

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

104a South Street Milnathort

Case Reference: FTS/HPC/EV/19/1681

Stephen Clark 9 Smith Street, Kinross, KY13 8DD ("the applicant")

Sarah-Jane McNaughton 104a South Street, Milnathort, KY13 9XB ("the respondent")

1. On 3 June 2019 an application was received from the Applicant's representative McNabs LLP. 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 ultimately lodged in connection with the application:- S 11 Notice to Local Authority with proof of service by recorded delivery, Notice to Leave dated 12 March 2019 with track confirmation signed for 12 April 2019, Copy Private Rented Tenancy Agreement, Rent Statement, Notice to Leave dated 26 March 2019 with track confirmation signed for 27 March 2019, Death Certificate of joint proprietor, unsigned white copy letter from unknown source to

respondent dated 26 March 2019 with recorded delivery slip.

2. The Applicant's agents state in their letter of 19 July 2019 to the Tribunal : "We note on this second notice sent on 26 March 2019, the correct period of notice has not been given as the 28-day period runs from the date of sending and not the date of delivery. We would highlight this error is not a substantial one and is mitigated by the fact the tenant was both aware of the position with regards notice and was in contact via telephone to request a second copy."
3. The documents are referred to for their terms and held to be incorporated herein.

DECISION

4. 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."

5. 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

1 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)).

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. According to the letter of the Representatives of the Applicant the application relies on the service of the second Notice to Leave dated 26 March 2019. This was sent recorded delivery to the work address of the Respondent. The tenancy agreement in clause 4 specifies that any communication is to be served by recorded delivery on the other party "to the address set out in clause [2 or 3] and 1]". The address of the Respondent stated in clause 2 is 13 Fleming Court Milnathort KY13 9WQ. The letter was addressed to the Respondent at her work address of c/o Pentland Land Rover Cupar Eden Valley Business Park CUPAR Fife KY15 4RB. This was signed for on 27 March 2019 by "Pentland".
3. Firstly one may question whether service of the Notice to Leave can be verified by a tracking signature "Pentland" at the Respondent's place of employment. It is clearly not the Respondent's name and does not prove that the Respondent herself received the Notice. It could also be argued in any event that the Notice to Leave was not served on the Respondent at the address specified in the Tenancy Agreement as per clause 4 of the tenancy agreement or at the Respondent's home address as mentioned in the guidance notes in the Notice to Leave.
4. However, even if one were to interpret these matters in a way that was favourable to the Applicant, in terms of the date on the Notice to Leave and the signed for tracking evidence, at best the Notice to Leave would have been served on 27 March 2019. The expiry of the period stated in S 54 (2) (b) (i) of the Act will be 28 days after the date of service. Taking this earliest possible date for service of the document, 27 March 2019 as the relevant date, the 28 day period would expire on 24 April 2019 and thus the earliest date for making the application in terms of S 62 (1) (b) and (4) of the Act would

be 25 April 2019, which is not the date stated in the Notice to Leave. The Notice to Leave states as the earliest date as 24 April 2019.

5. The Applicant's representatives acknowledge that the date is not correctly stated although it is not clear whether this is for the reason stated above, but argue that this is not a substantial matter and was mitigated by the fact that the tenant was aware of the position.
6. 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.
7. 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.*
8. 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.
9. 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 date (25 April 2019) on or after which an application to the Tribunal could be submitted. That was not done.

10. 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.
11. 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.
12. For these reasons, the Tribunal finds that, in terms of section 73, the error of stating “24 April 2019” in part 4 of the notice to leave, rather than “25 April 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.

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
5 August 2019

