

2008 No. 2098

LORD CHIEF JUSTICE

JUDICIAL APPOINTMENTS AND DISCIPLINE

**The Judicial Discipline (Prescribed Procedures) (Amendment)
Regulations 2008**

<i>Made</i> - - - -	<i>17th July 2008</i>
<i>Laid before Parliament</i>	<i>5th August 2008</i>
<i>Coming into force</i> - -	<i>28th August 2008</i>

The Lord Chief Justice, in exercise of his powers under sections 115, 120 and 121 of the Constitutional Reform Act 2005(a), and with the agreement of the Lord Chancellor, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland, makes the following Regulations:

Citation, commencement and application

1.—(1) These Regulations may be cited as the Judicial Discipline (Prescribed Procedures) (Amendment) Regulations 2008 and come into force on 28th August 2008.

(2) These Regulations apply to any complaint, including a complaint made before 28th August 2008 which has not been withdrawn, dismissed or determined.

Amendments to the Judicial Discipline (Prescribed Procedures) Regulations 2006

2. The Judicial Discipline (Prescribed Procedures) Regulations 2006(b) are amended as follows.

3. In regulation 2(2) (interpretation), after “In these regulations,” insert “unless the contrary intention appears”.

4. For regulation 3(4) (Office for Judicial Complaints), substitute—

“(4) Any reply by a complainant or the subject of the disciplinary proceedings to a request made by the Office for Judicial Complaints pursuant to enquiries made under paragraph (3) must be made within twenty business days of that request.”.

5. In regulation 9 (complaints made to advisory committees)—

(a) after paragraph (1) insert—

“(1A) Where an advisory committee receives no complaint under these Regulations or under rules made under paragraph (2), but it receives information from any source which suggests to it that disciplinary proceedings might be justified, it may treat

that information as if it were a complaint made under these Regulations, or under rules made under paragraph (2).”; and

(b) in paragraph (4) after “where the complaint” insert “concerns misconduct and”.

6. In regulation 10 (complaints made in relation to tribunals)—

(a) after paragraph 3 insert—

“(3A) Where a President receives no complaint under these Regulations or under rules made under paragraph (2), but instead receives information from any source which suggests that disciplinary proceedings might be justified, that President may treat that information as if it were a complaint made under these Regulations, or under rules made under paragraph (2).”;

(b) in paragraph (5) for “found a case to be substantiated” substitute “upheld a case”; and

(c) in paragraph (9) after “where the complaint” insert “concerns misconduct and”.

7. In regulation 13(2) (referral of other information for consideration), for “may” substitute “must”.

8. In regulation 14 (consideration of a complaint by the Office for Judicial Complaints)—

(a) in paragraph (1) omit from “Unless” until “investigated,”; and

(b) after paragraph (2) insert—

“(3) Where an account of facts given by a complainant differs from an account given by the judicial office holder about whom the complaint is made, the Office for Judicial Complaints must consult any independent evidence which exists which may verify the facts in dispute before it dismisses a complaint under paragraph (1), unless to do so would be disproportionate in all the circumstances.”.

9. In regulation 15 (further consideration of a complaint liable to be dismissed under regulation 14), after “where the complaint” insert “concerns misconduct and”.

10. In regulation 17 (nomination of nominated judge)—

(a) in paragraph (1) for “The nominated judge” substitute “A nominated judge”;

(b) in paragraph (2) after “cases” insert “, or to deal with different aspects of the same case”; and

(c) in paragraph (3) for “the nominated judge” substitute “a nominated judge”.

11. In regulation 18 (functions of nominated judge)—

(a) for “The nominated judge” substitute “A nominated judge”;

(b) at the end of paragraph (c) delete “and”;

(c) at the end of paragraph (d) substitute the full stop with “; and”; and

(d) after paragraph (d) insert—

“(e) whether the request made under regulation 29(2) by the subject of the disciplinary proceedings is totally without merit.”.

