

SCHEDULE 2

Regulation 11(2)

THE EMPLOYMENT TRIBUNALS (NATIONAL SECURITY) COMPLEMENTARY RULES OF PROCEDURE (SCOTLAND)

For use only in proceedings in which a power conferred on the Minister or the tribunal by rule 8(1), (2) or (3) of Schedule 1 is exercised

Modification of rule 3 of Schedule 1

1. In rule 3 of Schedule 1 (appearance by respondent), insert the following paragraphs after paragraph (1)—

“(1A) Paragraph (1)(c) shall not apply in any case in which—

- (a) a direction of a Minister of the Crown under rule 8(1)(b) (exclusion of applicant) applicable to this stage of the proceedings is given, or
- (b) a Minister of the Crown has informed the Secretary in accordance with rule 8(3) that he wishes to address the tribunal with a view to the tribunal making an order applicable to this stage of the proceedings under rule 8(2)(a) read with 8(1)(b),

before the expiry of the period for entering the appearance.

(1B) Where paragraph (1A) applies—

- (a) in a case falling within sub-paragraph (b) of paragraph (1A) and in which the tribunal decides not to make an order under rule 8(2)(a) read with 8(1)(b), the respondent shall within 21 days of the tribunal so deciding provide to the Secretary in writing sufficient particulars to show on what grounds he intends to resist the application. Upon receipt thereof the Secretary shall send a copy to each other party;
- (b) in a case falling within sub-paragraph (b) of paragraph (1A) and in which the tribunal makes an order under rule 8(2)(a) read with 8(1)(b), or in a case falling within sub-paragraph (a) of paragraph (1A), the respondent shall, within 42 days of the making of the order or the giving of the direction, as the case may be, provide to the tribunal and, where applicable, to the special advocate in writing sufficient particulars to show on what grounds he intends to resist the application.

(1C) In any case not falling within paragraph (1A) but in which a direction of a Minister of the Crown under rule 8(1)(c) (exclusion of applicant’s representative) applicable to this stage of the proceedings is given, or an order of the tribunal under rule 8(2)(a) read with 8(1)(c) applicable to this stage of the proceedings is made, the Secretary shall not send a copy of the notice of appearance to any person excluded from all or part of the proceedings by virtue of such direction or order.

(1D) In any case not falling within paragraph (1A) or (1C) but in which a Minister of the Crown has informed the Secretary in accordance with rule 8(3) that he wishes to address the tribunal with a view to the tribunal making an order applicable to this stage of the proceedings under rule 8(2)(a), read with 8(1)(c), the Secretary shall not send a copy of the notice of appearance to any person who may be excluded from all or part of the proceedings by virtue of such an order, if an order is made, at any time before the tribunal decides whether or not to make such an order.”

Modification of rule 4 of Schedule 1

2. At the end of rule 4 of Schedule 1 (case management), insert the following paragraph—

“(9) Where—

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- (a) a Minister has at any stage issued a direction under rule 8(1)(b) or (c) (exclusion of applicant or his representative), or the tribunal has at any stage made an order under rule 8(2)(a) read with 8(1)(b) or (c), and
- (b) the tribunal (whether on application of a party or of its own motion) is considering whether to impose, or has imposed, a requirement under paragraph (1) or (5) on any person,

a Minister of the Crown (whether or not he is a party to the proceedings) may make an application to the tribunal objecting to the imposition of a requirement under paragraph (1) or (5), or, where a requirement has been imposed, an application to vary or set aside the requirement, as the case may be. The tribunal shall hear and determine the Minister's application in private and the Minister shall be entitled to address the tribunal thereon. The application shall be made by notice to the Secretary and the Secretary shall give notice of the application to each party."

Modification of rule 7 of Schedule 1

3. For paragraph (3) of rule 7 of Schedule 1 (pre-hearing review), substitute—

"(3) A pre-hearing review shall not take place unless the Secretary has sent notice to the parties giving them an opportunity to submit representations in writing and, except in the case of a pre-hearing review in which a special advocate has been appointed in respect of the applicant, to advance oral argument at the review if they so wish. Where a special advocate has been appointed in respect of the applicant, oral argument may be advanced on behalf of the applicant at the review by the special advocate."

Insertion of rules 7A and 7B into Schedule 1

4. After rule 7 of Schedule 1, insert—

"Special advocate

7A.—(1) In any proceedings in which there is an excluded person the tribunal shall inform the Advocate General of the proceedings before it with a view to the Advocate General, if he thinks it fit to do so, appointing a special advocate to represent the interests of the applicant in respect of those parts of the proceedings from which—

- (a) any representative of his is excluded;
- (b) both he and his representative are excluded; or
- (c) he is excluded, where he does not have a representative.

