



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland  
(Housing and Property Chamber) under Section 71 Private Housing  
(Tenancies) (Scotland) Act 2016**

**Chamber Ref: FTS/HPC/CV/21/2810**

**Re: Property at 30 Broomlee Crescent, West Linton, EH46 7EH (“the Property”)**

**Parties:**

**Mrs Emily Anderson, Horse Shoe Cottage, Main Street, West Linton, EH46 7EA  
 (“the Applicant”)**

**Mrs Nicola Keyden, Neah Mair, 8 Halmyre Loan, Romanno Bridge, EH46 7DN  
 (“the Respondent”)**

**Tribunal Members:**

**Josephine Bonnar (Legal Member) and John Blackwood (Ordinary Member)**

**Decision (in absence of the Respondent)**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the  
Tribunal”) determined that an order for payment of the sum of £850 should be  
granted against the Respondent in favour of the Applicant.**

**Background**

1. The Applicant seeks a payment order in relation to an overpayment of rent. A copy tenancy agreement, bank statements and copies of WhatsApp messages were lodged in support of the application.
2. A copy of the application was served on the Respondent by Sheriff Officer on 14 January 2022. Both parties were advised that a case management discussion (“CMD”) would take place by telephone conference call on 22 February 2022 at 11.30am and that they were required to participate. They were provided with the telephone number and passcode. Prior to the CMD the

Respondent lodged a written response to the application and some documents. The Applicant also lodged a further submission.

3. The CMD took place on 22 February 2022 at 11am. Both parties participated.

### **Case Management Discussion**

4. The Legal Member noted that the following facts were agreed: -
  - (a) The Applicant became the tenant of the property on 8 September 2020. She signed a tenancy agreement, described as a short assured tenancy, which made provision for an initial term of 12 months.
  - (b) In terms of the tenancy agreement, rent was payable in advance at the rate of £850 per month.
  - (c) On 11 March 2021, the parties had a discussion by telephone. The Applicant advised that she intended to move back to her previous home. The Respondent said that she would look for another tenant. They did not discuss or agree a termination date.
  - (d) On 12 March 2021 the Respondent sent a message saying that she was happy that the Applicant had worked things out with her husband and that she had viewers for the property.
  - (e) On 17 March 2021, the Respondent sent a further message to the Applicant stating that the rent was paid up to the end of March and asking if the new tenant could move in on 1 April 2021.
  - (f) The Applicant did not cancel her direct debit and a further payment of rent was made on 29 March 2021, for the month of April.
  - (g) On 26 May 2021, the Applicant sent a message to the Respondent saying that she had noticed that had accidentally paid rent for April. The Respondent replied, stating that the April payment had been due as the Applicant had to give a full months' notice for ending the tenancy early.
  - (h) A new tenant took entry to the property on 1 April 2021.
5. The Legal Member noted that, although the tenancy was described as a short assured tenancy, it started after 1 December 2017. Ms Keyden confirmed that she had been unaware of the changes to private tenancies and no longer used the style of agreement signed by the Applicant. She had assumed that the agreement, with its minimum term of 12 months, was binding on both parties. She also thought that she was entitled to the full month notice from the end of March as she had agreed to terminate the lease early. Both parties confirmed to the Legal Member that there were several discussions between the parties during March 2021. The Applicant relied on the message of 17 March 2021,

which indicated that they had agreed to end the tenancy at the end of March. The Respondent stated that during their telephone discussion, she made it clear that a payment in lieu of notice for the month of April was to be paid. She said that she had allowed the whole of the deposit to be repaid to the Applicant for this reason, although cleaning and other expenses were incurred to re-instate the property before it was re-let.

6. Following further discussion, the Respondent advised that she wished to take advice from a solicitor or housing advisor. In the circumstances, the Legal Member determined that the application should proceed to a hearing to allow the Respondent to take advice and for evidence to be heard, if required.
7. The parties were notified that a hearing would take place by telephone conference call on 6 May 2022 at 10am. Neither party lodged further written representations in advance of the hearing. On 5 May 2022, the Respondent requested a postponement of the hearing. She stated that she had COVID 19 and did not feel able to participate in a hearing, even by video conference. The Tribunal refused the request due to the very short notice, the lack of medical evidence and the fact that the hearing was taking place by telephone conference call. The Respondent was also notified that she could renew her request at the hearing, if required, or lodge written representations which the Tribunal would allow late in the circumstances. The Respondent sent a further email to the Tribunal stating that she could not provide evidence as she had stopped testing positive a week before and had not retained any test results or obtained a PCR test. She said that she had not expected to feel so tired 2 weeks on and that talking caused her to cough, causing discomfort. She added that the situation had caused her to feel “extremely anxious” and that the Applicant was not acting in “good conscience” She was concerned that she would become over emotional as a result.

