



**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

30 D Townhead Street, Stevenson KA20 3AG

Case Reference: FTS/HPC/EV/20/1056

Susan Docherty 4 Dykesfield Place, Saltcoats, KA21 6DB ("the applicant")

Jacqueline Paul 30D Townhead Street, Stevenson, KA20 3AG ("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 9 April 2020 by email from the applicant's representative Move2 Lettings Ltd 25 Hamilton Street, Saltcoats, KA21 5DT.
2. The following documents were ultimately lodged in connection with the application:- S 11 Notice to Local Authority, Notice to Leave dated 6 March 2020 with confirmation it was sent recorded delivery on 6 March 2020, Copy Private Rented Tenancy Agreement, Rent Statement.

3. On 4 May 2020 the First-tier Tribunal asked the applicant to provide further information on the following issues: “1. Please provide evidence that the Section 11 Notice was sent to the local authority. 2. The tenancy agreement stipulates that communication of Notices will be by email. The Notice appears to have been issued by recorded delivery post. Please clarify whether the Notice was also sent by email, and if so, provide evidence of this. 3. The Notice to leave was posted on 6 March 2020. It stipulates that the earliest date upon which the application can be made to the Tribunal is 5 April 2020. In terms of the legislation the Notice is assumed to have been received 48 hours after it is sent. The date to be specified is the day after expiry of the Notice period. It therefore appears that the date ought to have been 6 April 2020, and the Notice is therefore not valid. Please confirm the basis upon which the tribunal can consider the application. 4. The rent statement submitted suggests that the arrears started in January 2020. As the Notice was issued at the beginning of March 2020, the Respondent would not have been in arrears of rent for three consecutive months at the date of service of the Notice. Please clarify the position regarding this ground for eviction. 5. Please provide evidence to support of ground 11, breach of tenancy.”

4. On 6 May 2020 the applicant’s respondent advised by email “Dear Natasha, As I am sure you will understand, I have not dealt with this process very much and to be honest find it a little confusing. This tenant moved into the property and has not paid a penny since. We have tried to help with advice about benefits and forms but still this tenant has paid nothing. 1. Unfortunately, I posted the Section 11 to the local authority via normal mail and therefore have no other proof except the signed copy sent to you. 2. Yes, I do have proof that the Notice was emailed to the tenant and have attached a copy of this. 3. I issued the Notice on the 6 March 2020 with a move out date 30 days later meaning that the tenant had until 12 midnight on the 5 April 2020 to vacate and we would not have been able to check until 6 April 2020. 4. I was under the impression that the Notice could be issued early with the vacating date 30 days after the date of the Notice, which in this case was 5 April 2020. 5. Ground 11, is that she has breached by not paying any rent, however, there have been numerous complaints and we have issued a complaint letter and visited her at the property to inform her of this. I have received various telephone calls about 3 large Dobermans at the property barking all day and night and no dog mess not getting picked up from both rear and front gardens and it is a ‘no pet’ tenancy, we have been told that there

are more than one person staying in the property but only one on the PRT and there are people coming and going and arriving in taxis and only in the property a matter of minutes and then leaving again. Getting proof of all the above is very difficult because neighbours do not want to put their names to letters and anti-social behaviour is a very hard ground to prove. However, just this morning there was a Police raid at the property and I have an incident number to prove it. Can I still use the current Notice and amend it for the Anti-Social ground? This tenant has proved to be very difficult to deal with and is just refusing to pay the rent or act in a tenant like manner. I am looking for as much advice on this as possible as the landlord is very stressed and of course out a lot of rent money. The property was completely renovated with new windows and front door installed just in December and now the Police have forced entry this morning. I am going to letter the tenant via email to say that I need to visit the property in 48 hours to ensure that it is secure. I am very worried about the property, the landlord and of course the local residents who are at their wits end. Any advice on this would be very much appreciated." There was no email copy of the Notice to Leave sent to the Respondent attached to the email.

5. 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 (1),(2) and (4) of the said Act state:

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.

