



**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

9 West Pilton Road Edinburgh EH4 4GX

Case Reference: FTS/HPC/EV/20/0519

Robert Pearson, 731-733 Ferry Road, Edinburgh, EH4 2UA ("the applicant")

Karin Paterson, 9 West Pilton Road, Edinburgh EH4 4GX ("the respondent")

1. On 13 February 2020 the First-tier Tribunal Housing and Property Chamber (the Tribunal) received an application made by the applicant and dated 5 February 2020. 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 dated 1 December 2018, which in clause 18 described the document as a Short Assured Tenancy and a Notice to Leave dated 5 February 2020, giving as the only ground of eviction "Your landlord intends to live in the Let Property" and stating as the first day proceedings can be raised with the Tribunal 2 March 2020.
2. On 17 February 2020 the Tribunal requested evidence that the eviction grounds are met, A copy of the notice given to the local authority under S 56 (1) of the Act and evidence of

how this was served. On 18 February 2020 the Applicant emailed the Tribunal advising he will soon be homeless and undertaking to send further evidence.

3. A copy of the requested notice under S 11 of the Homelessness etc (Scotland) Act 2003 to the City of Edinburgh Council was received by the Tribunal on 24 February 2020 together with a letter advising the Tribunal that the Applicant suffers from Epilepsy and stress often causes fits. He also provided copies of letters from him to the Respondent dated 4 December 2019 regarding an inspection he had carried out, a letter dated 4 January 2020 in which the Applicant states that he is giving the Respondent 30 days notice of termination of the tenancy and advising her the tenancy will end on 3 February 2020, and a further letter dated 4 January 2020 to the Respondent referring to an inspection of 3 January 2020 with 6 photographs of the property the Applicant states show damage or unauthorized alterations by the Respondent.
4. By email of 24 February 2020 the Tribunal then asked the Applicant to provide a valid Notice to Leave as the Notice to Leave submitted was dated the same day as the application and advised that the relevant notice period for applications on the ground that the landlord wishes to move into the property would be 84 days. The Tribunal also encouraged the Applicant to seek independent legal advice.
5. By email of 25 February 2020 the Applicant then provided a different Notice to Leave dated 4 January 2020, which gave as the grounds for the notice "Your landlord intends to live in the Let Property" and "You have breached the terms of your tenancy agreement". This Notice referred in part 3 to an enclosed letter with full details and photographs of the breach. This notice gave as the date proceedings could first be raised with the Tribunal 3 February 2020.
6. On 27 February 2020 the Applicant emailed the Tribunal a copy of a Summary Cause Summons lodged in Edinburgh Sheriff Court on 19 February 2020 seeking recovery of possession of the premises he occupied as a Pub Manager, which claims that due to the end of the employment relationship the property owner is seeking to evict the Applicant.
7. By email of 12 March 2020 the Tribunal asked the Applicant to provide evidence of service of the Notice to Leave dated 4 January 2020 and comments on the validity of the notice with regard to the notice period. The Applicant replied on the same day stating "The notice like all letters was hand delivered to the address. Can I ask are you deliberately telling me all is fine what is submitted and then asking for additional things. I will seek

more advice from my MSP re your service too."

8. On 17 March 2020 the Tribunal advised the Applicant "The application has been reviewed by one of our In-house convenors who has requested the additional information on 12/03/2020... The application has not been deemed "fine" or fit to go to a Discussion / Hearing yet because we are awaiting a response to the aforementioned requested info".
9. After that date the lockdown under Covid 19 restrictions started.
10. On 18 June 2020 the Applicant emailed the Tribunal asking "Can I please have an update as to when you will start to look at this account for me. I am now a front line worker and need my house back as a matter of urgency. This ongoing saga has also affected my health already. I await a prompt reply."
11. On 22 June 2020 the tribunal sent an email to the Applicant again attaching again the letter of 12 March 2020, noting that not all the issues raised had been answered and advising that the acceptance or rejection of the application would now be further considered by the Tribunal.
12. The documents referred to above and all other correspondence between the Applicant and the Tribunal are referred to for their terms and held to be incorporated herein.

DECISION

13. 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."

14. 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

Relevant legislation:

Rule 109 (b) of the Procedural Rules states 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

S 52 of the Act states: 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 54 of the Act states: 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).

62 Meaning of notice to leave and stated eviction ground

(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.

Reasons:

1. I consider that the requirements in s 52 (3) of the Act and Rule 109 (b) (ii) of the Procedure Rules are not met in this case. The Tribunal can only entertain an application if it is accompanied by a Notice to Leave. I consider that this requirement means that a valid Notice to Leave has to be submitted with the application. It is not entirely clear from the application and the following correspondence which of the two Notices to Leave the Applicant wishes to base the application on.
2. I have considered the matter in relation to both submitted Notices to Leave as set out below. The outcome is the same in regard to both Notices.
3. The Notice to Leave lodged with the application was dated 5 February 2020. The Notice to Leave states that it relies on Ground 4 of Schedule 3 of the Act. The entry in part 2 is: "Your landlord intends to live in the Let Property". The entry in part 4 states: An application will not be submitted to the Tribunal for an eviction order before 2 March 2020. This is the earliest date that Tribunal proceedings can start and will be at least the day after the end date of the relevant notice period (28 days or 84 days depending on the eviction ground or how long you have occupied the Let Property).
4. The application was lodged with the Tribunal on 13 February 2020 and is dated 5 February 2020, the same day as the Notice to Leave. The application was in fact made before the date on which it stated proceedings could first be raised. In terms of the Notice to Leave lodged, the application was made prematurely and would certainly not have given the tenant the required fair notice that an application to the Tribunal would be raised on 13 February 2020.
5. Furthermore, 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.

