



**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

Case reference FTS/HPC/EV/23/1404

Parties

Mrs Stella Avbunudje (Applicant)

Miss Danielle Maclean, Mr Kevin White (Respondent)

23 Henderson Street, Coatbridge, North Lanarkshire, ML5 1BL (House)

1. The application was made on 02.05.2023 to the First-tier Tribunal (the FTT) under rule 109 and S 51 of the Private Housing (Tenancies) (Scotland) Act 2016 (the Act) using ground 12A of schedule 3 of the Act.
2. Various documents were provided with the application. These include a Tenancy Agreement commencing 10.08.2022 with clause 7 stating payment of rent of £750 per calendar month is due in advance on the 10th day of the month, a S 11 notice and a Notice to leave dated 27.03.2023 with an entry in part 4 of 26.04.2023 as the first day when

proceedings can be raised as well as a rent statement showing that arrears first arose with the non payment of rent on the due date of 10.10.2022. There were no further payments shown in the rent statement.

3. The FTT wrote to the Applicant on 31.05.2023 requesting further information by 14.06.2023 in the following terms: “1. The application is made on the basis of a Notice to Leave sent on 27.3.23. The ground stated is ground 12 A. The tenancy agreement shows that the rent is payable monthly in advance on the 10th day of the month. From the rent statement lodged it thus appears that at the time the Notice to Leave was issued, 27.3.23, the tenant had not been in actual arrears of rent equating the sum of 6 month’s rent. The rent arrears in place on 27.3.23 appear to be for 5 full months from 10.10.22-9.3.23 and for 18 days in the month of 10.3.23 to 10.4.23. Ground 12A (2) (b) of the Private Housing (Tenancies) (Scotland) Act 2016 requires, however, that “the cumulative amount of those rent arrears equates to, or exceeds, an amount that is the equivalent of 6 months’ rent under the tenancy when notice to leave is given to the tenant on this ground in accordance with section 52(3),” . Please make written representations on why you consider on 27.3.23 there were rent arrears in place equating to at least 6 months rent. You may wish to take legal advice on the matter. 2. It appears that the Notice to Leave may not be valid as the date entered in part 4 as the date when proceedings could first be raised does not seem to have been calculated in accordance with the provisions of S 62 (1) (b), S 62 (4) and S 62 (5) of the Private Housing (Tenancies) (Scotland) Act 2016. S 62 (5) states that a notice is deemed to be received 48 hours after it was sent and S 62 (1) (b) refers to the date when proceedings can first be raised. This is defined in S 62 (4) as the day “after the day on which the notice period defined in S 54 (2) will expire. Please make representations as to why you consider the Notice to Leave can be considered valid. You may wish to take legal advice on the matter. 3. You have provided unredacted bank statements. Please either provide redacted bank statements and ask for the unredacted version to be withdrawn or confirm that you are in agreement that the unredacted bank statements are shared with the Respondents if the case is accepted..”
4. On 10.06.2023 the Applicant replied: Dear Savanagh, I know you cannot give legal advice, but does it mean I have to issue another eviction letter to my tenant? Do I have to withdraw and start all over again? The file documents are referred to for their terms and held to be incorporated herein.

DECISION

5. 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."

6. 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

Relevant Legislation

Rules of Procedure:

Rule 109. Where a landlord makes an application under section 51(1) (for an eviction order) of the 2016 Act, the application must—

(a)state—

(i)the name, address and registration number (if any) of the landlord;

(ii)the name, address and profession of any representative of the landlord;

(iii)the name and address of the tenant [[F72](#)(if known)]; and

(iv)the ground or grounds for eviction;

(b) 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

Ground 12A schedule 3

Substantial Rent arrears

12A(1)It is an eviction ground that the tenant has substantial rent arrears.

(2)The First-tier Tribunal may find that the ground named by [sub-paragraph \(1\)](#) applies if—

(a)the tenant has accrued rent arrears under the tenancy in respect of one or more periods,

(b)the cumulative amount of those rent arrears equates to, or exceeds, an amount that is the equivalent of 6 months' rent under the tenancy when notice to leave is given to the tenant on this ground in accordance with section 52(3), and

(c)the Tribunal is satisfied that it is reasonable to issue an eviction order.

(3)In deciding under [sub-paragraph \(2\)](#) whether it is reasonable to issue an eviction order, the Tribunal is to consider—

(a)whether the tenant being in arrears of rent over the period or periods in question is wholly or partly a consequence of a delay or failure in the payment of a relevant benefit,

(b)the extent to which the landlord has complied with the pre-action protocol prescribed by the Scottish Ministers under paragraph 12(4)(b) (and continued in force by virtue of section 49 of the Coronavirus (Recovery and Reform) (Scotland) Act 2022).

(4)For the purpose of this paragraph—

(a)references to a relevant benefit are to—

(i)a rent allowance or rent rebate under the Housing Benefit Regulations 2006 ([S.I. 2006/213](#)),

(ii)a payment on account awarded under regulation 93 of those Regulations,

(iii) universal credit, where the payment in question included (or ought to have included) an amount under section 11 of the Welfare Reform Act 2012 in respect of rent,

(iv) sums payable by virtue of section 73 of the Education (Scotland) Act 1980,

(b) references to delay or failure in the payment of a relevant benefit do not include any delay or failure so far as it is referable to an act or omission of the tenant.

