

COMPLAINTS ABOUT MEMBERS OF THE SCOTTISH TRIBUNALS RULES 2024

Made - - - -

31 August 2024

Coming into force - -

1 September 2024

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

Introductory provisions

Citation and commencement

1.—(1) These rules may be cited as the Complaints about Members of the Scottish Tribunals Rules 2024.

(2) They come into force on 1 September 2024.

Interpretation

2. In these rules, unless the context requires otherwise—

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

“a fitness assessment tribunal” means a fitness assessment tribunal constituted under Schedule 8 of the Tribunals (Scotland) Act 2014;

“a decision” includes but is not limited to a judgment in a case; a decision in relation to the conduct of proceedings; a decision in relation to case management; and, a decision in relation to programming;

“judicial member” is defined in section 19(1) and (2) of the 2014 Act and means the Lord President, the President of Tribunals or any person holding the office of—

(a) a judge of the Court of Session;

(b) the Chairman of the Scottish Land Court;

(c) a sheriff principal;

(d) a sheriff (including, for the First-tier Tribunal only, a part-time sheriff);

who is authorised to act as a member in line with section 17 of the 2014 Act.

“nominated judicial office holder” means a judicial member (except a part-time sheriff) or a Chamber President nominated in accordance with rules 11 and 12;

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

“member concerned” means the member against whom the complaint has been made;

“judicial complaints reviewer” means a person appointed by Scottish Ministers to review the handling of complaints investigations by the Judicial Office for Scotland into ordinary and legal members, to ensure that they have been dealt with in accordance with the Rules;

“Scottish tribunals” means the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland.

An overview of the complaints process

Purpose, principles and duties

3.—(1) These rules set out the procedure for making complaints about the conduct of ordinary and legal members of the Scottish Tribunals and for the investigation and determination of such complaints.

(2) The purpose of an investigation is to determine—

- (a) whether there has been misconduct on the part of a member and, if so
- (b) what, if any, disciplinary action is to be taken against that member.

(3) An investigation is to be progressed expeditiously and efficiently, with as few delays as possible.

(4) The complainer and the member concerned must co-operate with the Judicial Office and the nominated judicial office holder to further the investigation.

(5) A complainer must not make allegations or statements which have no factual basis, are misleading, or are vexatious.

(6) The complainer and the member concerned must comply with any time limits set in these rules or by the Judicial Office or the nominated judicial office holder.

(7) If the member concerned refuses to participate in the investigation process, the complaint is to be progressed without their input.

What do those involved in the process do?

4.—(1) The Judicial Office—

- (a) receives and deals with complaints about members;
- (b) carries out a first sift of complaints;
- (c) dismisses or pauses a complaint or refers complaints to the President of Scottish Tribunals.

(2) The President of Scottish Tribunals is to consider complaints that have not been dismissed by the Judicial Office and they —

- (a) may pause a complaint because of ongoing proceedings;
- (b) carry out a second sift of complaints and dismiss those which do not pass that sift;
- (c) decide whether a complaint calls into question the member's fitness for office and, if it does, inform the Lord President; and
- (d) if required, nominates a judicial office holder (see rule 4(3)) to investigate a complaint.

(3) The nominated judicial office holder—

- (a) when required, investigates complaints and reports to the Lord President;
- (b) makes recommendations to the Lord President.

The complaints procedure

What type of complaints must be considered?

5.—(1) The Judicial Office must consider all complaints about the conduct of members.

(2) A complaint is to be dismissed if it does not pass the sift carried out by the Judicial Office or the sift carried out by the President of Scottish Tribunals (see rules 8 and 11 respectively).

(3) A complaint—

- (a) is to be paused if it contains an allegation of criminal conduct (see rule 9);
- (b) may be paused if it relates to ongoing judicial proceedings (see rule 10).

How a complaint is made

- 6.—(1) A complaint must be in writing and sent to the Judicial Office.
- (2) The complaint must set out:—
- (a) the complainer's name and contact details;
 - (b) the name of the member;
 - (c) the nature of the complaint and, in particular, the detailed allegations of misconduct;
 - (d) the dates of the alleged misconduct.
- (3) The complainer must also enclose any documents upon which the complainer seeks to rely.

What are the time limits for making a complaint?

- 7.—(1) Subject to rule 7(3), a complaint must be made within three months of the conduct complained of.
- (2) If a complaint is submitted late, the Judicial Office must —
- (a) if it considers that the complaint falls to be dismissed under rule 8(3), dismiss the complaint; or
 - (b) if it considers that the complaint does not fall to be dismissed under rule 8(3), inform the complainer that they have 28 days to seek an extension of time and invite the complainer to provide an application based on exceptional circumstances to justify the complaint being treated as on time.
- (3) The Judicial Office may extend the time limit for making a complaint only in exceptional circumstances. If the Judicial Office grants the application, the complaint will proceed to rule 8. If the application is refused, the complaint must be dismissed.

