

2016 No. 244

TRIBUNALS AND INQUIRIES

Act of Sederunt (Fitness Assessment Tribunal Rules) 2016

Made - - - - *30th August 2016*

Laid before the Scottish Parliament *1st September 2016*

Coming into force - - *1st December 2016*

The Court of Session makes this Act of Sederunt under the powers conferred by paragraph 14 of schedule 8 of the Tribunals (Scotland) Act 2014(a) and all other powers enabling it to do so.

Citation and commencement etc.

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Fitness Assessment Tribunal Rules) 2016.

(2) It comes into force on 1st December 2016.

(3) A certified copy is to be inserted in the Books of Sederunt.

Interpretation

2. In these Rules—

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

“investigating officer” means the person appointed in accordance with rule 4(1), and references to an investigating officer are to be read as references to a substitute investigating officer where one has been appointed in accordance with rule 4(8);

“the Judicial Office” means the Judicial Office in the Scottish Courts and Tribunals Service which supports the Lord President in the Lord President’s non-judicial functions;

“member” means an ordinary member or a legal member of the Scottish Tribunals;

“member concerned” means a member of the Scottish Tribunals in relation to whom a tribunal has been constituted;

“the parties” are the member concerned and the presenting officer;

“presenting officer” means the person appointed in accordance with rule 8(1), and references to a presenting officer are to be read as references to a substitute presenting officer where one has been appointed in accordance with rule 8(6);

“statement of reasons” means a statement of the grounds on which it is alleged that the member concerned is unfit to hold the position of member of the Scottish Tribunals by reason of inability, neglect of duty or misbehaviour;

“tribunal” means a fitness assessment tribunal constituted under paragraph 13 of schedule 8 of the 2014 Act; and

(a) 2014 asp 10.

“tribunal case” means the issue of whether the member concerned is unfit to hold the position of member of the Scottish Tribunals by reason of inability, neglect of duty or misbehaviour.

Commencement of investigation

3. When a tribunal is constituted, the Judicial Office must give the member concerned written notice of—

- (a) the constitution of a tribunal; and
- (b) the membership of the tribunal.

Investigation

4.—(1) The tribunal must appoint an investigating officer from a list of persons who have been nominated for that purpose by the Lord President.

(2) Such an appointment is to be made within two months of the date on which written notice is given in terms of rule 3(a).

(3) The investigating officer is to investigate the tribunal case and in so doing—

- (a) must consider the existing information relating to the tribunal case and make such further enquiries as the investigating officer considers appropriate;
- (b) may obtain and consider any documents and productions which appear to be relevant; and
- (c) may interview any person the investigating officer considers appropriate to interview, including the member concerned if the member concerned agrees to be interviewed.

(4) If the investigating officer considers that it cannot be established that the member concerned is unfit to hold the position of member of the Scottish Tribunals, the investigating officer must—

- (a) recommend in writing to the tribunal that no further procedure is required; and
- (b) give reasons for that recommendation in writing.

(5) The Judicial Office must provide copies of the recommendation and reasons to the member concerned.

(6) If the investigating officer considers that further procedure is required, the investigating officer must submit to the tribunal—

- (a) a written recommendation for further procedure;
- (b) a statement of reasons to the tribunal; and
- (c) a list and copies of any documents, and a list of any other productions, that are relied on in the statement of reasons.

(7) The Judicial Office must provide the member concerned with a copy of the written recommendation submitted to the tribunal under rule 4(6)(a), together with—

- (a) a copy of the statement of reasons submitted to the tribunal in accordance with rule 4(6)(b);
- (b) a list of any documents and productions that are relied on in the statement of reasons; and
- (c) a copy of any document included on the list mentioned in subparagraph (b).

(8) If the investigating officer is unable to fulfil the investigating officer’s duties, the tribunal may appoint a substitute investigating officer from the list of persons referred to in paragraph (1).