## Hearing

8. The hearing took place by telephone conference call on 6 May 2022 at 10am. The Applicant participated. The Respondent did not participate, and no written submissions were lodged prior to the hearing. The Tribunal confirmed that, for the reasons previously stated, they were not satisfied that it would be in the interests of justice to postpone the hearing.
9. Mrs Anderson advised the Tribunal that she had signed the tenancy agreement which had been lodged with the application which provided for an initial 12-month term. She had not taken advice on the agreement and trusted that it was in order. Following an exchange of WhatsApp messages on 11 March 2021, she phoned Ms Keyden and told her that she had decided to move back to her previous home. She explained her reasons. She said that she could be flexible about the end date and Ms Keyden said that she would start looking for a new tenant. There was no discussion about the date on which the tenancy would end and notice or notice periods were not mentioned. Everything depended on when a new tenant was found. Mrs Anderson said that if she been told that a

months notice was required, she would have stayed for the month as she was able to be flexible. In response to questions from the Tribunal, Mrs Anderson referred to the copy WhatsApp messages lodged and confirmed that she received a message on 12 March 2021 which said that Ms Keyden was happy that Mrs Anderson had “worked things out”, that she had been “inundated “with potential viewers and asked whether viewings could take place the following week. On 15 March 2021, a further message was received in which Ms Keyden asked Mrs Anderson when she wanted to move out. In response, Mrs Anderson said, “I don’t mind what date you chose, I probably need a further weekend to move my stuff”. On 17 March 2021 Ms Keyden sent a further WhatsApp message which said “it looks like your rent is paid until the end of March. I will ask the new tenants to take the lease from April 1<sup>st</sup> if that’s ok. If you are happy to leave the table that would be great.” Mrs Anderson sent a response stating “That’s perfect, thanks, I meant to say dining table plus chairs. Would they like them too?”

10. Mrs Anderson said that she does not recall there being any other telephone calls or messages between 11 and 17 March 2021 and she was not present during viewings as Ms Keyden had a key. She said that, based on the message of 17 March 2021, she thought that she was not liable for any rent after 31 March 2021 and that the tenancy would end on that date. She said that she moved out a couple of days early, on 28 March 2021, although the rent had been paid up to the 31<sup>st</sup>. After 17 March 2021 there were no further discussions with Ms Keyden about the rent or end of the tenancy, although they did discuss a couple of other issues such as the landline number for the property and meeting up on the 28<sup>th</sup> of March for the property to be checked. Following that meeting, Mrs Anderson put the key through the letterbox. She had another key which was returned to Ms Keyden later. She did not return to the property after the 28th of March and understands that the new tenants moved in on 1 April.
11. In response to questions from the Tribunal about the telephone conversation on 11 March 2021, Mrs Anderson said that she had understood that there would be a future conversation about the tenancy ending when new tenants had been found and that the end date would depend on when the new tenants would be moving in. She added that she had expected to be liable for rent for every month that she lived at the property and that this liability would end when she moved out. She said that her liability for rent ended on 31 March 2021 because the new tenants were moving in on 1 April. Had she thought that she would be liable for the rent in April, she would have remained in the property until the end of that month.

### **Findings in Fact**

12. The Respondent is the owner and former landlord of the property.
13. The Applicant was the tenant of the property in terms of a private residential tenancy (PRT).

14. The tenancy ended on 31 March 2021.
15. A new tenant moved into the property on 1 April 2021
16. The Applicant forgot to cancel her direct debit and paid £850 at the end of March 2021 to the Respondent. This sum was not due.
17. The Respondent owes the sum of £850 to the Applicant.

## **Reasons for Decision**

18. The application was submitted with part of a tenancy agreement which is described as a short assured tenancy. The tenancy started on 8 September 2020 and provides for an initial term of 8 September 2020 until 8 September 2021. Although the remainder of the agreement was not provided, the parties agreed that rent was payable in advance at the rate of £850 per calendar month and that the agreement stated that the Applicant was required to give a months' notice to end the tenancy after the initial 12-month term had passed.
19. In terms of Paragraphs 1 and 2 of Schedule 5 of the 2016 Act, no new assured or short assured tenancies could be granted after the 2016 Act came into force, on 1 December 2017. As a result, the parties' tenancy could not be a short assured tenancy. Section 1 of the 2016 Act stipulates that a tenancy is a private residential tenancy if it is let to an individual as a separate dwelling (after 1 December 2017), occupied as the tenant's only or principal home and is not an excepted tenancy in terms of Schedule 1 to the 2016 Act. The Tribunal is satisfied that the tenancy was a private residential tenancy.
20. At the CMD and in her written representations, the Respondent stated that the whole deposit had been repaid to the Applicant although some cleaning had been required. She also said that she had incurred unnecessary expense at the beginning of the tenancy decorating the property and purchasing additional furniture for the Applicant's family. The Tribunal is satisfied that neither claim is relevant to the application as this only concerns the liability for rent for the month of April 2021.
21. Although she did not participate in the hearing, the Respondent stated in her written representations that there had been no overpayment of rent. She said that she had agreed to the tenancy being terminated early (a minimum term of 12 months had been agreed) but that she had been entitled to a full months rent in lieu of notice. As the March rent had already been paid, the payment due was for the month of April. At the CMD she confirmed that the Applicant moved out at the end of March and the new tenant took entry on 1 April 2021.
22. Sections 48 and 49 of the 2016 Act deal with termination of a PRT by the tenant. A tenant must give written notice and specify the date on which the tenancy is to end which must be "a day that is after the last day of the minimum notice

