

Housing and Property Chamber
First-tier Tribunal for Scotland



**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

57 Durisdeer Drive, Hamilton, ML3 8XH ("the property")

Case Reference: FTS/HPC/EV/20/0616

Ann Higgins, 80 Margaretvale Drive, Lanark ML9 1EH ("the applicant")

Stuart McNair, 57 Durisdeer Drive, Hamilton, ML3 8XH ("the respondent")

1. On 20 February 2020 an application for an eviction order was received from the applicant. The application was made 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). The following documents were lodged in connection with the application:- Tenancy Agreement, Notice to Leave with proof of service by email, Rent Statement, Notice to Local Authority with proof of service by recorded delivery.
2. The Notice to Leave is dated 29 August 2020, was served by email dated 29 August 2019 and states in part 4: "an application will not be submitted to the Tribunal for an eviction

order before 27 September 2019.”

3. The Grounds of eviction referred to in the Notice to Leave and the application are Ground 11 and Ground 12 of Schedule 3 of the Act. The documents referred to above are referred to for their terms and held to be incorporated herein.
4. The First-tier Tribunal (FTT) advised the Applicant on 9 March 2020 that the date in the Notice to Leave appeared to be incorrect regarding the date stated in part 4 of the Notice to Leave and gave the Applicant the opportunity to make representations. The Applicant states in the reply to the FTT dated 10 March 2020: “The regulations which set out the required form of the Notice to Leave are set out in The Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017 and do not contain any reference to the 48 hour assumption. This is only found in the guidance notes issued by the Scottish Government which I would submit are not to be regarded as definitive. They are expressly stated to be for guidance only to tenants. In my submission if the tenant were to raise this as an issue as part of his representations then it could be considered by the tribunal but even there I would argue that the “requirement” is an extra-statutory gloss on the actual legislation.”
5. The Applicant goes on to say that “Even if it were accepted that there had been a breach of the law as regards the date when the tenant should have been advised that proceedings would be raised the “correct” date would have been 29 September 2019 which was a Sunday. The tenant has suffered absolutely no prejudice here even if it is accepted that there was an error (which it is not). It would be wholly unreasonable to require the landlord to start from scratch and issue a fresh Notice to Leave given that no payments have been made since March 2019. In any event it seems absurd that the same assumed timescale applies to letters sent by post and email. It is surely within judicial knowledge that emails are to all intents and purposes instantaneous. An assumption that an email takes 48 hours to arrive can of course be rebutted by evidence.”

DECISION

6. 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."

7. 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 FTT has good reason to believe that it would not be appropriate to accept the application.

REASONS FOR DECISION

8. In terms of Rule 109 (b) of the Procedural Rules an application for an eviction order under S 51 of the Act has to be accompanied by:
 - i. evidence showing that the eviction ground or grounds has been met
 - ii. a copy of the notice to leave given to the tenant as required under section 52(3) of the 2016 Act
 - iii. a copy of the notice given to the local authority as required under section 56 (1) of the 2016 Act
9. I consider that the requirement in Rule 109 (b) ii is only met if the Notice to Leave is a valid Notice to Leave.
10. The requirements for a valid Notice to Leave are set out in S62 of the Act. S 62 1 (b) requires the Notice to specify the date on which the landlord under the tenancy in question expects to become entitled to make an application for an eviction order to the FTT. The date is to be calculated in accordance with S 62 (4), S 54 and S 62(5) of the Act. These are referred to for their terms.
11. It is not within the jurisdiction of the FTT to ignore the date in the Notice to Leave because there was no prejudice to the tenant. What is required in order to make an application to the FTT is set out in the legislation in S 52 (2) of the Act, which states:
"The Tribunal is not to entertain an application for an eviction order if it is made in breach of (a) subsection (3)... (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."
12. In terms of S 54 (2) and (3) of the Act, for a Notice to Leave in regard to Ground 12 of Schedule 3 of the Act the notice period is 28 days. In terms of S 62 (4) of the Act, the day to be specified in accordance with S 62 (1) (b) of the Act is the day falling after the day on which the notice period defined in S 54 (2) of the Act will expire. S 62 (5) of the Act then states: *"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."*

13. In this case the Notice was sent on 29 August 2019 and is thus presumed to have been received on 31 August 2019. The correct date to be inserted in part 4 of the Notice to Leave on the basis of that date would be 29 September 2019. The date stated on the Notice to Leave is 27 September 2019. The date is not a date calculated in accordance with the statutory provisions. The date of the month is not correct.
14. I did consider whether S 73 (1) of the Act could be applied in this case. This states that 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. It is clear from the wording of S 62(5) of the Act that it was intended that a landlord should be able to correctly identify the date to be stated in S 62 (1) (b) of the Act without having to know in advance precisely when in fact the tenant would receive the Notice to Leave, thus creating certainty for both parties of the date when an application to the First-tier Tribunal could be made. This certainty in my view is a fundamental aspect of the Notice to Leave. If the day of the month is incorrectly stated on the Notice to Leave this creates a fundamental uncertainty of when an application can be made to the Tribunal and goes beyond a typographical error, which may be considered to be covered by S 73 (1) of the Act. I consider that in this case the identification of the date in part 4 of the Notice to Leave is incorrect to an extent that materially affects the effect of the Notice to Leave, namely amongst other matters the certainty as to when the landlord can apply to the First-tier Tribunal. S 73 in my view cannot be used to remedy this.
15. With regard to the Appellant's representation of 10 March 2020, it is simply not correct that the assumption of a 48 hour period for service is only included in guidance as the Applicant states in the email of 10 March 2020. The assumption is stated explicitly in S 62 (5) of the Act.
16. The decision of the Upper Tribunal in UTS/AP/18/0012 Jagdish Singh Panpher v Christina McDonald confirms that the FTT cannot waive the requirement of S 52 (3) of the Act and explicitly states in [1] "The appellant ... advances a number of cogent

reasons why, if it had discretion to do so, the tribunal might allow the application for an eviction order to proceed, notwithstanding the defect identified in the notice to leave upon which the appellant relies. Unfortunately no such discretion exists. The tribunal can only operate within the terms of the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act") and subordinate legislation in the form of regulations made by Scottish Ministers. In terms of that legislation the tribunal is prohibited from entertaining an application for eviction which is not accompanied by a valid notice."

17. The 48 hour assumption is also not a rebuttable presumption as set out in S 26 (5) of the Interpretation and Legislative Reform (Scotland) Act 2010 which states: *"Where a document is served as mentioned in subsection (2)(b) on an address in the United Kingdom it is to be taken to have been received 48 hours after it is sent unless the contrary is shown"*. because in terms of S 1 (2) (a) of said act: *"This Part does not apply in so far as—
(a) the Act or instrument provides otherwise"*.

18. I consider that the date stated in the Notice to Leave provides insufficient reliable information to the recipient and thus makes the Notice to Leave invalid. In terms of S 52(3) of the Act the FTT cannot entertain the application. The lodging requirements for an application under Rule 109 are therefor not met. The application was not validly made. The Tribunal cannot entertain the application. The application is 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

23 March 2020