Examination of the complaint

What must the Judicial Office do with the complaint?

- 8.—(1) Without delay after receiving a complaint, the Judicial Office must send a written acknowledgment to the complainer.
- (2) The Judicial Office must then conduct a first sift and either—
- (a) dismiss the complaint under rule 8(3);
 - (b) pause the complaint under rule 9 (allegations of criminal conduct);
 - (c) refer the complaint to the President of Scottish Tribunals under rule 10 (ongoing proceedings); or
 - (d) if satisfied (a) to (c) do not apply, refer the complaint to the President of Scottish Tribunals for consideration in terms of rule 11.
- (3) The Judicial Office must dismiss the complaint if it—
- (a) does not contain sufficient information to enable it to be understood;
 - (b) is about a decision of the Scottish Tribunals;
 - (c) raises a matter which has already been dealt with (whether under these rules or otherwise), and does not present any material new evidence;
 - (d) raises a matter which falls within the functions of the Judicial Complaints Reviewer.
- (4) Where the Judicial Office dismisses the complaint under rule 8(3) it must notify the complainer in writing and provide the member concerned with a copy of the complaint with reasons for the dismissal.

(5) Where the Judicial Office does not dismiss the complaint under rule 8(3) it must provide a copy of the complaint to the member concerned and advise the member and the complainer of the next steps to be taken under these Rules.

What if there are allegations of criminal conduct?

9.—(1) If it appears to the Judicial Office that a complaint concerns criminal behaviour, they must pause consideration of that part of the complaint until they are satisfied—

- (a) the Crown indicates that they do not intend to commence criminal proceedings;
- (b) criminal proceedings have concluded; or
- (c) it becomes clear that there will be no criminal proceedings.

(2) Where the Judicial Office pause a complaint under this rule, it must—

- (a) provide a copy of the complaint to the member; and
- (b) notify the member and complainer in writing that consideration of the complaint has been paused under this rule.

(3) When the Judicial Office is satisfied that one of the conditions in Rule 9(1)(a) to (c) applies, the complaint will be referred to the President of the Scottish Tribunals for consideration under rule 11.

What happens if the complaint relates to ongoing proceedings or other proceedings?

10.—(1) If the complaint does not fall to be dismissed under rule 8(2)(a) and it relates to ongoing tribunal proceedings, the Judicial Office must refer the complaint to the President of Scottish Tribunals to advise on whether it is appropriate to consider the complaint before the tribunal proceedings are concluded.

(2) Where the President of Scottish Tribunals advises that it would not be appropriate to proceed—

- (a) consideration of the complaint is paused until the proceedings have concluded; and
- (b) the Judicial Office must notify the complainer and the member concerned of that fact in writing.

(3) Where proceedings have concluded the complainer must notify the Judicial Office within 28 days of the case concluding. Failure to inform the Judicial Office within 28 days, if it was, or reasonably ought to have been, within the complainer's knowledge, may result in the complaint being dismissed by the President of Scottish Tribunals.

(4) Where, at any stage after a member has been notified of a complaint under rule 8, 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 complaint, then the member is to notify the President of the Scottish Tribunals of that fact.

(5) If at any time in the course of carrying out their duties under these Rules, the Judicial Office, the nominated judicial office holder or the Lord President becomes aware of any such investigation or disciplinary procedure described in rule 10(5), the President of the Scottish Tribunals is to be notified of that fact.

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

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

- (a) consideration of the complaint is paused until the investigation or procedure has concluded; and
- (b) the Judicial Office is to notify the person complaining and the member concerned of that fact in writing.

(8) When the investigation or procedure has concluded, the member concerned should notify the Judicial Office within 28 days.

(9) If the President of Scottish Tribunals considers that the complaint should proceed, the complaint will be considered under rule 11.

