

COMPLAINTS ABOUT MEMBERS OF THE SCOTTISH TRIBUNALS RULES 2018

Made - - - - - 10 January 2018

Coming into force - - - - - 12 January 2018

The Lord President of the Court of Session makes these Rules under the power conferred by paragraph 3(1) of schedule 8 to the Tribunals (Scotland) Act 2014 (asp 10).

Citation and commencement

1. These Rules may be cited as the Complaints About Members of the Scottish Tribunals Rules 2018 and come into force on 12 January 2018.

Application

2.—(1) These Rules apply in relation to complaints about the conduct of ordinary and legal members of the Scottish Tribunals in the—

- (a) First-tier Tribunal for Scotland, and
- (b) Upper Tribunal for Scotland.

(2) These Rules do not apply in relation to complaints about the conduct of judicial members of the Scottish Tribunals. Complaints about judicial members are dealt with under the Complaints About the Judiciary (Scotland) Rules 2017.

Functions of the President of the Scottish Tribunals

3.—(1) The Lord President appoints the President of the Scottish Tribunals to—

- (a) supervise the operation generally of these Rules and report to the Lord President about that matter as appropriate;
- (b) carry out other functions specified by these Rules.

(2) Where the President of the Scottish Tribunals considers it to be inappropriate for him or her to carry out the functions in paragraph (1)(b) in relation to a complaint, those functions are to be carried out by a judge of the Court of Session, nominated by the Lord President.

Judicial Office

4.—(1) References in these Rules to the Judicial Office are to the Judicial Office which supports the Lord President in the Lord President's non-judicial functions.

(2) Where under these Rules a function is to be carried out by the Judicial Office, that function is to be carried out by the most senior member of its staff or such other member of staff as may be authorised (whether specifically or generally) by the most senior member.

Making a complaint

5.—(1) A complaint may be made by submitting a complaint document to the Judicial Office.

(2) A "complaint document" is a document in writing which—

- (a) is legible;
- (b) contains one or more detailed allegations of misconduct on the part of a named or identifiable member;
- (c) gives the date or dates of the alleged misconduct; and

- (d) states the name of the person who is making the complaint and details of an address to which correspondence may be sent.
- (3) A complaint document is to be accompanied by all documents within the control of the person complaining upon which that person seeks to rely.
- (4) If the member concerned—
 - (a) is under investigation, or is subject to an ongoing disciplinary procedure, by any other competent professional disciplinary body or tribunal; and
 - (b) the fact of that investigation or procedure is known to the person complaining,that person should include that information in the complaint document.
- (5) For the purposes of this rule—
 - (a) a document may be sent by any method which the Judicial Office has indicated to be an acceptable means of sending it;
 - (b) if sent by an electronic means indicated by the Judicial Office to be acceptable, a document is to be treated as valid only if it is capable of being used for subsequent reference.
- (6) A complaint document will not be accepted where it (or any communication associated with it) indicates that the person complaining does not want the member concerned to see a copy of the complaint document or any document accompanying it.

Allegations of criminal conduct

- 6. Where it appears to the Judicial Office that an allegation is of an act, omission or other conduct which may constitute a criminal offence—
 - (a) further consideration of that allegation under these Rules is suspended until—
 - (i) the relevant prosecutor indicates that no criminal proceedings are to be taken;
 - (ii) any such proceedings have concluded; or
 - (iii) it becomes clear to the Judicial Office that no such proceedings are to be taken; and
 - (b) the Judicial Office is to write to the person complaining to that effect.

Time limit

- 7.—(1) Subject to this rule, the Judicial Office is to dismiss any allegation which founds on anything said to have occurred more than 3 months before the date on which the complaint document was received.
- (2) The person complaining may make an application in writing to the Judicial Office that there are exceptional circumstances which justify allowing the allegation to continue to be considered under these Rules as if it had been submitted on time.
- (3) Where such a case is not made at the time of making the complaint, the Judicial Office is to write to the person complaining inviting him or her, by such date as may be specified, to make such a case. If such a case is not made by the date specified, the allegation is to be dismissed.
- (4) Where such a case is made, the President of the Scottish Tribunals is to decide whether the allegation is to be allowed to proceed under these Rules as if it had been submitted on time.
- (5) Where an allegation is dismissed under this rule the Judicial Office is to write to the person complaining to that effect.
- (6) Where the Judicial Office considers that the allegation falls to be dismissed under rule 8(3), it may decide not to invite representations under paragraph (3) above and proceed directly to deal with the matter under rule 8.

