
SCOTTISH STATUTORY INSTRUMENTS

2014 No. 102

JUDICIAL APPOINTMENTS AND DISCIPLINE

**Act of Sederunt (Fitness for Judicial
Office Tribunal Rules) (No. 2) 2014**

Made - - - - 9th April 2014
*Laid before the Scottish
Parliament* - - - - 11th April 2014
Coming into force in accordance with rule 1(2) and (3)

The Lords of Council and Session, under and by virtue of the powers conferred by section 12C(5) of the Sheriff Courts (Scotland) Act 1971⁽¹⁾ and section 37(5) of the Judiciary and Courts (Scotland) Act 2008⁽²⁾, and of all other powers enabling them in that behalf, do hereby enact and declare:

Citation, commencement etc.

1. (1) This Act of Sederunt may be cited as the Act of Sederunt (Fitness for Judicial Office Tribunal Rules) (No. 2) 2014.

(2) Subject to paragraph (3), it comes into force on 1st June 2014.

(3) Rule 16 comes into force on 19th May 2014.

(4) A certified copy of this Act of Sederunt is to be inserted in the Books of Sederunt.

Interpretation

2. In these Rules—

“the 1971 Act” means the Sheriff Courts (Scotland) Act 1971;

“the 2008 Act” means the Judiciary and Courts (Scotland) Act 2008;

“chairing member of the tribunal” means the person appointed to chair the tribunal in terms of section 12A(8)(3) of the 1971 Act or section 35(9) or (10) of the 2008 Act;

“clerk to the tribunal” means the person nominated by the Principal Clerk of Session and Justiciary to act as clerk to a tribunal;

(1) 1971 c.58.

(2) 2008 asp 6.

(3) Section 12A was inserted by the Judiciary and Courts (Scotland) Act 2008 (asp 6), section 40.

“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;

“judicial office holder” means—

- (a) the person who holds a shrieval office specified in section 12A(2) of the 1971 Act; or
- (b) the person who holds a judicial office specified in section 5(2) of the 2008 Act, as the case may be, with regard to whom a tribunal has been constituted;

“Lord Justice Clerk” means the Lord Justice Clerk of the Court of Session;

“Lord President” means the Lord President of the Court of Session;

“the parties” are the judicial office holder 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;

“statement of reasons” means a statement of the grounds on which it is alleged that the judicial office holder is unfit to hold office by reason of inability, neglect of duty or misbehaviour;

“tribunal” means a tribunal constituted under section 12A(1) of the 1971 Act or section 35(1) of the 2008 Act to investigate and report on a judicial office holder’s fitness for office; and

“tribunal case” means the issue of whether the judicial office holder is unfit to hold his or her judicial office, having regard to the terms of section 12A(1) of the 1971 Act or, as the case may be, section 35(1) of the 2008 Act.

Commencement of investigation

3. When a tribunal is constituted, the clerk to the tribunal must give the judicial office holder written notice of—

- (a) the decision of the First Minister to constitute the tribunal;
- (b) the membership of the tribunal.

Investigation

4. (1) The chairing member of the tribunal must appoint an investigating officer from a list of persons who have been nominated for that purpose by the Lord President or, where the Lord President is the judicial office holder, by the Lord Justice Clerk.

(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.

(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 judicial office holder if the judicial office holder agrees to be interviewed.

(4) If the investigating officer considers that it cannot be established that the judicial office holder is unfit to hold his or her office, the investigating officer must—

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

(5) The clerk to the tribunal must provide a copy of the recommendation and reasons to the judicial office holder.

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

- (a) submit a recommendation for further procedure;
- (b) provide a statement of reasons to the tribunal; and
- (c) provide 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 clerk to the tribunal must provide the judicial office holder with—

- (a) written notice of that recommendation;
- (b) a copy of the statement of reasons; and
- (c) a list and copies of any documents and a list of any productions that are relied on in the statement of reasons.

(8) If the investigating officer is unable to fulfil his or her duties, the chairing member of 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 judicial office holder may apply 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 written notice is given under rule 4(7)(a).

(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 decision to grant the application.

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

Response to statement of reasons

6. (1) The judicial office holder may lodge a written response to the investigating officer's recommendation and statement of reasons.