(2) A special advocate shall be—

- (a) an Advocate; or
- (b) a solicitor who has by virtue of section 25A of the Solicitors (Scotland) Act 1980(1) rights of audience in the Court of Session or the High Court of Justiciary.

(3) Where the excluded person is the applicant, he shall be permitted to make a statement to the tribunal before the commencement of the proceedings, or the part of the proceedings, from which he is excluded.

(4) Except in accordance with paragraphs (5) to (7), the special advocate may not communicate directly or indirectly with any person (including an excluded person)—

(1) 1980 c. 46.

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- (a) (except in the case of the tribunal and the respondent) on any matter contained in the particulars referred to in rule 3(1B)(b), or
 - (b) (except in the case of a person who was present) on any matter discussed or referred to during any part of the proceedings in which the tribunal sat in private pursuant to a direction of the Minister under rule 8(1)(a) or an order of the tribunal under rule 8(2)(a) read with rule 8(1)(a).
- (5) The special advocate may apply for directions from the tribunal authorising him to seek instructions from, or otherwise to communicate with, an excluded person—
- (a) on any matter contained in the particulars referred to in rule 3(1B)(b), or
 - (b) on any matter discussed or referred to during any part of the proceedings in which the tribunal sat in private as referred to in paragraph (4)(b).
- (6) An application under paragraph (5) shall be made by presenting to the Secretary a notice of application, which shall state the title of the proceedings and set out the grounds of the application.
- (7) The Secretary shall notify the Minister of an application for directions under paragraph (5) and the Minister shall be entitled to address the tribunal on the application.
- (8) In these rules, in any case in which a special advocate has been appointed to represent the interests of the applicant in accordance with paragraph (1), any reference to a party shall (save in those references specified in paragraph (9)) include the special advocate.
- (9) The references mentioned in paragraph (8) are the following, namely those in rule 2(1)(b), 2(3), 3(3), 4(7)(a), 6(1) (on the second occasion “party” appears), 7(4) (on the second and third occasions “party” appears), 7(5), 7(6) (on the second occasion “party” appears), 7(7) (on the first and third occasions “party” appears), 7(8), 8(1), 8(3) (on the first occasion “party” appears), 10(7), 11(3), 12(3)(b), 14, 15(3), 15(4), 19(1), 23(4)(a), 23(4)(e) (on the second occasion “party” appears), 23(4) (in the full out words) and 23(10).

Reasons for the tribunal’s decision in national security cases

- 7B.**—(1) This rule applies to the document setting out the reasons for the tribunal’s decision prepared under rule 12(3) in any particular Crown employment proceedings in which a direction of a Minister of the Crown has been given under rule 8(1)(a), (b) or (c), or an order of the tribunal has been made under rule 8(2)(a) read with 8(1)(a), (b) or (c).
- (2) Before the Secretary enters the document referred to in rule 12(3) in the Register he shall send a copy of that document to the Minister.
- (3) If the Minister considers it expedient in the interests of national security he may—
- (a) direct the tribunal that the document referred to in rule 12(3) shall not be disclosed to any person who was excluded from all or part of the proceedings and to prepare a further document setting out the reasons for its decision but with the omission of such of the reasons as are specified in the direction;
 - (b) direct the tribunal that the document referred to in rule 12(3) shall not be disclosed to any person who was excluded from all or part of the proceedings but that no further document setting out the tribunal’s reasons for its decision should be prepared.
- (4) Where the Minister has directed the tribunal in accordance with paragraph (3)(a), the document prepared pursuant to that direction shall be signed by the chairman and marked in each place where an omission has been made.”

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Modification of rule 10 of Schedule 1

5. In rule 10 of Schedule 1 (hearing)—

(a) for paragraph (2) substitute—

“(2) Any hearing of or in connection with an originating application shall, subject to any direction of a Minister of the Crown under rule 8(1)(a) or order of a tribunal under rule 8(2)(a) read with 8(1)(a), take place in public.”; and

(b) for paragraph (4) substitute—

“(4) A member of the Council on Tribunals or of its Scottish Committee shall be entitled to attend any hearing taking place in private in his capacity as a member, save where the hearing is taking place in private pursuant to a direction of a Minister of the Crown under rule 8(1)(a) or an order of a tribunal under rule 8(2)(a) read with 8(1)(a).”