Initial assessment of complaint

8.—(1) This rule applies to an allegation which is not currently suspended under rule 6 and has not been dismissed under rule 7.

(2) The Judicial Office is to carry out an initial assessment of the allegation.

(3) If the Judicial Office considers that the allegation falls into paragraph (4), it is to dismiss that allegation.

(4) An allegation falls into this paragraph if—

- (a) it does not contain sufficient information to enable a proper understanding of the allegation to be achieved;
- (b) it is about a decision of the Scottish Tribunals;
- (c) it raises a matter which has already been dealt with (whether under these Rules or otherwise), and does not present any material new evidence;
- (d) it raises a matter which falls within the functions of the Judicial Complaints Reviewer under paragraphs 9 and 10 of schedule 8 to the 2014 Act.

(5) Where an allegation is dismissed under paragraph (3), the Judicial Office is to provide written reasons to the person complaining to that effect.

(6) Where an allegation is not dismissed under paragraph (3), the Judicial Office is to write to the person complaining to inform them of that fact and of the next step to be taken under these Rules.

Notification to member and other disciplinary proceedings

9.—(1) This rule applies to an allegation which is not currently suspended under rule 6 and which has not been dismissed under rule 7 or 8.

(2) The Judicial Office is to send to the member concerned—

- (a) a document (which may be the complaint document) containing the allegation;
- (b) all information about the allegation which is in or which accompanied the complaint document;
- (c) notification of the next step to be taken under these Rules.

(3) Where, at any stage after a member has been notified of an allegation under paragraph (2), the member is notified of an investigation or disciplinary procedure by any other competent professional disciplinary body or tribunal in respect of the member concerning the same or similar subject-matter as that allegation, then the member is to notify the President of the Scottish Tribunals of that fact.

(4) If at any time in the course of carrying out their duties under these Rules, the Judicial Office, the investigating judicial office holder or the Lord President becomes aware of any such investigation or procedure, the President of the Scottish Tribunals is to be notified of that fact.

(5) When the President of the Scottish Tribunals becomes aware, or is notified in accordance with paragraph (3) or (4), of any such investigation or procedure, he or she is to consider whether further consideration under these Rules of the allegation against the member concerned is appropriate before that investigation or procedure has concluded.

(6) Where the President of the Scottish Tribunals decides under paragraph (5) that further consideration of the allegation under these Rules is inappropriate—

- (a) no further action is to be taken under these Rules until the investigation or procedure has concluded; and
- (b) the Judicial Office is to notify the person complaining and the member concerned.

Ongoing proceedings

10.—(1) This rule applies where a member has been notified of an allegation under rule 9(2).

(2) If it appears to the Judicial Office that the allegation relates to proceedings in the Scottish Tribunals which are not concluded, it is to refer the allegation to the President of the Scottish Tribunals for advice as to whether it would be appropriate for consideration under these Rules to continue before the proceedings are concluded.

(3) Where the President of the Scottish Tribunals advises that it would be inappropriate for that to occur—

- (a) no further action is to be taken under these Rules until the proceedings have concluded; and
- (b) the Judicial Office is to write to the person complaining and to the member concerned to that effect.

Consideration by President of the Scottish Tribunals

11.—(1) This rule applies to an allegation—

- (a) which is not dismissed under rule 8; and
- (b) whose consideration is not currently suspended under rule 10.

(2) The allegation is to be considered by the President of the Scottish Tribunals in accordance with the following paragraphs.

(3) If the President of the Scottish Tribunals is of the view that the allegation falls into paragraph (4), he or she is to dismiss the allegation and is to inform the Judicial Office accordingly.

