Carlisle Council gave Mr Hoodless a notice of intent to impose a financial penalty of £1,000 in respect of alleged breaches of regulation 3(1)(a), (1)(b), and (1)(c) in respect of the Premises. Mr Hoodless made written representations in response to the notice in which he said that an electrician had been asked to undertake an EICR early in 2021, in advance of the 1 April deadline, but had been unable to do so due to issues with his business and health during the Covid-19 pandemic, and also because of related difficulties with the tenant granting access to the Premises. Mr Hoodless also repeated his assertion that the Premises had previously been inspected in 2016, following storm damage and a roof leak, but that the relevant EICR, along with other records, had been lost in a fire in early 2019.

25. On 1 November 2021, following an internal review of its decision, Carlisle Council issued the Final Notice which is the subject of this appeal. The council stated that it had imposed the penalty because, as an owner and manager of the Premises, Mr Hoodless had failed in his duties to comply with the Regulations and had only commissioned the EICR after the council had made him aware of his legal obligations under the Regulations.

GROUNDS OF APPEAL

26. Mr Hoodless does not accept that he has breached the Regulations: he says that he took reasonable steps to have the Premises inspected prior to April 2021 but that there were good reasons why this was not possible. He also says that Carlisle Council are wrong to claim that the Premises had not been regularly inspected, or that the first inspection did not take place before 1 April 2021. Moreover, Mr Hoodless asserts that the Premises complied with the standards which were current when they were inspected in 2016, and that any non-compliance noted on the 2021 EICR is simply as a result of the relevant standards having been updated.

27. In any event, Mr Hoodless says that the £1,000 penalty imposed on him by Carlisle Council is disproportionate to the seriousness of any contravention of the Regulations in this case.

DISCUSSION AND CONCLUSIONS

Procedural compliance by the local housing authority

28. Mr Hoodless has not challenged Carlisle Council's compliance with the procedural requirements in Schedule 2 to the Regulations and, based on our own consideration of the documentary evidence provided to the Tribunal, we are satisfied that those requirements were indeed met.

Compliance with the Regulations by the landlord

29. Carlisle Council's decision to impose a financial penalty can only be upheld if the Tribunal is itself satisfied, beyond reasonable doubt, that Mr Hoodless has breached a duty under regulation 3(1)(a), (1)(b) and/or (1)(c) in relation to the Premises.

Regulation 3(1)(a)

30. This requires Mr Hoodless to ensure that the electrical safety standards are met during any period when the Premises are occupied under a specified tenancy. It is important to note that this is an absolute requirement: if the Premises do not meet those standards at a time when they are occupied by a residential tenant, then the duty is breached. Whether or not the landlord has acted reasonably is immaterial.

31. The EICR produced by J Etheridge Electrical on 21 August 2021 indicated that the condition of the electrical installations in the Premises was unsatisfactory due to the various issues identified by the inspector: the report clearly demonstrates that the Premises did not then meet the relevant electrical safety standards. The Premises were tenanted at the time and so there is no doubt that Mr Hoodless breached this regulation.

32. We accept that Mr Hoodless had asked his electrician to inspect the Premises in March 2021 (before Carlisle Council's intervention) and that the subsequent delay in the inspection being carried out was not of his choosing. However, this does not alter the fact that the Premises did not comply with the current electrical safety standards. Mr Hoodless had an absolute duty under the Regulations to ensure that they did comply.

Regulation 3(1)(b)

33. In effect, this requires Mr Hoodless to ensure every electrical installation in the Premises is inspected and tested at intervals of no more than 5 years by a qualified person.

34. Mr Hoodless asserts that the Premises were last inspected in 2016 (and less than 5 years before the inspection carried out by J Etheridge Electrical in 2021). He told Carlisle Council about this and clearly feels aggrieved that, in his view, this evidence has been disregarded by the council.

35. Although it is for Carlisle Council to prove, beyond reasonable doubt, that there has been a breach of the regulation, there is also an evidential burden on Mr Hoodless to prove (on the balance of probabilities) that the Premises had indeed been inspected and tested in the 5 years prior to the inspection in August 2021. We listened

carefully to what Mr Hoodless had to say about this, but we would have expected him to be able to produce some additional evidence in support of his position. He was unable to do so: no copy of the previous EICR was available, nor could Mr Hoodless say exactly when the previous inspection had been carried out, or by whom. The EICR produced by J Etheridge Electrical stated that the last inspection was in November 1993, but Mr Hoodless could not explain why.

36. For the interval between inspections to be no greater than 5 years, the last inspection and testing of the Premises (prior to that carried out on 21 August 2021) would need to have been done no earlier than 21 August 2016. However, Mr Hoodless was unable to say when in 2016 the previous inspection had taken place.

37. It is an integral feature of the Regulations that a landlord must be able to produce a copy of the most recent EICR, either to the tenant or to the local housing authority if they ask to see it. If the landlord loses the EICR, then it is incumbent on them either to obtain another copy of it, or to have the Premises re-inspected. Taking all of this into account, we are not satisfied that the electrical installations in the Premises were inspected and tested during the 5-year period ending on 21 August 2021. We are therefore satisfied, beyond reasonable doubt, that there has been a breach of regulation 3(1)(b).