12. For regulation 22 (functions of investigating judge), substitute—

“Functions of investigating judge

22.—(1) The investigating judge must advise the Lord Chancellor and the Lord Chief Justice—

(a) as to the facts of a case;

(b) whether the case is substantiated or not;

(c) whether disciplinary action should be taken; and if so what disciplinary action should be taken; and

(d) as to any other matters in the terms of reference.

(2) Where it falls to the investigating judge to establish any fact, any question as to whether that fact is established must be decided on the balance of probabilities.”.

13. For regulation 23 (procedure of investigation by investigating judge) and regulation 24 (evidence and representations), substitute—

“Procedure of investigation by investigating judge

23.—(1) The investigating judge must—

- (a) decide how to conduct the investigation;
- (b) notify the subject of the disciplinary proceedings and any complainant of the proposals for the conduct of the investigation, and whether oral evidence will be taken;
- (c) invite the subject of the disciplinary proceedings to give evidence and make representations about the procedure adopted and the case; and
- (d) record any representations on the proposals which those persons may make.

(2) The investigating judge may invite the complainant or any person who may be able to assist the investigation to give evidence about the case.

(3) Any evidence or representations from the complainant or the subject of the disciplinary proceedings must be provided to the investigating judge within ten business days of an invitation under paragraphs (1) or (2).

(4) The investigating judge may take oral evidence if it is considered necessary to do so.

(5) The investigating judge must arrange for any evidence given orally to be recorded in a transcript or a tape recording.

(6) The investigating judge must disclose any evidence obtained under paragraph (2) to the subject of the disciplinary proceedings and must invite that person to make representations on the evidence.

(7) The subject of the disciplinary proceedings must make any representations under paragraph (6) within ten business days of the invitation under that paragraph.

(8) Where the investigating judge considers that it is necessary to disclose evidence obtained during the course of an investigation to any person other than the subject of the disciplinary proceedings, the investigating judge must first invite—

- (a) the person who provided the evidence, and
- (b) the subject of the disciplinary proceedings

to make representations about the proposed disclosure.

(9) The person who provided the evidence, and the subject of the disciplinary proceedings, must make any representations under paragraph (8) within ten business days of the invitation.”.

14. In regulation 25(6) (report of investigating judge)—

- (a) for “Representations” substitute “Any representations”; and
- (b) for “(3) or (4)” substitute “(2) or (3)”.

15. In regulation 27(2) (notification of proposed disciplinary action and final decision), for “twenty” substitute “ten”.

16. In regulation 29 (convening a review body)—

- (a) for paragraph (1)(d) substitute—

“(d) the subject of the disciplinary proceedings requests the Lord Chancellor and the Lord Chief Justice to refer the case to a review body under paragraph (2) unless—

- (i) the request to refer is totally without merit; or

- (ii) before a review body has convened, the subject of the disciplinary proceedings withdraws the request under paragraph (5)(a), in which case the Lord Chancellor and the Lord Chief Justice shall not convene a review body unless they consider there are good reasons for doing so.”;
- (b) after paragraph (2) insert—
 - “(2A) (a) Where the subject of the disciplinary proceedings makes a request under paragraph (2), the Lord Chancellor and the Lord Chief Justice must in the first instance refer that request to a nominated judge to consider whether the request is totally without merit.
 - (b) The nominated judge invited to consider the request must not be a nominated judge who has previously considered any aspect of the case.”;
- (c) in paragraph (4)—
 - (i) at the end of sub-paragraph (a) delete “, and” and substitute a semicolon;
 - (ii) at the end of sub-paragraph (b) substitute the full stop with “and why; and”;
 - (iii) after sub-paragraph (b) insert—
 - “(c) indicate whether he wishes to make oral representations to the review body.”;
- (d) after paragraph (4) insert—
 - “(5) (a) Subject to sub-paragraph (b), the subject of the disciplinary proceedings may withdraw a request under paragraph (2) at any time.
 - (b) If the request made under paragraph (2) is withdrawn after a review body has convened, the subject of the disciplinary proceedings must give reasons for withdrawing the request.
 - (c) The review body must discontinue its review if the request made under paragraph (2) has been withdrawn, unless it considers there are good reasons to continue with a review.”.