(4) An allegation falls into this paragraph if—

- (a) it does not contain sufficient information to enable a proper understanding of the grounds of the allegation to be achieved;
- (b) it is about a decision of the Scottish Tribunals;
- (c) it raises a matter which has already been dealt with, whether under these Rules or otherwise, and does not present any material new evidence;
- (d) it raises a matter which falls within the functions of the Judicial Complaints Reviewer under paragraphs 9 and 10 of schedule 9 to the 2014 Act;
- (e) it is vexatious;
- (f) it is without substance;
- (g) it is insubstantial, that is to say that, even if substantiated, it would not require any disciplinary action to be taken.

(5) In forming a view as to whether paragraph (4)(f) or (g) applies, the President of the Scottish Tribunals is to take due account of the extent to which the conduct concerned complies with any guidance issued by the Lord President under section 34 of the 2014 Act.

(6) Where an allegation is dismissed under paragraph (3), the Judicial Office is to write to the person complaining and the member concerned to that effect.

(7) If the President of the Scottish Tribunals is of the view that one or more allegations in a complaint fall outside paragraph (4), he or she is to consider whether paragraph (8) applies and is to inform the Judicial Office accordingly.

(8) This paragraph applies where the President of the Scottish Tribunals thinks that the allegation, if substantiated, would raise a possible question of fitness for office.

(9) Where the Judicial Office is informed that paragraph (8) applies—

- (a) it is to inform the Lord President; and

- (b) no further action is to be taken under these Rules until the Lord President indicates whether he or she intends to request the establishment of a fitness assessment tribunal in respect of the member concerned.

(10) In the event that the Lord President indicates an intention to make such a request—

- (a) consideration under these Rules is to cease; and
- (b) the Judicial Office is to write to the person complaining and to the member concerned to that effect.

Referral for investigation

12.—(1) This rule applies to an allegation—

- (a) which was not dismissed under rule 11; and
- (b) whose consideration did not cease under rule 11(10).

(2) The Judicial Office is to refer the allegation to a person nominated by the President of the Scottish Tribunals for investigation.

(3) Subject to paragraph (4), the person investigating is to be a judicial office holder.

(4) Where the member concerned is a member of the Upper Tribunal for Scotland, the investigating judicial office holder is to be a judge of the Court of Session, excluding the President of the Scottish Tribunals and the Lord President.

(5) Where at any stage of consideration under these Rules the investigating judicial office holder thinks that the matter may be capable of resolution to the satisfaction of the person complaining and the member concerned without further investigation, he or she may communicate with them both with a view to securing that outcome.

(6) Where that outcome is achieved, the investigating judicial office holder is to write to the Judicial Office to that effect and consideration of the allegation under these Rules is to cease.

Investigation and report

13.—(1) This rule applies to an allegation referred to an investigating judicial office holder which has on initial consideration been incapable of resolution under rule 12(6).

(2) The investigating judicial office holder is to investigate the allegation and produce a report determining—

- (a) the facts of the matter;
- (b) whether the allegation is substantiated (or substantiated in part); and if so, to recommend whether the Lord President should exercise the power mentioned in paragraph 5(1) of schedule 8 to the 2014 Act.

(3) The report must—

- (a) be in writing;
- (b) contain reasons for its conclusions;
- (c) be submitted to the Judicial Office.

(4) In deciding whether an allegation is to any extent substantiated and in making any recommendation in consequence the investigating judicial office holder is to take due account of the extent to which the conduct concerned complies with any guidance issued by the Lord President under section 34 of the 2014 Act.

Procedure and conduct of investigation

14.—(1) For the purposes of the investigation the investigating judicial office holder may—

- (a) make such inquiries regarding the allegation as he or she considers appropriate;
- (b) obtain and consider any documents which appear to be relevant;

