



**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

0/2, 4 Bridgend Road, Elderslie PA5 9EJ ("the property")

Case Reference: FTS/HPC/EV/20/1707

Surjit Singh ("the applicant")

David Trotter ("the respondent")

1. On 14 August 2020 the applicant, through his representative Penny Lane Homes, made an application to the First-tier Tribunal, Housing and Property Chamber (FTT) under Rule 109 of the Procedural Rules 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, Notice to Leave, Rent Statement, Notice to Local Authority.
2. The Notice to Leave is dated 26 February 2020 and states in part 4: "an application will not be submitted to the Tribunal for an eviction order before 27 March 2020."

3. The Ground of eviction referred to in the Notice to Leave and the application is Ground 12 of Schedule 3 of the Act although this is not expressly stated. The application only refers to "rent arrears". The documents referred to above are referred to for their terms and held to be incorporated herein.
4. On 2 September 2020 the applicant was asked to provide confirmation of the date the date the Notice to Leave was sent. He then provided a recorded delivery acceptance slip dated 27 February 2020.
5. On 11 September 2020 the FTT advised the Applicant that the date in the Notice to Leave appeared to be incorrect regarding the date stated in part 4 of the Notice to Leave and gave the applicant the opportunity to clarify the position.
6. The Applicant states in the reply to the FTT dated 24 September 2020 that the notice was posted on 26 February 2020 and received 27 March 2020 and gave the full 28 days notice. This was clearly incorrect as the recorded delivery receipt was signed 27 February 2020.
7. On 19 October 2020 the FTT then again wrote to the applicant advising that the applicant had not provided written representations regarding the provision in the Act stated in the previous letter from the FTT.
8. On 30 October 2020 the applicant again stated through his agents that the Notice to Leave was posted on 26 February 2020 and received on 27 February 202 and gave the full 28 days notice. He stated that should suffice.

DECISION

9. 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."

10. 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

11. In terms of Rule 109 (b) of the Procedural Rules 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

12. I consider that the requirement in Rule 109 (b) ii is only met if the Notice to Leave is a valid Notice to Leave.

13. The requirements for a valid 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), S 54 and S 62(5) of the Act. These are referred to for their terms.

14. I could be argued that since the Notice to Leave was signed for on 27 February 2020 this did not prejudice the respondent because the notice period of 28 days was provided. However, is not within the jurisdiction of the FTT to ignore the date in the Notice to Leave because there was no prejudice to the tenant. What is required in order to make an application to the FTT is set out in the legislation in S 52 (2) of the Act, which states: *“The Tribunal is not to entertain an application for an eviction order if it is made in breach of (a) subsection (3)... (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.”*

15. In terms of S 54 (2) and (3) of the Act, for a Notice to Leave in regard to Ground 12 of Schedule 3 of the Act the notice period is 28 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. S 62 (5) of the Act then states: *“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.”*

16. In this case the Notice was sent on 26 February 2020 and is thus presumed to have been received on 28 February 2020. The correct date to be inserted in part 4 of the Notice to Leave on the basis of that date would be 28 March 2020. The date stated on the Notice

to Leave is 27 March 2020. The date is not a date calculated in accordance with the statutory provisions. The date of the month is not correct.

17. I did consider whether S 73 (1) of the Act could be applied in this case. This states that 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. It is clear from the wording of S 62(5) of the Act that it was intended that a landlord should be able to correctly identify the date to be stated in S 62 (1) (b) of the Act without having to know in advance precisely when in fact the tenant would receive the Notice to Leave, thus creating certainty for both parties of the date when an application to the First-tier Tribunal could be made. This certainty in my view is a fundamental aspect of the Notice to Leave. If the day of the month is incorrectly stated on the Notice to Leave this creates a fundamental uncertainty of when an application can be made to the Tribunal and goes beyond a typographical error, which may be considered to be covered by S 73 (1) of the Act. I consider that in this case the identification of the date in part 4 of the Notice to Leave is incorrect to an extent that materially affects the effect of the Notice to Leave, namely amongst other matters the certainty as to when the landlord can apply to the First-tier Tribunal. S 73 in my view cannot be used to remedy this.
18. I did also consider whether the current provision in the Coronavirus (Scotland) Act 2020 schedule 1 paragraph 10 might be of assistance. However, this clearly deals solely with situations where the Notice to Leave was issued during the time the Act was in force and thus not with this situation, where the Notice to Leave was issued prior to 7 April 2020.
19. Finally, given the applicants statement that the notice period was adhered to and that this should be sufficient for the application to proceed, it is not correct that the assumption of a 48 hour period for service is only relevant if the actual time of receipt is not known. The assumption is stated explicitly in S 62 (5) of the Act regardless of whether or not it is known that the period does not reflect the actual time of service.
20. The 48 hour assumption is not a rebuttable presumption as set out in S 26 (5) of the

Interpretation and Legislative Reform (Scotland) Act 2010 which states: “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”. because in terms of S 1 (2) (a) of said act: “This Part does not apply in so far as—(a)the Act or instrument provides otherwise”. The provision of S 62 (5) of the Act explicitly does provide otherwise and S 26 (5) of the Interpretation and Legislative Reform (Scotland) Act 2010 thus does not apply. Even although it is known that the notice period of 28 days was adhered to because the actual time of delivery of the notice was 27 February 2020, the entry in the Notice to Leave was wrongly calculated and thus the notice invalid.

21. The decision of the Upper Tribunal in UTS/AP/18/0012 Jagdish Singh Panpher v Christina McDonald confirms that the FTT cannot waive the requirement of S 52 (3) of the Act and explicitly states in [1] “The appellant ... advances a number of cogent reasons why, if it had discretion to do so, the tribunal might allow the application for an eviction order to proceed, notwithstanding the defect identified in the notice to leave upon which the appellant relies. Unfortunately no such discretion exists. The tribunal can only operate within the terms of the Private Housing (Tenancies) (Scotland) Act 2016 (“the 2016 Act”) and subordinate legislation in the form of regulations made by Scottish Ministers. In terms of that legislation the tribunal is prohibited from entertaining an application for eviction which is not accompanied by a valid notice.”

22. I consider that the date stated in the Notice to Leave provides insufficient reliable information to the recipient and thus makes the Notice to Leave invalid. In terms of S 52(3) of the Act the FTT cannot entertain the application. The lodging requirements for an application under Rule 109 are therefore not met. The application was not validly made. 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 McFatridge

Petra Hennig McFatridge
Legal Member
16 November 2020