Modification of rule 11 of Schedule 1

6. For paragraph (2) of rule 11 of Schedule 1 (procedure at hearing), substitute—

“(2) Subject to paragraph (1), and to any direction of a Minister of the Crown under rule 8(1)(b) or (c) (exclusion of applicant or his representative) or order of the tribunal under rule 8(2)(a) read with 8(1)(b) or (c), at the hearing of an originating application a party shall be entitled to give evidence, to call witnesses, to question any witnesses and to address the tribunal.”

Modification of rule 12 of Schedule 1

7. In rule 12 of Schedule 1 (decision of tribunal)—

(a) after paragraph (5), insert—

“(5A) Where the Minister has directed the tribunal as referred to in rule 7B(3) (a) (keeping secret certain reasons for the tribunal’s decision), the clerk shall transmit the document prepared pursuant to that direction to the Secretary who shall enter the document, and the document referred to in paragraph (2), in the Register and, where applicable, shall send a copy of the entry to any excluded person. The clerk shall also transmit the document referred to in paragraph (3) to the Secretary. That document shall be omitted from the Register but the Secretary shall send a copy of it, of the document referred to in paragraph (2) and the document prepared pursuant to the direction under rule 7B(3)(a), in accordance with paragraph (5D).

(5B) Where the Minister has directed the tribunal as referred to in rule 7B(3)(b) (keeping secret all of the reasons for the tribunal’s decision), the Secretary shall enter the document referred to in paragraph (2) in the Register and shall send a copy of the entry to any excluded person. The clerk shall also transmit the document referred to in paragraph (3) to the Secretary. That document shall be omitted from the Register but the Secretary shall send a copy of it and of the document referred to in paragraph (2) in accordance with paragraph (5D).

(5C) Where—

- (a) a Minister of the Crown has given a direction under rule 8(1)(d) (concealing identity of witness);
- (b) the tribunal has made an order under rule 8(2)(a) read with 8(1)(d); or
- (c) the tribunal has taken steps under rule 8(2)(c) to keep secret all or part of the reasons for its decision;

any further document prepared pursuant to that direction or order, or pursuant to those steps, as the case may be, shall be signed by the chairman and marked in each place where an omission has been made. The clerk shall transmit such further document to the Secretary who shall enter the document, and the document referred to in paragraph (2), in the Register and, where applicable, shall send a copy of the entry to any excluded person. The clerk shall also transmit the document referred to in paragraph (3) to the Secretary. That document shall be omitted from the Register but the Secretary shall send a copy of it, of the document referred to in paragraph (2) and of the document prepared pursuant to the direction, order or steps referred to in sub-paragraphs (a) to (c) in accordance with paragraph (5D).

(5D) Any documents required by paragraphs (5A) to (5C) to be sent in accordance with this paragraph shall be sent by the Secretary to—

- (a) the respondent,
- (b) such of the applicant or the applicant’s representatives as was not an excluded person,
- (c) if applicable, the special advocate,
- (d) where the proceedings were referred to the tribunal by a sheriff, to that sheriff, and
- (e) where there are proceedings before an appellate court relating to the decision in question, to that court.”;

(b) for paragraph (8) substitute—

“(8) Clerical mistakes in the documents referred to in paragraphs (2), (3) and rule 7B(4), or errors arising in those documents from an accidental slip or omission may at any time be corrected by the chairman by certificate.”; and

(c) for paragraphs (10) and (11) substitute—

“(10) Where a document (“the first document”) omitted from the Register pursuant to paragraph (5A), (5B), (5C) or (6) is corrected by certificate under paragraph (8), the Secretary shall send a copy of the corrected document to those persons to whom in accordance with paragraph (5D) or (6) as the case may be, he sent the first document; and where there are proceedings before any appellate court relating to the decision in question, he shall send a copy to that court together with a copy of the entry in the Register of the document referred to in paragraph (2), if it has been altered under paragraph (9).

(11) Where this rule or rule 7B(4) requires a document to be signed by a chairman of a tribunal composed of three or two persons, but by reason of death or incapacity the chairman is unable to sign it, the document shall be signed by the other member or members of the tribunal, who shall certify that the chairman is unable to sign.”

Modification of rule 13 of Schedule 1

8. For paragraph (1)(c) of rule 13 of Schedule 1 (review of tribunal’s decision), substitute—

“(c) the decision was made in the absence of a party (other than in pursuance of a direction of the Minister under rule 8(1) or an order of the tribunal under rule 8(2)(a));”.