- (c) interview such persons as he or she considers appropriate.
- (2) The investigating judicial office holder is to—
- (a) give an interviewee reasonable notice of the date and time of the interview;
 - (b) permit an interviewee to be accompanied by a person of the interviewee's choosing for the purpose of—
 - (i) providing moral support;
 - (ii) helping to manage papers;
 - (iii) taking notes;
 - (iv) offering advice.
- (3) The investigating judicial office holder may arrange for any interview to be recorded by equipment which records sound digitally on an appropriate storage medium.
- (4) The member concerned is to comply with a request from the investigating judicial office holder that he or she be interviewed.
- (5) The procedure and conduct of an investigation is such (consistent with respect for the principles of fairness and natural justice) as the investigating judicial office holder thinks fit; but—
- (a) the member concerned is to be afforded the opportunity to submit a written response to the allegation;
 - (b) the person complaining and the member concerned are each to be afforded the opportunity to submit written comments on any information obtained by the investigating judicial office holder which he or she has not previously seen;
 - (c) so far as the determination of questions of fact is concerned—
 - (i) the investigation is to be conducted with the aim of ascertaining the truth;
 - (ii) findings of fact are to be made on the balance of probabilities;
 - (d) so far as possible, the investigation is to be conducted without disclosure to third parties of the identity of the person complaining or the member concerned.
- (6) Before the investigation starts the investigating judicial office holder is to prepare and issue to the person complaining and the member concerned a statement of the procedure he or she has decided on.
- (7) Where, after the investigation starts, the investigating judicial office holder wishes to depart from that procedure in a material way, he or she is to inform the person complaining and the member concerned in writing before continuing the investigation.
- (8) The investigating judicial office holder is to make a note of the substance of all conversations in the course of the investigation which are material to it and is to create and maintain a file containing—
- (a) those notes;
 - (b) all documents relevant to the investigation; and
 - (c) all recordings of interviews carried out in the course of the investigation.
- (9) For the purpose of these Rules, notes taken by the investigating judicial office holder under paragraph (3) are deemed to be an accurate record of any interview where the interviewee has signed a copy of the notes to that effect.
- (10) After submitting a report under rule 13(3)(c), the investigating judicial office holder is to send the file to the Judicial Office.

Review by President of the Scottish Tribunals

- 15.**—(1) This rule applies where the Judicial Office has received a report under rule 13.
- (2) The report is to be put before the President of the Scottish Tribunals, together with the investigating judicial office holder's file.
- (3) The President of the Scottish Tribunals is to review the determinations in the report.

(4) Having reviewed the determinations, the President of the Scottish Tribunals may require the investigating judicial office holder to reconsider any of those determinations.

(5) Such a requirement is to be in writing and a copy is to be sent to the Judicial Office.

(6) For the purposes of reconsidering a determination, the investigating judicial office holder may—

- (a) make such further inquiries regarding the allegation as he or she considers appropriate;
- (b) obtain and consider any further documents which appear to be relevant;
- (c) interview (or re-interview) such persons as he or she considers appropriate.

(7) Rules 14(2), (3), (4) and (9) apply to an interview under paragraph (6)(c) as they apply to an interview conducted under rule 14(1)(c)

(8) The investigating judicial office holder is to make a note of the substance of all conversations in the course of reconsideration of a determination which are material to it and is to update the investigating judicial office holder's file with—

- (a) those notes;
- (b) all additional documents relevant to the reconsideration;
- (c) all recordings of interviews carried out in the course of the reconsideration.

(9) Having carried out all reconsiderations required by the President of the Scottish Tribunals, the investigating judicial office holder is to resubmit the report and the file.

(10) In relation to any determination which the investigating judicial office holder was required to reconsider the report is to contain statements of—

- (a) what the investigating judicial office holder did in reconsidering the determination;
- (b) what the outcome of the reconsideration was.

Report to the Lord President

16.—(1) Paragraph (2) applies where the Judicial Office has—

- (a) received a report under rule 13(3)(c) and the President of the Scottish Tribunals has indicated that he or she does not require the investigating judicial office holder to review any determination under rule 15; or
- (b) received a report under rule 15(9).

(2) The Judicial Office is to put the report before the Lord President.

(3) Paragraph (4) applies where—

- (a) the report finds the allegation to be substantiated (or substantiated in part); and
- (b) the report recommends that the Lord President should exercise a power mentioned in paragraph 5(1) of schedule 8 to the 2014 Act.

(4) The Lord President is to write to the member concerned inviting him or her to make written representations.

(5) The Lord President's letter is to contain or be accompanied by such information, which may include the report, as he or she considers appropriate for the purpose of giving the member a fair opportunity to make any representations.

(6) The member concerned may make any representations by such date as is specified in the invitation made under paragraph (4).