Regulation 3(1)(c)

38. This required Mr Hoodless to ensure the first inspection and testing of the Premises was carried out by 1 April 2021. This first inspection must obviously be one which is sufficient to assess whether the Premises comply with the electrical safety standards but, for the reasons already mentioned, we find that there is insufficient evidence that any such inspection took place prior to 21 August 2021. We are therefore satisfied, beyond reasonable doubt, that there has also been a breach of regulation 3(1)(c).

Amount of the financial penalty

39. We are satisfied that it is appropriate for Carlisle Council to impose a financial penalty on Mr Hoodless in respect of breaches of the Regulations. We must therefore determine the amount of that penalty.

40. The Tribunal's task is not simply a matter of reviewing whether the penalty imposed by the Final Notice was reasonable: the Tribunal must make its own determination as to the appropriate amount of the financial penalty having regard to all the available evidence. In doing so, the Tribunal may have regard to the government's non-statutory guidance (mentioned at paragraph 17 above) and should also have particular regard to Carlisle's Policy (see paragraph 19 above). Indeed, the Tribunal's starting point in any particular case should normally be to apply that policy as though it were standing in the local authority's shoes. Whilst the Tribunal must afford great respect (and thus special

weight) to the decision reached by the local housing authority in reliance upon its own policy, however, it must be mindful of the fact that it is conducting a rehearing, not a review: the tribunal must use its own judgment and it can vary such a decision where it disagrees with it, despite having given it that special weight.

41. It follows that, in order to determine this appeal, it is necessary for us to consider the provisions of Carlisle's Policy, together with the decision which the council made in reliance upon that Policy in this case.

42. Carlisle's Policy on enforcing the Regulations forms part of a broader private sector housing enforcement policy which sets out the approach which the council will take when exercising a range of enforcement powers, including those conferred by the Housing Act 2004; the Housing and Planning Act 2016; the Smoke and Carbon Monoxide Alarm (England) Regulations 2015; as well as the Regulations which are relevant to this appeal. So, in relation to financial penalties imposed under section 249A of the 2004 Act, for example, the Policy explains how the amount of any such penalty should be determined on a case by case basis, by reference to an assessment of culpability and harm: it states "The more serious the offence, the higher the penalty should be". However, when it comes to financial penalties under the Regulations, the Policy states:

> "The Council can impose a financial penalty of up to £30,000 on a landlord who fails to comply with the regulations. The Council will, in the first place, serve a penalty charge notice in line with its current charging policy for civil penalties. This has been set at £1,000 and has been adopted by all the Cumbrian District Councils. In line with other areas of penalty and fee charging within housing, Carlisle and the other five Cumbrian district Councils have collectively opted to introduce a proposed minimum fee for fines at £1,000 per offence. The level of fine is calculated on Officer time and a reflection of other fines issued for housing offences in the courts. Appendix 3 details the fine structure which must be adopted by the authority under the regulations."

43. Appendix 3 to Carlisle's Policy (which is also applicable to financial penalties imposed by the council under Smoke and Carbon Monoxide Alarm Regulations) appears simply to provide for a penalty of £1,000 for a "first offence" and £2,000 for a "second offence".

44. In their oral evidence to the Tribunal, the council's officers confirmed that Carlisle's Policy requires that, where a financial penalty is imposed for a breach of the Regulations, it must be for a fixed amount (£1,000 in this case). They made the point that, in their view, three separate £1,000 penalties could have been imposed on Mr Hoodless for three separate breaches, but that the council had decided to impose just one penalty in this case.

45. The difficulty with Carlisle's Policy is that it lacks flexibility: it does not permit the decision-maker to impose a penalty of an amount which is intended to reflect the seriousness of the breach in question. So, any penalty imposed on Mr Hoodless for a breach of the Regulations would be £1,000 irrespective of whether the Council considered it to be a minor breach or an egregious one. That approach is not in line with the non-statutory guidance, (which says that the amount of the penalty "should reflect the severity of the offence as well as taking account of the landlord's previous record of offending"), and we do not think that it can be right.

46. The principles which Carlisle Council applies when imposing financial penalties under section 249A of the Housing Act 2004 are set out in Appendix 5 to Carlisle's Policy. The application of these principles requires an assessment to be made of the seriousness of the conduct in question, by reference to culpability and harm, and we consider this also to be a better means of determining the amount of a financial penalty imposed under the Regulations (particularly so, given that the permitted maximum amount of any penalty is £30,000, both under the 2004 Act and under the Regulations).

47. In this case, we would assess both culpability and harm as being "low": Mr Hoodless had endeavoured to have the Premises inspected prior to the April 2021 deadline, and his conduct was not unreasonable. Although there were breaches of the electrical safety standards, no actual harm was caused to the tenant. Such an assessment under Carlisle's Policy indicates a financial penalty in the £500 - £1,500 range, with a starting point of £1,000. However, the Policy also indicates that this starting point may be adjusted downwards to take account of previous good character and evidence of efforts to remedy the situation. We therefore consider it appropriate to reduce the amount of the penalty to £750 because there is no evidence of previous infringements of housing legislation by Mr Hoodless, and also because of his swift compliance with the remedial notice which was served upon him.

OUTCOME

48. For the reasons explained above, we uphold the decision of Carlisle Council to impose a financial penalty on Mr Hoodless, but we vary the amount of the penalty to £750. The imposition of such a financial penalty is appropriate in the circumstances of this case: not only does it reflect the seriousness of the relevant regulatory breaches, but it should also have a suitable punitive and deterrent effect.

Signed: J W Holbrook
Judge of the First-tier Tribunal
Date: [ ] 2022