Application for further specification of reasons

5.—(1) The member concerned may apply in writing to the tribunal for further specification of the information contained in the statement of reasons.

(2) The application must—

- (a) specify the matters in relation to which further specification is sought; and

(b) be made within 21 days of the date on which the member concerned is provided with a copy of the written recommendation given under rule 4(7).

(3) Where the tribunal grants the application, it must direct the investigating officer to provide such further specification in writing as the tribunal considers appropriate within 21 days of the date of the decision to grant the application.

(4) Where the tribunal refuses the application, it must notify the member concerned in writing within 21 days of the date of receipt of the application by the tribunal and give reasons for its decision.

Response to statement of reasons

6.—(1) The member concerned may lodge a written response to the investigating officer's recommendation and statement of reasons submitted under rule 4(6).

(2) Any written response must—

(a) be submitted to the Judicial Office within 28 days of—

(i) the date on which the member concerned is provided with a copy of the written recommendation under rule 4(7);

(ii) the date on which the tribunal notifies the member concerned that it has refused an application for further specification in terms of rule 5(4); or

(iii) the date on which the investigating officer provides further specification in terms of rule 5(3),

whichever is the latest;

(b) state to what extent any facts set out in the statement of reasons are admitted or denied;

(c) include any statement of facts that the member concerned wishes to make;

(d) indicate any issues of law that the member concerned intends to raise;

(e) provide the names and addresses of any persons that the member concerned may wish to call as witnesses; and

(f) provide a list and copies of any documents and a list of any productions to which the member concerned may wish to refer at any hearing.

(3) The tribunal may, on cause shown, allow the member concerned to lodge a supplementary written response containing further information falling within the scope of paragraphs (2)(b) to (f).

Consideration of recommendation etc.

7.—(1) The tribunal must consider the investigating officer's recommendation and statement of reasons and any written response by the member concerned, and determine whether—

(a) the investigation should proceed to a hearing; or

(b) no further procedure is required.

(2) The tribunal must give reasons in writing for its determination.

Representation at hearings

8.—(1) If the tribunal determines that the investigation is to proceed to a hearing, the tribunal must appoint a presenting officer from a list of persons who have been nominated for that purpose by the Lord President.

(2) The investigating officer must provide to the presenting officer copies of all documents supplied to or by the tribunal and the member concerned.

(3) The tribunal case is to be presented by the presenting officer.

(4) The presenting officer may instruct the investigating officer to carry out such further investigations as the presenting officer considers necessary.

(5) The member concerned may be represented before the tribunal by an advocate or solicitor, or any other person authorised by the tribunal.

(6) If the presenting officer is unable to fulfil the presenting officer's duties, the tribunal may appoint a substitute presenting officer from the list of persons referred to in paragraph (1).

Duty to disclose information

9.—(1) The presenting officer and the investigating officer must disclose to the member concerned any information not previously disclosed that—

- (a) is likely to form part of the facts and circumstances placed before the tribunal by the presenting officer;
- (b) may materially strengthen the position of the member concerned in respect of the tribunal case; or
- (c) may materially undermine the presenting officer's position in respect of the tribunal case.

(2) During the relevant period, the presenting officer must—

- (a) keep under review all the information that may be relevant to the tribunal case of which the presenting officer is aware; and
- (b) disclose to the member concerned any information not previously disclosed in accordance with paragraph (1).

(3) In this rule, "relevant period" means the period which begins when the presenting officer complies with paragraph (1) and ends when the tribunal reports to the First Minister and the Lord President in accordance with paragraph 22(2) of schedule 8 of the 2014 Act.

Preliminary hearing

10.—(1) Before proceeding to a hearing under rule 11, the tribunal must hold a preliminary hearing.

(2) The Judicial Office must give the parties written notice of the date, time and place of the preliminary hearing.