(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 tenancy agreement in clause 4 specifies that any communication is to be served by email on the other party "to the email addresses set out in clause [2 or 3] and 1)". There is no evidence that the Notice to Leave was sent by email as the copy of the email referred to in the email of 6 May 2020 was not attached. However, even if one accepts that the Notice to Leave was sent correctly by email as the Applicant's representative asserts, this could not have been done earlier than 6 March 2020 as this was the day the Notice to Leave was signed. There is also evidence in the recorded delivery slip that the Notice to Leave was sent recorded delivery on that day.
3. The first problem in this case is the calculation of the notice period. The expiry of the period stated in S 54 (2) (b) (i) of the Act will be 28 days after the date of service. 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 8 March 2020 regardless of whether it was sent by email or recorded delivery. This was clearly known to the Applicant as clause 4 of the Private

Residential Tenancy agreement states this clearly. Taking this as the relevant date, the 28 day period would expire on 5 April 2020 and thus the earliest date for making the application in terms of S 62 (1) (b) and (4) of the Act would be 6 April 2020, which is not the date stated in the Notice to Leave. The Notice to Leave states as the earliest date as 5 April 2020

4. The applicant was made aware of the issue in the request for further information and her representative stated *"I issued the Notice on the 6 March 2020 with a move out date 30 days later meaning that the tenant had until 12 midnight on the 5 April 2020 to vacate and we would not have been able to check until 6 April 2020. I was under the impression that the Notice could be issued early with the vacating date 30 days after the date of the Notice, which in this case was 5 April 2020."*
5. 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.
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 "1 November 2019" in part 4 of the notice to leave, rather than "3 November 2019" 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. Furthermore, the Notice to Leave is not valid for an application to the Tribunal on the basis of Ground 12 of Schedule 3 of the 2016 Act because at the time the Notice to Leave was issued, 6 March 2020, the Respondent had not been in arrears for three or more consecutive months. In terms of the Rent Statement the arrears first arose on 6 January 2020. The Notice to Leave was issued on 6 March 2020, which is 2 months after the arrears first arose. Ground 12 (1) of Schedule 3 of the Act requires the following: "12 Rent Arrears (1) It is an eviction ground that the tenant has been in rent arrears for three or more consecutive months." Sheriff I Fleming in the Upper Tribunal decision [2019] UT 59 Abdul Majid v Adele Gaffney and Andrew Robert

Britton of 17 October 2019 stated in para 14: “... It is clear that the words “expects” relates to the date on which the application will be made. That is entirely distinct from the eviction ground. The statutory provision is clear which is that the ground of eviction must be satisfied at the date of service of the Notice to Leave. If it is not it is invalid. If it is invalid decree for eviction should not be granted. The decision of the First-tier Tribunal sets out the position with clarity. It could in my view it could never have been intended by Parliament that a landlord could serve a notice specifying a ground not yet available in the expectation that it may become available prior to the making of an application. Such an approach would be open to significant abuse. Either the ground exists at the time when the Notice to Leave is served or it does not. If it does not the Notice to Leave is invalid and it cannot be founded on as a basis for overcoming the security of tenure.....” This clearly sets out that the requirement of a valid Notice to Leave is that at the time the Notice to Leave is served the ground on which the notice is based must exist. In terms of the Notice to Leave however ground 12 clearly requires three months consecutive rent arrears. The Notice to Leave is thus also invalid if based on Ground 12 of Schedule 3 of the Act because at the date the Notice to Leave was issued the tenant had not been in rent arrears for three or more consecutive months. The arrears had only been in place for 2 months.

13. I also note that with regard to the application under Ground 11 of Schedule 3 the application had not been validly lodged in terms of Rule 109. Rule 109 (b) (i) requires “evidence showing that the eviction ground or grounds has been met”. No such evidence has been provided by the Applicant at the time of lodging. An explanation for the absence of evidence was given in the email by the representative and it was stated that evidence could be provided, however this had not been included in the email.

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
27 May 2020