17. In regulation 30 (functions of a review body), after paragraph (2) insert—

“(2A) Where a review body reviews any finding of fact under paragraph (1)(a), any question as to whether, upon review, that fact is established must be decided on the balance of probabilities.”.

18. For regulations 31 (review of documents), 32 (recommendations without a full review) and 33 (further procedure of review body), substitute—

“Review of documents and procedure of review body

31.—(1) A review body shall have access to the documents which the Office for Judicial Complaints, an advisory committee, a President, a nominated judge, the investigating judge, the Lord Chancellor and the Lord Chief Justice have used for the purpose of exercising their functions under these Regulations or under rules made under these Regulations.

(2) The review body must initially review the case on the basis of those documents and of any statement under regulation 29(4)(b) which the judicial office holder has provided.

(3) After its initial review under paragraph (2), the review body must—

- (a) determine the procedure it will follow; and
- (b) inform the subject of the disciplinary proceedings of the proposed procedure.

(4) A review body must take oral evidence from the subject of the disciplinary proceedings if so requested, unless it considers it unnecessary to do so.

(5) A review body may take evidence, including oral evidence, from any other person.”.

19. In regulation 34 (draft report of review body)—

(a) in paragraph (2) after “person” insert “who may be adversely affected by its contents”;
and

(b) for paragraph (4) substitute—

“(4) Any representations by the subject of the disciplinary proceedings, or the complainant if the draft report has been disclosed to that person, must be made within 10 business days of the invitation.”.

20. In regulation 36(1) (deferral of consideration of a case)—

(a) for “the Lord Chancellor and the Lord Chief Justice” substitute “the Office for Judicial Complaints”; and

(b) where it appears in the original paragraph, for “the Office for Judicial Complaints” substitute “it”.

23rd June 2008

Phillips of Worth Matravers, CJ

I agree

26th June 2008

Jack Straw
Lord Chancellor

I agree

17th July 2008

A C Hamilton
Lord President of the Court of Session

I agree

27th June 2008

Brian Kerr
Lord Chief Justice of Northern Ireland

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Judicial Discipline (Prescribed Procedures) Regulations 2006 (S.I. 2006/676) (“the principal Regulations”) and come into force on 28th August 2008. The principal Regulations prescribe the procedures to be followed in the investigation and determination of allegations of misconduct by judicial office holders under chapter 3 of Part 4 of the Constitutional Reform Act 2005 (c.4).

In addition to the amendments which aim to clarify, simplify or consequentially amend the principal Regulations:

- (a) regulations 5 and 6 make provision about information which can be treated as a complaint;
- (b) regulation 7 requires the Office for Judicial Complaints (“OJC”) to refer complaints it has received from the Lord Chancellor and Lord Chief Justice to a nominated judge (this referral is currently discretionary);
- (c) regulation 8 requires the OJC to dismiss complaints which fall within regulation 14(1)(a)-(k) of the principal Regulations (this dismissal is currently discretionary). It also requires the OJC to consult any independent evidence to verify disputed facts unless to do so would be disproportionate;
- (d) regulation 9 limits the circumstances in which a decision to dismiss a complaint by the OJC can be reconsidered;
- (e) regulation 10 enables the Lord Chief Justice to appoint different judicial office holders to consider different aspects of the same case;
- (f) regulation 11 provides for a new function for a nominated judge to consider whether a request to convene a review body is totally without merit;
- (g) regulations 12 and 17 provide that, during investigation or review respectively, facts must be established on the balance of probabilities;
- (h) regulation 15 reduces from twenty to ten the number of business days in which the subject of disciplinary proceedings must make any representations to the Lord Chancellor’s and the Lord Chief Justice’s proposed disciplinary action;
- (i) regulation 16 introduces new procedures for the convening of a review body;
- (j) regulation 19 restricts disclosure of a review body’s draft report to persons who may be adversely affected by its contents and clarifies who is subject to the requirement to provide representations on a draft report within 10 business days; and
- (k) regulation 20 provides that the OJC have the power to defer consideration of a case in certain circumstances.

A full regulatory impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen.

STATUTORY INSTRUMENTS

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