Referral to the President of Scottish Tribunals

President of Scottish Tribunals to decide whether an investigation is required

- 11.**—(1) The President of Scottish Tribunals must carry out a second sift of the complaint and either—
- (a) dismiss the complaint under rule 11(2);
 - (b) refer the complaint to the Lord President to consider requesting the establishment of a fitness assessment tribunal; or
 - (c) refer the complaint to a nominated judicial office holder to investigate.
- (2) The President of Scottish Tribunals must dismiss the complaint if they consider that it—
- (a) should not have passed the sift under rule 8(2);
 - (b) is vexatious;
 - (c) is without substance; or
 - (d) even if substantiated, would not require any disciplinary action to be taken.
- (3) Where a complaint is dismissed under rule 11(2), the Judicial Office is to write to the member and complainer to that effect.
- (4) This rule only applies if the member is still in office. If the complaint is not dismissed under rule 11(2) the President of Scottish Tribunals must—
- (a) consider whether the complaint, if substantiated, would call into question the member's fitness for office; and
 - (b) if so, inform the Lord President.
- (5) Where the Lord President is informed under rule 11(4)(b), the Lord President must decide whether to ask the First Minister to establish a tribunal to consider the members fitness for office.
- (6) Where the Lord President requests the establishment of a fitness assessment tribunal—
- (a) consideration of the complaint under these rules ceases; and
 - (b) the Judicial Office must notify the complainer and the member of that in writing.
- (7) If the President of Scottish Tribunals considers that the complaint requires to be investigated, they must allocate the complaint to a nominated judicial office holder and the Judicial Office must—
- (a) give written notice to the complainer and the member concerned —
 - (i) that the complaint has been allocated to a nominated judicial office holder; and
 - (ii) informing them of the next step to be taken;
 - (b) send a copy of the complaint and all accompanying documentation to the nominated judicial office holder.

Allocation to a nominated judicial office holder

Allocation to a nominated judicial office holder

12.—(1) Subject to rules 12(2) and (3), the person investigating is to be a nominated judicial office holder, nominated by the President of Scottish Tribunals.

(2) Where the complaint is against a member of the Upper Tribunal for Scotland the nominated judicial office holder must be a judge of the Court of Session, excluding the President of the Scottish Tribunals or the Lord President

(3) Where the complaint is against a Chamber President the nominated judicial office holder must be a sheriff principal or judge of the Court of Session, excluding the President of the Scottish Tribunals or the Lord President.

What must the nominated judicial office holder do?

13.—(1) The nominated judicial office holder must investigate the complaint promptly and—

- (a) determine the facts of the matter;
- (b) determine whether the complaint is substantiated (in whole or in part);
- (c) if the complaint is substantiated, in whole or in part, make a recommendation that the Lord President exercise a power mentioned in paragraph 5(1) of schedule 8 to the 2014 Act;
- (d) complete any investigations within 21 weeks and may extend the time limit only in exceptional circumstances.

(2) Where at any stage in considering a complaint the nominated judicial office holder believes that the complaint may be resolved to the satisfaction of the complainer and the member concerned without further investigation, the nominated judicial office holder may communicate with them both with a view to securing that outcome.

(3) Where the complaint is resolved—

- (a) the nominated judicial office holder must notify the Judicial Office; and
- (b) consideration of the complaint ceases.

(4) The nominated judicial office holder must take account of any guidance relating to the conduct of members issued by the Lord President.

Nominated judicial office holder's powers of investigation

14.—(1) The nominated judicial office holder may do anything necessary for the purpose of investigating the complaint, including—

- (a) imposing a time limit on any step to be taken by the complainer or the member concerned;
- (b) varying a deadline or time limit imposed under these rules in relation to their investigation;
- (c) making inquiries;
- (d) obtaining and considering any documents;
- (e) requiring the complainer or the member concerned to lodge any information they hold relating to the complaint;
- (f) interviewing any persons.

(2) If the nominated judicial office holder is to interview any person, including but not limited to the member concerned and the complainer, they must—

- (a) give the interviewee reasonable notice of the date and time of the interview;
- (b) permit the interviewee to be accompanied by a person of his or her choosing for the purpose of—
 - (i) providing moral support;
 - (ii) helping to manage papers;
 - (iii) taking notes;
 - (iv) offering advice.

(3) The nominated judicial office holder may arrange for an interview to be recorded by any means they consider appropriate.

(4) The member concerned, the complainer and any other interested parties must comply with a request to be interviewed.

(5) Where an interviewee signs a note of an interview taken by the nominated judicial office holder, that note is deemed to be an accurate record of the interview.

How will the investigation be conducted?

15.—(1) The procedure and conduct of an investigation is to be as the nominated judicial office holder thinks fit.

(2) The nominated judicial office holder must give the complainer and the member concerned a note setting out the procedure to be followed.

(3) The nominated judicial office holder may depart from that procedure provided they inform the complainer and member concerned in writing before doing so.

(4) The member concerned must be given the opportunity to submit a written response to the complaint.

(5) The complainer and the member concerned must be given the opportunity to submit written comments on any information obtained by the nominated judicial office holder which they have not previously seen.

(6) The nominated judicial office holder may reach conclusions based on the information ascertained throughout the investigation.

(7) The nominated judicial office holder must submit a written report to the Lord President setting out the matters referred to in rule 16(3), and providing reasons for any conclusions reached.

