



**DECISION AND STATEMENT OF REASONS OF PETRA HENNIG MCFATRIDGE LEGAL
MEMBER OF THE FIRST-TIER TRIBUNAL WITH DELEGATED POWERS OF THE CHAMBER
PRESIDENT**

Under Rule 8 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules
of Procedure 2017 ("the Procedural Rules")

in connection with

4 Haughton Square, Main street, Alford, AB33 8DW

Case Reference: FTS/HPC/EV/20/1560

Mrs Kerry Jane Stephen ("the applicant")

Mr Ryan Colquhoun ("the respondent")

PROCEDURAL BACKGROUND:

1. The application under Rule 109 of the Procedural Rules being an application for an eviction order under S 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act) was made on 21 July 2020.
2. The following documents were ultimately lodged in connection with the application:- S 11 Notice to Local Authority with email sending same on 21 July 2020, Notice to Leave dated 17 December 2019 with confirmation it was sent by email the same day, Copy Private Rented Tenancy Agreement, Rent Statement, emails from Robert Stephen 14 and 16 December 2019 to representative, email from applicant to representative 29 April 2020.

3. The PRT between the parties commenced on 15 February 2019 and Notice to Leave was sent on 17 December 2019 with the date of 12 March 2020 stated in part 4 as the first day when proceedings could start. The ground of eviction stated is “your landlord intends to sell the property”.
4. On 24 August 2020 the First-tier Tribunal asked the applicant to provide further information on the following issues:
 - *“The Notice to Leave you have submitted appears to be the same Notice that was lodged with the previous application, which was rejected. However, it has been amended so that box 1 in Part 2 has now been selected. Please confirm whether this Notice was amended after it was sent to the Respondent on 17 December 2020.*
 - *The previous application was rejected as neither the application nor the notice to leave were accompanied by evidence which established that the landlord intended to sell the let property. In particular, it was noted that the email expressing the intention to sell was from a third party. It does not appear that you have provided evidence of the owner/landlords intention to sell with this application, or with the notice to leave, as this cannot be provided retrospectively. Please clarify the basis upon which the tribunal can consider the application.*
 - *It appears that the date specified in the Notice to leave, part 4, is incorrect. If the document was sent by email on 17 December 2019, the date which ought to have been specified is 13 March 2020, not 12 March 2020. Please clarify the basis upon which the Tribunal can entertain the application.”*
5. On 3 September 2020 the applicant’s respondent advised by email as follows:
 - *“When the first application was submitted in the 20th March 2020, I submitted an email from Jennifer Massie advising the tenant owner was planning to sell with a separate attachment of the PDF of the Notice to Leave. It transpired this was the copy without a signature or the reason box being ticked. The tenant was provided with a signed and ticked copy on the 17th December. For the second application I got access to Jennifer Massie’s emails and I added an email from Jennifer Massie with the signed agreement to the tenant which was emailed to the applicant on the 17th December along with a hard copy in the post.*
 - *The third party you refer to was her husband. The landlord gave permission for her husband to email on her behalf which was explained in the second application. The owner can issue a letter to this effect if required.*
 - *The notice was served on the 17th December 2020. 84 days later is the 10th March 2020. With the two day leeway for receiving the documents we would present the tribunal hearing no earlier than the 12th March 2020. The first application to the tribunal was submitted on the 20th March, this is past this date.*
6. There was no further documentation produced with the email.

7. The documents are referred to for their terms and held to be incorporated herein.

DECISION

I considered the application in terms of Rule 8 of the Procedural Rules. That Rule provides:-

"Rejection of application

8.—(1) The Chamber President or another member of the First-tier Tribunal under the delegated powers of the Chamber President, must reject an application if –

(a) they consider that the application is frivolous or vexatious;

(b) the dispute to which the application relates has been resolved;

(c) they have good reason to believe that it would not be appropriate to accept the application;

(d) they consider that the application is being made for a purpose other than a purpose specified in the application; or

(e) the applicant has previously made an identical or substantially similar application and in the opinion of the Chamber President or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, there has been no significant change in any material considerations since the identical or substantially similar application was determined.

(2) Where the Chamber President, or another member of the First-tier Tribunal, under the delegated powers of the Chamber President, makes a decision under paragraph (1) to reject an application the First-tier Tribunal must notify the applicant and the notification must state the reason for the decision."