(2) Any written response must—

- (a) be submitted to the clerk to the tribunal within 28 days of—
 - (i) the date of the written notice provided under rule 4(7)(a);
 - (ii) the date on which the tribunal notifies the judicial office holder 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 judicial office holder wishes to make;
- (d) indicate any issues of law that the judicial office holder intends to raise;

- (e) provide the names and addresses of any persons that the judicial office holder may wish to provide as witnesses; and
 - (f) provide a list and copies of any documents and a list of any productions to which the judicial office holder may wish to refer at any hearing.
- (3) The tribunal may, on cause shown, allow the judicial office holder to lodge a supplementary written response containing further information falling within the scope of paragraph (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 judicial office holder, 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 chairing member of the tribunal must appoint a presenting officer from a list of persons who have been nominated for that purpose by the Lord President or, where the Lord President is the judicial office holder, by the Lord Justice Clerk.
- (2) The investigating officer must provide to the presenting officer copies of all documents supplied to or by the tribunal and the judicial office holder.
- (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 judicial office holder 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 his or her duties, the chairing member of 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 judicial office holder 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; or
 - (b) may materially strengthen the judicial office holder's position before the tribunal; or
 - (c) may materially undermine the presenting officer's position before the tribunal.
- (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 judicial office holder 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.

Preliminary hearing

- 10.** (1) Before proceeding to a hearing under rule 11, the tribunal must hold a preliminary hearing.
- (2) The clerk to the tribunal 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 judicial office holder 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 clerk to the tribunal 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 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 judicial office holder so requests; or
 - (b) for any reason the tribunal considers that the circumstances are such as to make a private hearing inappropriate.
- (4) All hearings must be recorded by electronic means or otherwise as approved by the tribunal.

Powers of tribunal

- 13.** (1) Subject to the provisions of sections 12A to 12F of the 1971 Act, sections 35 to 39 of the 2008 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 clerk to the tribunal 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 judicial office holder is unfit to hold his or her office, the presenting officer must—

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

(2) The clerk to the tribunal must provide a copy of the recommendation and reasons to the judicial office holder.

(3) If the judicial office holder ceases to hold judicial office 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 judicial office holder; or
- (c) on its own motion,

determine that it cannot be established that the judicial office holder is unfit to hold his or her office.

(5) Where the tribunal makes a determination mentioned in paragraph (4), it must report that determination to the First Minister in accordance with section 12D of the 1971 Act or section 38 of the 2008 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 in accordance with section 12D of the 1971 Act or section 38 of the 2008 Act; and
- (b) send a copy to—
 - (i) the judicial office holder; and
 - (ii) the Lord President or, where the judicial office holder is the Lord President, to the Lord Justice Clerk.

Revocation

16. The Act of Sederunt (Fitness for Judicial Office Tribunal Rules) 2014(4) is revoked.

Edinburgh
9th April 2014

BRIAN GILL
Lord President
I.P.D.

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 by tribunals constituted under section 12A(1) of the Sheriff Courts (Scotland) Act 1971 or section 35(1) of the Judiciary and Courts (Scotland) Act 2008 to investigate and report on a judicial office holder's fitness for office.

Rule 3 provides for the clerk to the tribunal (a person nominated by the Principal Clerk of Session and Justiciary) to notify the judicial office holder that the First Minister has constituted a tribunal, and of its membership.

Rule 4 sets out the investigation process, including the appointment by the chairing member of an investigating officer from a list of persons nominated by the Lord President (or the Lord Justice Clerk, if the tribunal is constituted in respect of the Lord President). It specifies the powers and duties of the investigating officer. Once the investigation is complete, it is for the investigating officer to recommend to the tribunal either that no further procedure is required, or to make a recommendation as to further procedure. The investigating officer must give reasons in either case. The clerk to the tribunal must then give the judicial office holder a copy of the recommendation, the reasons for it and any supporting documents.

Rule 5 enables the judicial office holder to apply to the tribunal for further specification of the information contained in the statement of reasons. Such an application must be made within 21 days of notice being given. 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 judicial office holder within 21 days, and give reasons.

Rule 6 provides for the judicial office holder 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 judicial office holder. It must then determine 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 chairing member from a list of persons nominated by the Lord President (or the Lord Justice Clerk, if the tribunal is constituted in respect of the Lord President). The judicial office holder 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 judicial office holder if it is likely to be placed before the tribunal, might materially strengthen the judicial office holder's position or materially weaken the presenting officer's position. This duty subsists until the tribunal reports to the First Minister.

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 to be held in private, unless the judicial office holder requests that a hearing is held in public

or the tribunal considers that 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 ways in which proceedings may be brought to an end. Where the presenting officer considers that it cannot be established that the judicial office holder 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 judicial office holder is unfit for office. This may be on the recommendation of the investigating officer or the presenting officer, on a submission by the judicial office holder, or on its own motion. Where the tribunal makes such a determination, it must report in those terms to the First Minister. In addition, proceedings come to an end if the judicial office holder ceases to hold office.

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 judicial office holder and the presenting office holder 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, the tribunal must send a copy of its report to the judicial office holder and the Lord President (or the Lord Justice Clerk, if the tribunal is constituted in respect of the Lord President).

Rule 16 revokes the Act of Sederunt (Fitness for Judicial Office Tribunal Rules) 2014, which are due to come into force on 20th May 2014.

This Act of Sederunt applies to tribunals constituted by the First Minister on or after 1st June 2014.