(8) So far as the determination of questions of fact is concerned findings of fact are to be made on the balance of probabilities.

(9) So far as reasonably possible the investigation is to be conducted without the disclosure of the identity of the complainer or the member to third parties who are not invited to assist with the investigation.

(10) Rule 15(9) does not apply to the Lord President's decision under rule 17(5) on publication or disclosure of the complaint.

(11) The nominated judicial office holder is to make a note of all material communications in the course of the investigation and keep a file containing—

- (a) those notes;
- (b) all relevant documents; and
- (c) recordings of any interviews.

The nominated judicial office holder's report

The nominated judicial office holder's report

16.—(1) The report must—

- (a) be accompanied by the file;
- (b) be sent to the member and to the Judicial Office for Scotland.

(2) On receipt of the report, the member may lodge written representations with the Judicial Office, no later than four weeks of receipt of the report.

(3) The Lord President must consider the report, and any written representations from the member concerned and, if the report contained a recommendation to exercise a power in paragraph 5(1) of schedule 8 to the 2014 Act, decide –

- (a) whether to follow this recommendation;
- (b) whether to take any other action open to the Lord President.

Outcome of the investigation

Notification of outcome

- 17.**—(1) This rule applies where the Lord President has—
- (a) received a report under rule 16; and
 - (b) taken the action (if any) which the Lord President proposes to take.
- (2) The Judicial Office must inform the complainer in writing of—
- (a) the outcome of the investigation; and
 - (b) any action taken by the Lord President in consequence.
- (3) The Judicial Office’s letter to the complainer must contain such information as the Lord President considers appropriate for the purpose of explaining to the complainer the reasons for the outcome and any actions taken.
- (4) The Lord President must inform the member in writing of—
- (a) the outcome of the investigation into the complaint; and
 - (b) any action that is to be taken.
- (5) The Lord President may publish or disclose to any person/s such information concerning the complaint and the outcome (including the identity of the complainer or the member) as the Lord President considers appropriate.

Miscellaneous

Withdrawal of complaints

- 18.**—(1) A complainer may withdraw a complaint at any time before the Lord President has received the report under rule 16, by writing to the Judicial Office to that effect.
- (2) If a complainer fails to respond to correspondence from the Judicial Office or the nominated judicial office holder within 28 days or refuses a request to be interviewed the complaint may be deemed to have been withdrawn.
- (3) If a complaint has been withdrawn, the nominated judicial office holder may decide that further procedure is appropriate and continue to consider the complaint.
- (4) Where a complaint continues to be investigated despite being withdrawn, the procedure in these rules continues to apply, except where they impose any obligation on or in respect of a complainer such as a requirement to notify the complainer or seek comment from the complainer, in which case such an obligation is disapplied.

Investigation in absence of a complaint

- 19.**—(1) Where no complaint is made under these rules but the President of Scottish Tribunals receives information from any source which suggest to them that consideration under these rules of a possible allegation of misconduct is appropriate, the President of Scottish Tribunals may refer the matter to Judicial Office for consideration
- (2) Where a matter is treated as a complaint under this rule, the procedure in these rules will apply, except where they impose any obligation on or in respect of a complainer.
- (3) In cases arising under this rule, the 3 month time limit in rule 7 for complaints applies in respect of a referral and begins from the date the President of Scottish Tribunals receives the information which suggests a referral under rule 19(1) is appropriate.

What if the member ceases to hold office?

20.—(1) Subject to the other requirements of these rules, a complaint may be accepted, and consideration of a complaint may continue, after the member concerned has ceased to be a member, provided the complaint relates to their conduct at the time of being a member.

(2) A new complaint under rule 20(1) must be made under these rules as if the member were still in office; and is subject to the 3 month time limit in rule 7 with the further limitation that the Judicial Office cannot, under rule 7(3), extend the time limit for accepting a complaint beyond 12 months of the date the member ceased to be a member.

(3) Where consideration of a complaint commences, or continues after a member has ceased to be a member:

- (a) the procedure in these rules applies or, as the case may be, continues to apply;
- (b) the former member will be invited to provide their comments; and
- (c) the nominated judicial office holder shall submit their report in accordance with rule 16.

(4) Where a member who is the subject of a complaint dies, consideration of the complaint ceases.

Revocation and Saving

21.—(1) The Complaints about Members of the Scottish Tribunals Rules 2018 that came into force on 12 January 2018 are revoked.

(2) Despite the revocation of those rules, they continue to apply to complaints made to the Judicial Office before these rules come into force.

CJM SUTHERLAND
Lord President of the Court of Session

Edinburgh
31 August 2024