period". (S49(1)(c)). That minimum notice period is 28 days. If the notice does not comply with S49(1)(c), the notice can still operate to terminate the tenancy if the landlord agrees in writing to the tenancy ending on the day specified in the notice. (S49(2)). The Tribunal is satisfied that, if the Respondent agreed in writing to the tenancy ending on 31 March 2021, then the Applicant was not required to give the full 28 days notice or make an equivalent payment in lieu of notice.

23. At the CMD, the Legal Member noted that the parties were not in agreement about whether a notice period had been discussed during the telephone conversation which took place on 11 March 2021. During her evidence the Applicant said that this had not been discussed. She said that a termination date had not been agreed as this was to depend on when a new tenant was identified for the property. This explanation is supported by the WhatsApp messages of 12, 15 and 17 March 2022. On 15 March 2021, the Respondent asked the Applicant when she wanted to move out. In response, the Applicant said that the Respondent should choose the date. On 17 March 2022, the Respondent said that the new tenants would move in on 1 April since the rent had been paid up to the end of March. It is quite clear from that correspondence that the parties had reached an agreement that the tenancy would terminate at the end of March 2021, that a new tenant would take entry on 1 April 2021 and that the liability for rent would cease at the end of March.

24. In the Upper Tribunal decision in the case of *Linden v MacPherson* 2022 UT 05, the Upper Tribunal considered when an assured tenancy between the parties came to an end. In terms of the tenancy agreement, the tenancy was due to end in May 2021. Having regard to documentation lodged, which included several electronic messages, the Upper Tribunal noted that the Landlord had found a buyer for the property who wanted to take possession of the property "sooner rather than later". It was also clear that the Tenants were "willing to leave early". The Upper Tribunal was also satisfied that the landlord agreed that the Tenant would not be held to the contractual period of notice, which was 28 days. There was therefore "clear agreement varying the contractual period of notice" and that "as soon as the appellants found alternative accommodation, they would be entitled to move as soon as possible and that without the requirement to give contractual notice. That agreement was unequivocal and unqualified and consistent with the reasons why each party wanted the tenancy to terminate" (12)

25. Although the *Linden* case related to an assured tenancy under the Housing (Scotland) Act 1988 the Tribunal is satisfied that Sheriff O'Carroll's comments are relevant to the present case. A PRT cannot have a minimum term, so the term specified in the parties' lease does not apply. In terms of the contract and the 2016 Act, the Applicant was required to give a notice period of 28 days. However, between 11 and 17 March 2021 the parties agreed to terminate the tenancy early on 31 March 2021. This agreement was in writing and was clear and unequivocal. The Tribunal concludes that the tenancy terminated (and

liability for rent ceased) on 31 March 2021.

26. The Tribunal notes that, even if it had not been satisfied that the tenancy had been lawfully terminated on 31 March 2021, the Respondent would not have been entitled to rent for the month of April. From 1 April, a new tenant was in occupation of the property, presumably paying rent. It follows that the Respondent was not able to fulfil her obligations as landlord to the Applicant namely, to provide her with vacant possession of the property. In those circumstances, there could be no contractual liability for rent. The Applicant advised the Tribunal that if the Respondent had insisted on 28 days notice, the Applicant would have remained in the property until the notice period had expired as she did not require to move out by a certain date. It is not clear why the Respondent thought that the Applicant had agreed to pay a months rent for a property she could not occupy, particularly when the Respondent was receiving rent from another tenant for the same period.

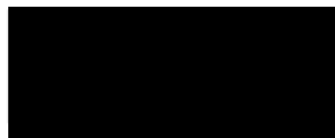
27. In the circumstances, the Tribunal is satisfied that the Applicant is entitled to a payment order for the sum of £850.

## **Decision**

28. The Tribunal determines that an order for payment for the sum of £850 should be granted in favour of the Applicant.

## **Right of Appeal**

**In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal 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.**



**Josephine Bonnar, Legal Member**

**6 May 2022**