



**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/22/4132

Parties

Mr Murdoch MacDonald (Applicant)

Mr Paul Hughes (Respondent)

Mac Media Law Limited (Applicant's Representative)

Flat 2/2, 78 Paisley Road West, Glasgow, G51 1HB (House)

PROCEDURAL BACKGROUND:

1. The application 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) was received by the Tribunal on 16.11.22.
2. The following documents were ultimately lodged in connection with the application:- S

11 Notice to Local Authority and email sending same, Notice to Leave dated 27.5.22 with statement it was hand delivered to the Respondent personally on the same day, Tenancy Agreement, affidavit of the Applicant.

3. The Tribunal sought further information from the Applicant's agent regarding the validity of the Notice to Leave and the ground on which the application was based. The Tribunal pointed out that the Notice to Leave appeared not to state the correct date in part 4 of the document. On 6.3.23 the Applicant's agent stated that this was a miscalculation but that she thought that as the application was not made until after the expiry of the correct date, there was not detriment to the Respondent from the period being stated incorrectly. She also stated: "*If, however, the Tribunal is of the opinion that this invalidates the application then Mr MacDonald will be required to re-commence proceedings by service of a new notice to leave.*"
4. The Tribunal wrote to the Applicant's agent on 23.3.23 in the following terms: "*With respect to the error in the Notice to Leave, it is likely, based on previous decisions and authorities, that this would be found to be an invalid Notice if the case was to proceed to a Case Management Discussion. Please confirm that you are withdrawing the application, or provide written representations with authorities, as to why the matter should proceed to a Case Management Discussion.*"
5. No reply has been received by 25.5.23.
6. The case documents and all correspondence in the case are referred to for their terms and held to be incorporated herein.

DECISION

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."

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:

Applicable Legislation:

S 62 of the Private Housing (Tenancies) (Scotland) Act 2016 states:

62 Meaning of notice to leave and stated eviction ground

This section has no associated Explanatory Notes

(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. ...

S 54 of the said Act states:

54 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).

S 52 of the Act states:

52 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 73 of the Act states:

73 Minor errors in documents

(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.

(2) This section applies to—

...

(d) a notice to leave (as defined by section 62(1)).

Findings and Reasons:

1. In terms of S 52 (3) of the Act an application must be accompanied by a copy of the Notice to Leave. I consider that this means that a valid Notice to Leave must be submitted with the application. The issue here is whether or not the Notice to Leave was a valid Notice to Leave and thus fulfills the requirement of S 52 (3) of the Act.
2. The issue in this case is the notice period. The expiry of the period stated in S 54 (2) (b) (ii) of the Act will be 84 days after the date of service as the tenant had been entitled to occupy the property for more than 6 months and one of the grounds stated in the Notice to Leave, ground 4, requires an 84 day notice period. The date of 19.8.22 as the date on which proceedings first can be raised on the basis of a notice

to leave issued on 27.5.22 stated in part 4 of the Notice to Leave is thus incorrect. The date to be entered into the Notice to Leave, if accepting the notice was hand delivered to the Respondent on 27.5.22, should have been 20.8.22, this being 84 days notice period and, as stated in S 62 (4) of the Act, stating the date after the expiry as the date when proceedings could first be raised.

3. The legislation sets out explicitly the dates and periods which have to be observed to create a valid 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. The date stated on the notice is not the correct date. The calculation overlooks the provision of S 62 (4) of the Act, which states: *“(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.”*
4. 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.
5. 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 Tribunal, 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.
6. 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.

7. 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.
8. 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.
9. For these reasons, the Tribunal finds that, in terms of section 73, the error of stating “19 August 2022” in part 4 of the notice to leave 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.
10. The Tribunal considered whether S 52 (4) of the Act could be of assistance to the Applicant. All S 52(4) allows is to consider an application made in breach of S 54 if it considers it is reasonable to do so. However, stating the wrong date in the Notice to Leave is not a breach of S 54 but a breach of S 62 (1) (b), which prescribes the information to be included in the Notice to Leave. Had the Notice to Leave stated the correct date but had the application been made before that date, then the Tribunal could have considered whether it would have been appropriate to consider the application made e.g. due to time pressure because of antisocial behavior. S 54 relates, as the title states, to “Restriction on applying during the notice period” and it is only a non compliance with that which the Tribunal has discretionary power to consider. The breach in this case is not of S 54 but of S 62 and the Tribunal has no discretionary power to entertain this application as the date stated in the Notice to Leave had been wrongly stated in terms of that provision. As stated above, the only other power potentially applicable, that in S 73, does not apply in this case.
11. Furthermore, the Applicant’s agent had indicated in her email of 6.3.23 that the date

as stated in the Notice to Leave was a miscalculation. There was no dispute that this is not the correct date. The Tribunal, in light of this admission, invited the Applicant's agent to make further submissions as to why the matter should be referred to a Case Management Discussion. No reply was received by 6.4.23, which was the date stated in the letter from the Tribunal for submitting a reply. No further contact has been made by the Applicant's agents in the matter. In light of this it would appear that the application is no longer insisted upon.

12. For the above reasons the Tribunal considered that it would not be appropriate to accept the application.

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
25 May 2023