(7) The Lord President is to consider any representations before deciding whether to exercise a power mentioned in paragraph 5(1) of schedule 8 to the 2014 Act

Notification of outcome, etc.

17.—(1) This rule applies where—

- (a) the Lord President has received a report under rule 16(2); and

- (b) the Lord President has taken all action (if any) which the Lord President proposes to take in relation to the allegation.
- (2) The Judicial Office is to write to the person complaining to inform the person of—
 - (a) the outcome of the investigation of the allegation; and
 - (b) any action taken by the Lord President in consequence.
- (3) The Judicial Office’s letter is to contain or be accompanied by such information as the Lord President considers to be appropriate for the purpose of giving the person complaining a fair understanding of the matters mentioned in paragraphs (2) (a) and (b).
- (4) Except where the Lord President has already done so under rule 16, the Lord President is to write to the member who is the subject of the report to inform the member of the matters mentioned in paragraphs (2) (a) and (b).
- (5) After paragraphs (2) and (4) have been complied with, the Lord President may publish or disclose to any person such information concerning the whole matter (including the identity of the person complaining or the member concerned or both) as the Lord President considers appropriate.

Withdrawal of complaint

- 18.**—(1) A person complaining may, by writing to the Judicial Office to that effect, withdraw an allegation at any time before the Lord President has received a report about it under rule 16(2).
- (2) Where a person complaining fails to respond to correspondence from the Judicial Office or the investigating judicial office holder within 28 days, the complaint may be deemed to have been withdrawn and may be treated in accordance with this rule.
- (3) Where an allegation is withdrawn before it is referred to an investigating judicial office holder under rule 12, the President of the Scottish Tribunals is to consider whether further procedure under these Rules is appropriate.
- (4) If the President of the Scottish Tribunals determines further procedure is appropriate, the allegation is to continue to be considered under these Rules as if it had not been withdrawn.
- (5) Where an allegation is withdrawn after it is referred to an investigating judicial office holder under rule 12, the investigating judicial office holder is to consider whether further investigation of the allegation is appropriate.
- (6) If the investigating judicial office holder determines further investigation is appropriate, the allegation is to continue to be investigated under these Rules as if the complaint had not been withdrawn.
- (7) Where an allegation is continuing under these Rules by virtue of paragraph (4) or (6), any requirement in these Rules or in the statement of the procedure decided on under rule 14(6) to communicate a matter to or seek comments from the person complaining ceases to apply.

Consideration of matters in absence of a complaint

- 19.**—(1) Paragraph (2) applies where no complaint is made under these Rules but the President of the Scottish Tribunals receives information from any source which suggests to the President of the Scottish Tribunals that consideration under these Rules of a possible allegation of misconduct is appropriate.
- (2) The allegation is to be considered under these Rules (with the necessary modifications to reflecting the absence of a person complaining) as if—
 - (a) a complaint containing it had been made under rule 5; and
 - (b) rule 7 did not apply.

Ceasing to be a member of the Scottish Tribunals

20. Where the member against whom an allegation under these Rules had been made ceased to hold the position of member of the Scottish Tribunals or dies, consideration of the allegation under these Rules is to cease.

Interpretation

21.In these Rules—

“the 2014 Act” means the Tribunals (Scotland) Act 2014;

“decision” means a decision made by the Scottish Tribunals in any matter in a case before them.

“judicial member” means any judicial office holder holding the office of—

- (a) judge of the Court of Session;
- (b) Chairman of the Scottish Land Court;
- (c) sheriff principal;
- (d) sheriff;
- (e) summary sheriff

“judicial office holder” means a judicial member or a Chamber President;

“member” under these Rules means both an ordinary member and a legal member, but not a judicial member, of the Scottish Tribunals;

“member concerned” means the member against whom the allegation has been made.

Revocation and Saving

22.—(1) The Complaints about Members of the Scottish Tribunals Rules 2017 that came into force on 24 April 2017 are revoked.

(2) Those Rules as they applied immediately before 12 January 2018 continue to have effect for the purpose of any complaint made but not determined, dismissed or withdrawn prior to that date.

CJM Sutherland
Lord President of the Court of Session

Edinburgh
January 2018