After consideration of the application, the attachments and correspondence from the Applicant, I consider that the application should be rejected in terms of Rule 8 (c) of the Rules of Procedure on the basis as the Tribunal has good reason to believe that it would not be appropriate to accept the application.

REASONS FOR DECISION:

Applicable Legislation:

S 62 of the Private Housing (Tenancies) (Scotland) Act 2016 states:

62 Meaning of notice to leave and stated eviction ground

This section has no associated Explanatory Notes

(1) References in this Part to a notice to leave are to a notice which—

(a) is in writing,

(b) specifies the day on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the First-tier Tribunal,

(c) states the eviction ground, or grounds, on the basis of which the landlord proposes to seek an eviction order in the event that the tenant does not vacate the let property before the end of the day specified in accordance with paragraph (b), and

(d) fulfils any other requirements prescribed by the Scottish Ministers in regulations.

(2) In a case where two or more persons jointly are the landlord under a tenancy, references in this Part to the tenant receiving a notice to leave from the landlord are to the tenant receiving one from any of those persons.

(3) References in this Part to the eviction ground, or grounds, stated in a notice to leave are to the ground, or grounds, stated in it in accordance with subsection (1)(c).

(4) The day to be specified in accordance with subsection (1)(b) is the day falling after the day on which the notice period defined in section 54(2) will expire.

(5) For the purpose of subsection (4), it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent.

S 54 of the said Act states:

54 Restriction on applying during the notice period

(1) A landlord may not make an application to the First-tier Tribunal for an eviction order against a tenant using a copy of a notice to leave until the expiry of the relevant period in relation to that notice.

(2) The relevant period in relation to a notice to leave—

(a) begins on the day the tenant receives the notice to leave from the landlord, and

(b) expires on the day falling—

(i) 28 days after it begins if subsection (3) applies,

(ii) 84 days after it begins if subsection (3) does not apply.

(3) This subsection applies if—

(a) on the day the tenant receives the notice to leave, the tenant has been entitled to occupy the let property for not more than six months, or

(b) the only eviction ground, or grounds, stated in the notice to leave is, or are, one or more of the following—

(i) that the tenant is not occupying the let property as the tenant's home,

(ii) that the tenant has failed to comply with an obligation under the tenancy,

(iii) that the tenant has been in rent arrears for three or more consecutive months,

(iv) that the tenant has a relevant conviction,

(v) that the tenant has engaged in relevant anti-social behaviour,

(vi) that the tenant associates in the let property with a person who has a relevant conviction or has engaged in relevant anti-social behaviour.

(4) The reference in subsection (1) to using a copy of a notice to leave in making an application means using it to satisfy the requirement under section 52(3).

S 52 of the Act states:

52 Applications for eviction orders and consideration of them

(1) In a case where two or more persons jointly are the landlord under a tenancy, an application for an eviction order may be made by any one of those persons.

(2) The Tribunal is not to entertain an application for an eviction order if it is made in breach of—

(a) subsection (3), or

(b) any of sections 54 to 56 (but see subsection (4)).

(3) An application for an eviction order against a tenant must be accompanied by a copy of a notice to leave which has been given to the tenant.

(4) Despite subsection (2)(b), the Tribunal may entertain an application made in breach of section 54 if the Tribunal considers that it is reasonable to do so.

(5) The Tribunal may not consider whether an eviction ground applies unless it is a ground which—

(a) is stated in the notice to leave accompanying the landlord's application in accordance with subsection (3), or

(b) has been included with the Tribunal's permission in the landlord's application as a stated basis on which an eviction order is sought.

S 73 of the Act states:

73 Minor errors in documents

(1) An error in the completion of a document to which this section applies does not make the document invalid unless the error materially affects the effect of the document.

(2) This section applies to—

...

(d) a notice to leave (as defined by section 62(1)).

