



**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/24/5029

Parties

Mr Frankie Rizza (Applicant)

Mr Matthew Alexander MacDonald (Respondent)

Miss Margaret Ross (Applicant's Representative)

19A Main Street, Bathgate, EH48 3SA (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 1.11.24. The application stated as the ground for the

application grounds 12 and 12A of schedule 3 of the Act and was accompanied by a Notice to Leave dated 12.9.24 based on ground 12 only. The applicant also included a tenancy agreement, a rent statement, the S 11 notice and service evidence, Sheriff Officers' confirmation of service of the Notice to Leave on 18.9.24. The date stated in part 4 of the Notice to Leave was 19.9.24 and the date of the Notice to Leave on the document was stated as 12.9.24.

2. On 29.11.24 the FTT wrote to the representative as follows: *• The notice to leave and certificate of service produced show that the notice was served on 18 September 2024. The notice states that the earliest date that proceedings will be raised is 19 September 2024. Please have regard to sections 54(2), 62(4) and 62(5) of the Private Housing (Tenancies) (Scotland) Act 2016. The period of notice which you have given has not provided the required period of notice and accordingly the notice may be invalid. Please confirm your position in relation to the validity of the notice. • As the application seeks to rely on ground 12 (3 consecutive months rent arrears) the landlord must comply with the pre-action protocols before seeking to evict. Please have regard to the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020 and Scottish Government guidance. Please submit evidence of compliance with the pre-action protocol.*
3. The agent replied on 4.12.24 as follows: "The Sheriff Officers delivered the notice to quit on the 18th of September . Mr Macdonald told me he would move out on the 31 October 2024,however he did not and so I raised the First tier tribunal papers on the 31st of October Mr Macdonald was, at that point time 7 months in arrears ,3 consecutive months February March and April 2024 and also consecutive months June July August September and now October and November 2024. On checking Gov . notes I read that if the tenant has lived for more than six months in the property 28 days is permitted notice if there are 3 consecutive months arrears.By waiting to raise the action on 31st October because he said he was vacating,that gave him 43 days. On the second point re issuing information and supportive organizations I did this verbally on several occasions but each time Mr Macdonald was insistent that he had more than enough money to pay the rent but " something" always seemed to come up and prevented him from doing so . Therefore I have no printable evidence of providing him with this information. However I spoke with Mr Macdonald today, Tuesday 3rd December, in person and reminded him of one of my suggestions in September to apply for Universal Credit.At that time he told me his relative was helping him and it would be through between 15- 21st September and he was eligible for a £5000 back payment of

disability for his daughter and this would pay the arrears. Today his response was his relative was still helping him and he offered to ask her to call me, which I accepted. He also informed me he has Social work and a support worker to help. I have attached an up to date rent record and also a letter from the selling Agent. Unfortunately these continued losses are not sustainable and because of this, the decision to sell has been made. I have explained this to Mr Macdonald . I have arranged, with his consent, for the Agent and myself to view the property on Thursday 5th December, regarding a valuation so it can go up for sale as soon as 19a is vacated. I will email you the signed copy from Mr Newman but took the opportunity of adding it to this correspondence in its present, for approval condition. Please contact me if there is any further necessary clarification required and thank you for your attention.

4. 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)).

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 date stated in part 4 is 19.9.24, which is 7 day after 12.9.24, the date of the Notice to Leave. The applicant served the Notice to Leave on the Respondent on 18.9.24 by Sheriff Officers. The ground on the Notice to Leave is ground 12 and thus a ground stated in S 54 (3) of the Act. Thus in terms of S 54 (2) (ii) of the Act a notice period of 28 days applied.
3. The date to be entered into the Notice to Leave, if accepting the notice was dated 12.9.24, should have been 11.10.24, this being calculated on the basis of a 28 days notice period commencing on 12.9.24 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.
4. 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.

5. 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 over 3 weeks prior to the correct date. The calculation overlooks the interaction of the correct notice period for a notice issued on the grounds in question 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 not based on a 28 day notice period.
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 “19.9.24” 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.
12. The matter is further compounded by the fact that the date stated in part 4 of the Notice to Leave, 19.9.24, is in fact the date after the Notice to Leave was served on the tenant, namely 18.9.24. The delay between the date of the notice and the service date would lead to further confusion and insecurity of the recipient.
13. 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. The fact that the Applicant waited ultimately until 1.11.24 to make the application is thus not relevant.

14. Because the Tribunal does not have discretion in the matter and the Notice to Leave is not a valid Notice to Leave which meets the statutory requirements, the application is not complete.
15. It would not be appropriate for the Tribunal to accept an application based on an invalid Notice to Leave, which thus does not meet the lodging requirement of rule 109 (b) (ii) of the Rules of Procedure and the requirement for a valid application in terms of S 52 (3) of the Act.
16. 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

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Legal Member

10 January 2025