



**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

Case reference FTS/HPC/EV/24/2289

Parties

Mr James McNee (Applicant)

Miss Lisa Cairns (Respondent)

54 Ellismuir Road, Baillieston, Glasgow, G69 7JU (House)

A 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 received by the Tribunal on 20.5.24. The application was made under ground 4 of schedule 3 of the Act, although this was not specifically stated on the application.
2. The Applicant produced in evidence a Notice to Leave dated 23.2.24 with the date in

part 4 stated as 31.3.24, an email sending same, and some correspondence with Gardeen Housing Association. The case file is referred to for its contents and held to be incorporated herein.

3. The Tribunal repeatedly advised the Applicant's agent that the notice to leave appears to be defective as part 4 states as the date when proceedings can first be raised 31.3.24, which does not take into account the correct notice period of 84 days. The Tribunal advised that taking legal advice may be appropriate and that the Applicant should consider to withdraw the application and re-serve the required Notice. The FTT repeatedly requested that he provide a S 11 notice.
4. The Applicant argues that he did not know that he required to send a S 11 notice to the local authority, that he needs the property back as soon as possible and that his tenant told him she received legal advice that the appropriate date of the end of the notice period would be 17.5.24 and told him she would not be moving out and he needed to raise proceedings. He also states he resides in Canada.
5. The case documents and all correspondence in the case are referred to for their terms and held to be incorporated herein.

B 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.

C REASONS FOR DECISION:

I 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)).

S 56 of the Act states:

(1) A landlord may not make an application to the First-tier Tribunal for an eviction order against a tenant unless the landlord has given notice of the landlord's intention to do so to the local authority in whose area the let property is situated.

(2) Notice under subsection (1) is to be given in the manner and form prescribed under section 11(3) of the Homelessness etc. (Scotland) Act 2003.

(3) In a case where two or more persons jointly are the landlord under a tenancy, references in subsection (1) to the landlord are to any one of those persons.

II Findings and Reasons:

1. In terms of S 52 (3) of the Act and rule 109 (b) (ii) of the Rules of Procedure 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 and rule 109.

2. The Applicant states the Notice to Leave was served on the Respondent by email on 23.2.24. For the ground stated in the application, namely that the Applicant needs to move into the property, which is not a ground to which S 54 (3) applies, the notice period in terms of S 54 (2) is 84 days. The date to be entered into the Notice to Leave, if accepting the notice was served on 23.2.24 by email should have been 20.5.24, this being calculated on the basis of a 84 days notice period, the 48 hour period for service by email sated in S 62 (5) and stating the date after the expiry as the date when proceedings could first be raised as required in terms of S 62 (4) of the Act.
3. Paragraph 10 of schedule 1 of the Coronavirus (Scotland) Act 2020, which allowed the Tribunal discretion to deal with wrongly calculated periods in a Notice to Leave has been repealed by the Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2022.
4. 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 but a date months prior to the correct date. The calculation overlooks the correct notice period for a notice issued on the grounds in question and the provisions of S 62 (5) regarding the addition of 48 hours service period to the calculation of the date where service is achieved by email or mail and 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.”* The notice stated a date which is based on a 28 day notice period.
5. 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.
6. 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.

7. 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.
8. 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.
9. 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.
10. For these reasons, the Tribunal finds that, in terms of section 73, the error of stating “31.3.24” in part 4 of the notice to leave materially affects the effect of the notice and makes it invalid. It is not a “Notice to Leave” meeting the requirements stated in S 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.
11. The Tribunal considered whether S 52 (4) of the Act could be of assistance to the Applicant. All S 52(4) allows is to consider an application made in breach of S 54 if it

considers it is reasonable to do so. However, stating the wrong date in the Notice to Leave is not a breach of S 54 but a breach of S 62 (1) (b), which prescribes the information to be included in the Notice to Leave. Had the Notice to Leave stated the correct date but had the application been made before that date, then the Tribunal could have considered whether it would have been appropriate to consider the application made e.g. due to time pressure because of antisocial behavior. S 54 relates, as the title states, to “Restriction on applying during the notice period” and it is only a non compliance with that which the Tribunal has discretionary power to consider. The breach in this case is not of S 54 but of S 62. The Tribunal has no discretionary power to entertain this application as the date stated in the Notice to Leave had been wrongly stated in terms of that provision. As stated above, the only other power potentially applicable, that in S 73, does not apply in this case.

12. The Applicant states his tenant told him the notice period was to 17.5.24 and that he had to raise proceedings. He stated that he had told the tenant in 2023 he would require the property back and thus she had had much longer notice and had also acknowledged the end date of 17.5.24 to him. However, neither verbal notice nor advice from Shelter to the tenant about the correct notice period are relevant in this context. As set out above, the Notice to Leave was wrongly completed and there is no discretion under which the FTT could then consider this document.
13. Furthermore, the Applicant had been advised repeatedly that he required to produce the notice issued to the local authority. S 56 of the 2016 Act specifically states that *A landlord may not make an application to the First-tier Tribunal for an eviction order against a tenant unless the landlord has given notice of the landlord's intention to do so to the local authority in whose area the let property is situated.* This is a legal requirement for the raising of a valid application. It is stated as a lodging requirement for an application under rule 109 in rule 109 (b) (iii). The Applicant failed to produce this document and from his representations clearly had not sent such a notice to the local authority. Again this is a matter for which the FTT has no discretion.
14. It would not be appropriate for the Tribunal to accept an application based on an invalid Notice to Leave and an application which is not accompanied by a S 11 notice to the local authority, which thus does not meet the lodging requirements of rule 109 (b) (ii) and (iii) of the Rules of Procedure and the requirement for a valid application in terms of S 52 (3)

and S 56 (1) of the Act. For the above reasons the application has to be rejected.

D 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 McFatrige
Legal Member
2 August 2024