Findings and Reasons:

1. In terms of S 52 (3) of the Act an application must be accompanied by a copy of the Notice to Leave. I consider that this means that a valid Notice to Leave must be submitted with the application. The issue here is whether or not the Notice to Leave was a valid Notice to Leave and thus fulfills the requirement of S 52 (3) of the Act.
2. The issue in this case is the calculation of the notice period. The expiry of the period stated in S 54 (2) (b) (ii) of the Act will be 84 days after the date of service as the tenant had been entitled to occupy the property for more than 6 months and the ground stated in the Notice to Leave is not one of the grounds stated in S 54 (3) of the Act. In terms of S 62 (5) of the Act it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent. This would then mean the notice to leave is assumed to have been received on 19 December 2020 as it was emailed to the respondent on 17 December 2019.
3. The applicant was made aware of the issue in the request for further information of 24 August 2020 and her representative stated *“The notice was served on the 17th December 2020. 84 days later is the 10th March 2020. With the two day leeway for receiving the documents we would present the tribunal hearing no earlier than the 12th March 2020. The first application to the tribunal was submitted on the 20th March, this is past this date.”*
4. The calculation of the applicant is simply not correct. The legislation sets out explicitly the dates and periods which have to be observed to create a valid Notice to Leave. This is further described in detail in the guidance notes on the Notice to Leave. A tenant, having so been advised, must then be able to rely on the accuracy of the information provided in the Notice to Leave. The date stated on the notice is not the correct date. The calculation overlooks the provision of S 62 (4) of the Act, which states: *“(4) The day to be specified in accordance with subsection (1)(b) is the*

day falling after the day on which the notice period defined in section 54(2) will expire.”

5. The calculation is based on the date on which the Notice to Leave was sent and adding 84 days notice period and 2 days in terms of S 64(5) of the Act. It omitted to take into account that the date stated in S 64(1) (b) falls the day after the expiry of the notice period and thus not on 12 March 2020 but on 13 March 2020.
6. The Tribunal has considered whether S 73 of the Act may be applicable in this case to assist the applicant. This states: (1) An error in the completion of a document to which this section applies does not make the document invalid unless the error materially affects the effect of the document.
7. In the Tribunal’s view, the word “effect” in section 73 (and in the explanatory note) denotes the effect the notice is intended to have if it is completed without error. It follows from section 62(1)(b), (c) and (d) that a notice to leave completed without error will give the tenant certain information, namely: 1. the day on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the FTT, being the day after the notice period expires (section 62(1)(b)). This date is stated in part 4 of the prescribed form, in which the tenant is expressly advised that “An application will not be submitted to the Tribunal for an eviction order before [the date]”, 2. The eviction ground on which the landlord intends to seek an order (section 62(1)(c)), which is indicated by ticking the appropriate box in part 3 of the prescribed form, 3. Details and evidence of the eviction ground (section 62(1)(d) and part 3 of the prescribed form, 4. The tenant’s details (section 62(1)(d) and part 1 of the prescribed form), 5. The name, address and telephone number of the landlord or his agent (section 62(1)(d) and part 2 of the prescribed form). All these parts of the form require to be completed.
8. In the Tribunal’s view, an error in completion “affects the effect” of the notice to leave if, as a result of the error, the notice does not give the tenant that information. In this case, the error clearly “affects the effect” of the notice to leave, because a correct notice would have informed the Respondent of the correct date on or after which an application to the Tribunal could be submitted. That was not done.
9. The notice should, at the very least, correctly inform the tenant of the “why” (the statutory ground) and the “when” of the proceedings that the landlord anticipates

raising.

10. To state an earlier date than the date on which, in terms of the Act, the landlord is entitled to raise proceedings is not, in the view of the Tribunal, “an obviously minor error” which could then be dealt with in terms of S 73 of the Act by the Tribunal. It is an error which causes the notice to fail in achieving one of its fundamental purposes.

11. For these reasons, the Tribunal finds that, in terms of section 73, the error of stating “12 March 2020” in part 4 of the notice to leave, rather than “13 March 2020” materially affects the effect of the notice and makes it invalid. It is not a “notice to leave” under section 62. Therefore, the document which accompanied the application to the First-tier Tribunal was not, for the purposes of section 52(3), “a copy of a notice to leave”, and accordingly, given section 52(2)(a), the Tribunal cannot entertain the application.

12. For the above reasons the application has to be rejected.

What you should do now

If you accept the Legal Member's decision, there is no need to reply.

If you disagree with this decision:-

An applicant aggrieved by the decision of the Chamber President, or any Legal Member acting under delegated powers, may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them. Information about the appeal procedure can be forwarded to you on request.

Petra Hennig McFatridge
Legal Member
8 September 2020