6. The calculation of the date when proceedings were first raised was calculated incorrectly. The dates stated in part 4 of both notices submitted are incorrect.
7. The requirements for a valid Notice to Leave in terms of part 4 of the 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), and S 54 of the Act. These are referred to for their terms. As the notices were issued in January and February 2020 respectively they were issued prior to the temporary changes of the Act by the Coronavirus (Scotland) Act 2020 after 7 April 2020 and for both the original notice periods under the Act apply.
8. In terms of S 54 (2) and (3) of the Act, for any Notice to Leave which states as one of the grounds or the sole ground of the notice Ground 4 of Schedule 3 of the Act the notice period is 84 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. For both Notices to Leave the notice period was calculated too short.
9. S 54 (2) (b) (ii) of the Act refers to the notice period being 84 days unless subsection (3) applies. Subsection 3 (a) does not apply for either Notice to Leave lodged because the tenant had been entitled to occupy the let property since 1 December 2018 and thus for more than 6 months on either 4 January 2020 or 5 February 2020.
10. S 54 (3) (b) of the Act does not apply either. Both Notices to Leave give as one or as the sole grounds stated in the notice Ground 4 "Your landlord intends to live in the Let Property". This ground is not stated as one of the grounds in S 54 (3) (b) of the Act. Because ground 4 is listed as one of the grounds in the Notice to Leave in both notices lodged, the notice period required was 84 days.
11. If one assumes that the delivery of the notice was by hand accepting, as the Applicant states in correspondence, that this was the case for all such documents, the notice period for the Notice to Leave lodged with the application begins on the day the tenant received the notice from the landlord, which would have been 5 February 2020 and expires 84 days after it begins according to S 54 (2) (a) and (b). of the Act. The date to be stated on part 4 of the Notice to Leave would then be the date after the notice period expired according to S 62 (4) of the Act. The notice period in terms of S 54 (2) (ii) would have

been 84 days. The Notice to Leave relies solely on ground 4: "Your landlord intends to live in the Let Property", which is not one of the grounds stated in S 54 (3) (b). The date to be entered on the Notice to Leave dated 5 February 2020 should thus have been stated as 30 April 2020 and not 2 March 2020 as stated on the notice.

12. The Applicant had been advised of the need for an 84 day notice period in the Tribunal's email of 24 February 2020, which specifically stated "The Applicant is seeking to end the tenancy as he wishes to live in the property. The relevant notice period for this ground is 84 days. "In that email the Tribunal specifically pointed out that the Applicant may wish to seek independent legal advice.
13. The Applicant then sent the Notice to Leave of 4 January 2020. The Notice to Leave of 4 January 2020 clearly refers to Grounds 4 (Landlord intends to live in property) and 11 (Breach of tenancy agreement) of Schedule 3 of the Act as the reasons given for the notice. The relevant provision is S 54 (2) and (3) of the Act and again the date to be entered in part 4 of the notice would have to be calculated on the basis of the relevant notice provision. The date stated on the Notice to Leave as the first day on which proceedings could be raised with the Tribunal in part 4 is stated as 3 February 2020. The date which should have been entered, again accepting the Applicant's explanation that the notice was hand delivered on 4 January 2020 would then be 29 March 2020.
14. 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.
15. 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.

16. 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.
17. 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.
18. 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.
19. For these reasons, the Tribunal finds that, in terms of section 73, the error of stating "2 March 2020" in part 4 of the notice to leave of 5 February 2020, rather than "30 April 2020" 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 on the basis of that notice and the Notice to Leave did not constitute a valid notice in terms of the lodging requirement in Rule 109 (b) (ii) of the Rules. From the information provided it is not evidenced that the required requirement in Rule 109 (b) (ii) has been met by that notice.
20. For these reasons the Tribunal also finds that, in terms of section 73, the error of stating "3 February 2020" in part 4 of the notice to leave of 4 January 2020, rather than "29 March 2020" 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 submitted by the Applicant to the First-tier Tribunal on 24 February 2020 also was not, for the purposes of section 52(3), "a copy of a notice to leave" Accordingly, given section 52(2)(a) of the Act, the Tribunal

cannot entertain the application on the basis of that notice and the Notice to Leave did not constitute a valid notice in terms of the lodging requirement in Rule 109 (b) (ii) of the Rules. From the information provided it is not evidenced that the required requirement in Rule 109 (b) (ii) has been met by this notice.

21. The application was not validly made.

22. 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-McFatrige
Legal Member
03 July 2020