



**DECISION AND STATEMENT OF REASONS OF ALISON KELLY, 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 Rules")

In connection with

104 Dunmore Street, Dundee, DD3 0EE

**Case Reference: FTS/HPC/20/0068**

**Ms Rita Davidson ("the Applicant")**

**Miss Lana Finlayson ("the Respondent")**

1. The Application was lodged under Rule 109 of the Chamber Procedural Rules on 10<sup>th</sup> January 2020, being an application by a private landlord for possession in relation to a Private Residential Tenancy. The following documents were enclosed with the Application:

- (i) Copy Notice To leave
- (ii) Copy section 11 Notice
- (iii) Rent Statement

2. The Tribunal Administration wrote to the Applicant on 13<sup>th</sup> January 2020 asking for proof that the Section 11 Notice had been sent to the local authority. The Applicant responded by email on 13<sup>th</sup> January 2020 confirming that the Notice had been sent by ordinary post.
3. The Application was put before a Legal Member for consideration. On 16<sup>th</sup> January 2020 the Tribunal wrote to the Applicant seeking confirmation of the date on which the Notice To Leave was sent to the tenant, and how it was sent, with proof. The letter stated that the Tribunal required the information in order to assess whether sufficient notice has been given to the tenant.
4. The Applicant replied by email on 16<sup>th</sup> January 2020, confirming that Notice To Leave was served by Sheriff Officer on 11.12.19. The Certificate of Service was produced.

## DECISION

5. The Legal Member considered the application in terms of Rule 8 of the Chamber 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."*

6. After consideration of the application, the supporting documentation and correspondence from the Applicant, the Legal Member considers that the application should be rejected on the basis that it is frivolous within the meaning of Rule 8(1)(a) of the Procedural Rules.

### **Reasons for Decision**

7. 'Frivolous' in the context of legal proceedings is defined by Lord Justice Bingham in *R v North West Suffolk (Mildenhall) Magistrates Court*, (1998) Env LR9. He indicated at page 16 of the judgment; "*What the expression means in this context is, in my view, that the court considers the application to be futile, misconceived, hopeless or academic*". It is that definition which the Legal Member

has considered as the test in this application, and on consideration of this test, the Legal Member considers that this application is frivolous, misconceived and has no prospect of success.

## REASONS FOR DECISION

8. The relevant provisions in the 2016 Act are:

### **52 Applications for eviction orders and consideration of them**

...

(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.

...

### **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.

...

(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.

9. For the purposes of section 62(1)(d), the relevant regulations are the Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017, schedule 5 of which sets out the prescribed form for a notice to leave. Part 4 of that form is set out as follows:

**Part 4 THE END OF THE NOTICE PERIOD**

An application will not be submitted to the Tribunal for an eviction order before (insert date). This is the earliest date that the 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).

Signed:

(Landlord(s) or Agent):

Dated:

10. In this case, the date entered in the form, after the words “eviction order before” was “08/01/2020”. The date of signature of the notice was “11/12/2019”. Apart from the issue arising from those entries, discussed below, the correct statutory form was used, and correctly completed.
11. Also relevant, as part of the statutory background, is section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010, which states:

**26 Service of documents**

(1) This section applies where an Act of the Scottish Parliament or a Scottish instrument authorises or requires a document to be served on a person (whether the expression “serve”, “give”, “send” or any other expression is used).

(2) The document may be served on the person—

...

(b) by being sent to the proper address of the person—

...

(ii) by a postal service which provides for the delivery of the document to be recorded, or

...

(4) For the purposes of subsection (2)(b), the proper address of a person is—

...

(c) in any other case, the last known address of the person.

(5) Where a document is served as mentioned in subsection (2)(b) on an address in the United Kingdom it is to be taken to have been received 48 hours after it is sent unless the contrary is shown.

12. The Notice was served on the respondent by Sheriff Officer on 11<sup>th</sup> December 2019. The Certificate of Service shows that it was served by way of depositing in the letterbox of the address.
13. The Legal Member is of the view that this constitutes service under section 26(2)(b) of the 2010 Act, as it was not served personally on the Respondent by the Sheriff Officer. Accordingly, under section 26(5), the Notice to Leave “is to be taken to have been received 48 hours after it is sent unless the contrary is shown.” This is confirmed, in respect of a notice to leave, by section 62(5) of the 2016 Act, which states: “it is to be assumed that the tenant will receive the notice to leave 48 hours after it is sent”. Therefore, for the purposes of the discussion which follows, the notice can be taken to have been served on 13<sup>th</sup> December 2019.
14. Under section 54, the relevant notice period in this case is 28 days, because the only eviction ground stated in the notice is rent arrears. Therefore, section 54(3)(b)(iii) and (2)(b)(i) apply. Consequently, the notice period in this case began on 13<sup>th</sup> December 2019, being “the day the tenant receives the notice to leave from the landlord”. Under section 54(2)(b)(i), the notice period expired on 10<sup>th</sup> January 2020.
15. Under section 62(1)(a), (b) and (d), the notice to leave must be in writing, in the prescribed form, and state a date. Under section 62(4), that date is “the day falling after the day on which the notice period defined in section 54(2) will expire.” In this case, that date was 10<sup>th</sup> January 2020. Therefore, in order to comply with section 62(1)(b) and (4), the date which ought to have been specified in the notice was 10<sup>th</sup> January 2020.
16. The date specified in the notice to leave produced by the applicant’s representatives is 8<sup>th</sup> January 2020.
17. This raises the possibility that the notice to leave produced by the applicant’s representatives is not a “notice to leave” under section 62. That follows from the opening words of that section: a “notice to leave” is a notice which fulfils the

four requirements (a) to (d) of section 62(1). If the notice does not fulfil any of those requirements, it is not a "notice to leave" under the Act.

18. That, in turn, calls into question the competency of the application, given section 52(2)(a) and (3). If the document given to the tenant, a copy of which accompanies the application to the Tribunal, is not a "notice to leave", then the applicant has failed to comply with section 52(3). In that case, the Tribunal "is not to entertain" the application, and it falls 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.

Alison Kelly

Miss Alison Kelly  
Legal Member  
27<sup>th</sup> January 2020