1. The application is made on ground 12A of schedule 3 of the Act and would require, in terms of S 52 (3) of the Act, to be accompanied by a Notice to Leave and in terms of S 56 by a Notice to the Local Authority. The FTT considers that the meaning of this section is that the Notice to Leave has to be a valid Notice to Leave. The same requirements are also stated in rule 109, which is the rule under which the application is made.
2. The Notice to Leave provided is dated 27.03.2023 and was served by email on that date. It states as the only eviction ground on the notice ground 12A. In terms of the tenancy agreement the rent of £750 per month is payable in advance on or before the 10th day of each month. The rent statement lodged with the application shows a £0 balance prior to 10.10.2022, when no payment was made on the due date. The arrears increase from then onwards.
3. Although in the context of ground 12, which relates to 3 months consecutive rent arrears, the matter of how to establish the level and duration of arrears of rent for the required period or sum on the relevant day of the Notice to Leave being given to the tenant has been fully and comprehensively dealt with by the Upper Tribunal in at least two decisions, which are binding on the FTT. The UT held that the ground must be met on the day when the Notice to Leave is given to the tenant.
4. In the decision [2019] UT 59 Majid v Gaffney Sheriff Fleming sets out the requirements of a valid Notice to Leave in cases of rent arrears and states in para 9 “[9] *The First-tier Tribunal may only order eviction if one of the grounds specified in Schedule 3 to the 2016 Act applies. It is clear from the terms of the Notice to Leave that ground 12 is being relied upon; as at the date of the Notice to Leave the tenant must have been in rent arrears for three or more consecutive months. Therefore, if the tenant was first in arrears of rent as at 30 April 2019 then the expiry of the three month period would be 30 July 2019. As at 1 July 2019 the tenant was not in rent arrears for three or more consecutive months. **The tenant must have been in arrears for the specified period of time, not simply owing rent.** Ground 12 does not apply as at the date of service of the Notice to Leave.” and goes on to say: “[13] *The basis for the decision of the First-tier Tribunal is that the Notice to Leave specified a ground for eviction which was not satisfied as at the date of the service. That being the case the notice itself is invalid. [14] The appellant appears to be conflating two separate statutory provisions. In terms of section 62(1)(b) reference is made to a date on which the landlord “expects to become entitled to make an application for an eviction order to the First-Tier Tribunal”. It is clear that the word “expects” relates to the date on which the application will be made. That is entirely distinct from the eviction ground. **The statutory provision is clear which is that the ground of eviction must be satisfied at the date of service of the Notice to Leave. If it is not it is invalid.** If it is invalid decree for eviction should not be granted. The decision of the First-tier Tribunal sets out the position with clarity. It could in my view it could never have been intended by**

*Parliament that a landlord could serve a notice specifying a ground not yet available in the expectation that it may become available prior to the making of an application. Such an approach would be open to significant abuse. **Either the ground exists at the time when the Notice to Leave is served or it does not. If it does not the Notice to Leave is invalid and it cannot be founded on as a basis for overcoming the security of tenure that the 2016 Act.** There is no arguable ground of law. Permission to appeal is refused.”* The issue was further recently confirmed in the decision of Sheriff Kelly in [2022] UT07 Rafique v Morgan.

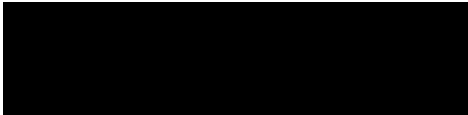
5. Having regard to these decisions, the clear requirement for a valid Notice to Leave in arrears cases is that as at the date the Notice to Leave is served on the tenant the requirement for the ground must be met. In cases of an eviction under ground 12A thus the question is whether on the date the Notice to Leave was given to the tenant **the cumulative amount of those rent arrears equates to, or exceeds, an amount that is the equivalent of 6 months’ rent under the tenancy.** The UT also defined that there is a requirement of a tenant being in arrears of rent, not simply owing rent.
6. Taking the first date when a deficit is shown on the rent statement, 10.10.2022 and the date when Notice to Leave was given to the tenant on 27.03.2023 it is clear that the arrears of rent on 27.10.2023 were not equivalent to 6 months rent as required. On 27.03.2023 the tenant was in arrears of rent of 5 full months (10.10.2022 to 09.3.2023) and in arrears of rent of only part of the month for the payment due on 10.03.2023 for the next month in advance. 6 full months had not expired and whilst on 10.03.2023 a payment of the full month of rent in advance was due, that month had not expired. The tenant was only in actual arrears as at 27.03.2023 for 18 days of that rental payment. The rest of the month from 10.03.2023 to 09.04.2023 could not be taken to be in arrears as the days to which it related had not happened yet. The FTT is bound by the clear decisions of the Upper Tribunal on this matter that the requirement is that the ground is met on the day the Notice to Leave is given to the tenant. On that day there were only 5 months and 18 days rent arrears and thus ground 12A, which requires an amount of the equivalent of 6 months’ rent was not met. The Notice to Leave was issued incorrectly and is thus invalid. It would not be appropriate to accept an application based on a Notice to Leave which is invalid.
7. Furthermore, the date shown in part 4 of the Notice to Leave was incorrect. The date must take into account not only the provision of S 62 (5) of the Act by adding 48 hours from the sending of the notice but also the provision of S 62 (4), which states that “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. The Applicant had not taken into account the provision of S 62 (4) of the Act in her calculation and thus the date was one day earlier than required. The Notice to Leave would be invalid on that basis. It would, again, not be appropriate to accept an application based on an invalid Notice to Leave.
8. The application is accordingly rejected.
9. The applicant should note that this decision does not prevent the applicant from making a further application to the FTT in future based on a new Notice to Leave.

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

16 June 2023