(3) At the preliminary hearing the tribunal may—

- (a) confirm with the member concerned what facts, if any, are in dispute;
- (b) hear argument from the parties on and decide any legal or other preliminary issue raised in any written response or supplementary written response lodged under rule 6;
- (c) make any case management directions, including directions as to the lodging of documents or the attendance of witnesses that it considers necessary for the future conduct of the proceedings; and
- (d) fix a hearing under rule 11.

Hearing

11.—(1) If the tribunal determines that a hearing is necessary, it may fix—

- (a) a hearing on legal submissions only; or
- (b) a hearing at which—
 - (i) the parties may present oral and documentary evidence and refer to productions;
 - (ii) witnesses may be examined; and
 - (iii) the parties may make submissions on fact and law.

(2) The Judicial Office must give the parties written notice of the date, time and place of the hearing.

Conduct of hearings

- 12.**—(1) Subject to paragraph (3), hearings of the tribunal are to be held in private.
- (2) The tribunal is to deliberate in the absence of any other person.
- (3) The tribunal may conduct the hearing or any part of it in public if—
- (a) the member concerned so requests; or
 - (b) the tribunal considers that the circumstances are such as to make a private hearing inappropriate.
- (4) All hearings must be recorded electronically or by other means approved by the tribunal.

Powers of tribunal

13.—(1) Subject to the provisions of paragraphs 15 to 23 of schedule 8 of the 2014 Act and these Rules, the tribunal may regulate its own procedure.

(2) The tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the tribunal may, on cause shown—

- (a) extend or shorten the time for complying with any rule or direction;
- (b) permit a party to amend a document;
- (c) adjourn or postpone a hearing;
- (d) sist proceedings.

(4) If any hearing is postponed or adjourned, the Judicial Office must give the parties written notice of the date, time and place to which the hearing has been postponed or adjourned.

Termination of proceedings

14.—(1) If the presenting officer considers at any time that it cannot be established that the member concerned is unfit to hold the position of member of the Scottish Tribunals by reason of inability, neglect of duty or misbehaviour, the presenting officer must—

- (a) recommend in writing to the tribunal that no further procedure is required; and
- (b) give reasons for that recommendation in writing.

(2) The Judicial Office must provide a copy of the recommendation and reasons to the member concerned.

(3) If the member concerned ceases to be a member of the Scottish Tribunals at any stage in the proceedings, the proceedings are terminated.

(4) At any stage in the proceedings, the tribunal may—

- (a) on the basis of a recommendation by the investigating officer or the presenting officer;
- (b) on the basis of a submission by the member concerned; or
- (c) on its own motion,

determine that it cannot be established that the member concerned is unfit to hold the position of member of the Scottish Tribunals by reason of inability, neglect of duty or misbehaviour.

(5) Where the tribunal makes a determination mentioned in subparagraph (4), it must submit a report to that effect to the First Minister and the Lord President in accordance with paragraph 22(2) of schedule 8 of the 2014 Act.

Decision and report

15.—(1) Where the tribunal, having considered the evidence, proposes to make findings of fact on disputed issues, it must send to the parties a draft of its findings and invite them to comment on the draft by such date as the tribunal specifies.

(2) The tribunal must have regard to any comments made under paragraph (1), but need not give the parties an opportunity to comment on any alterations made to the draft before the submission of its report.

(3) The tribunal must—

- (a) submit its report to the First Minister and the Lord President in accordance with paragraph 22(2) of schedule 8 of the 2014 Act; and
- (b) send a copy of its report to—
 - (i) the President of the Scottish Tribunals;
 - (ii) the Chamber president of any chamber to which the member concerned is assigned;
 - (iii) the Vice-President of any division of the Upper Tribunal to which the member concerned is assigned; and
 - (iv) the member concerned.

CJM SUTHERLAND
Lord President
I.P.D.

Edinburgh
30th August 2016

EXPLANATORY NOTE

(This note is not part of the Act of Sederunt)

This Act of Sederunt makes provision as to the procedure to be followed in tribunals constituted under paragraph 13 of schedule 8 of the Tribunals (Scotland) Act 2014 (asp 10).

Rule 3 provides for the Judicial Office to notify the member concerned that the First Minister has constituted a tribunal, and of its membership.

Rule 4 sets out the investigation process, including the appointment by the tribunal of an investigating officer from a list of persons nominated by the Lord President. It specifies the powers and duties of the investigating officer. Once the investigation is complete, it is for the investigating officer either to recommend that no further procedure is required or to make a recommendation as to further procedure. The investigating officer must state reasons for the recommendation made and provide the material mentioned in rule 4(6)(c). The Judicial Office must provide copies to the member concerned of the recommendation made, the statement of reasons, documents relied upon, and lists thereof and of any productions.

Rule 5 enables the member concerned to apply for further specification of the information contained in the statement of reasons. Such an application must be made within 21 days of the member concerned being provided the relevant documentation under rule 4(7). If the tribunal grants the application, it must direct the investigating officer to provide further specification within 21 days. If it is refused, the tribunal must notify the member concerned within 21 days and give reasons.

Rule 6 allows for the member concerned to lodge a written response to the statement of reasons within 28 days of the statement being provided, the refusal of an application for further specification, or the provision of further specification, whichever of these dates is latest. The tribunal may allow a supplementary written response to be lodged.

Rule 7 provides for the tribunal to consider the investigating officer's recommendation and statement of reasons and any written response by the member concerned. It must then determine either that the investigation should proceed to a hearing or that no further procedure is required and give reasons for that determination.

Rule 8 relates to representation at hearings. The tribunal case is to be presented by a presenting officer appointed by the tribunal from a list of persons nominated by the Lord President. The member concerned may be represented by a solicitor, an advocate or any other person authorised by the tribunal.

Rule 9 requires the presenting officer and the investigating officer to disclose previously undisclosed information to the member concerned if it is likely to be placed before the tribunal, might materially strengthen the position of the member concerned or weaken the presenting officer's position. This duty applies until the tribunal reports to the First Minister and the Lord President.

Rule 10 provides for the holding of a preliminary hearing, at which the tribunal may confirm the facts in dispute, determine preliminary matters, make case management directions and fix a hearing under rule 11. A hearing under rule 11 may be fixed to hear legal submissions only, or the leading of evidence may be permitted.

Rule 12 provides for the conduct of hearings. In particular, it specifies that hearings of the tribunal are heard in private, unless the member concerned requests that a hearing is held in public or the circumstances would make holding it in private inappropriate. All hearings must also be recorded, and the tribunal is to deliberate in the absence of any other person.

Rule 13 sets out the powers of the tribunal to regulate its own procedure. In addition to a general power to regulate procedure, it has specific powers to extend or shorten the time for complying with any rule, or any direction that it gives, to permit amendment of documents, to adjourn or postpone a hearing, and to sist proceedings.

Rule 14 specifies the way in which proceedings may be brought to an end. Where the presenting officer considers that it cannot be established that the member concerned is unfit for office, the presenting officer must make a recommendation to the tribunal to that effect, and give reasons. The tribunal may, at any stage, determine that it cannot be established that the member concerned is unfit for office. This may be on the recommendation of the investigating officer or the presenting officer, on a submission by the member concerned, or on its own motion. Where the tribunal makes such a determination, it must report in those terms to the First Minister and the Lord President. In addition, proceedings come to an end if the member concerned ceases to be a member of the Scottish Tribunals.

Rule 15 makes provision about the tribunal's report. Where the tribunal proposes to make findings of fact on disputed issues, it must give the member concerned and the presenting officer a draft of its findings and invite comments. The tribunal must have regard to any such draft, but need not give the parties a further opportunity to comment on an amended draft. In addition to reporting to the First Minister and the Lord President, the tribunal must send a copy of its report to the member concerned, the President of the Scottish Tribunals and, where applicable, the Chamber President of any chamber to which the member concerned is assigned and the Vice-President of any division of the Upper Tribunal to which the member concerned is assigned.

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