

SCHEDULE 3

Regulation 11(3) and (4)

THE EMPLOYMENT TRIBUNALS (EQUAL VALUE)
COMPLEMENTARY RULES OF PROCEDURE (SCOTLAND)
For use only in proceedings involving an equal value claim

PART I

—ordinary cases

Modification of rule 4 of Schedule 1

1. In rule 4 of Schedule 1 (case management)—

(a) after paragraph (5), insert—

“(5A) Subject to paragraph (5B), a tribunal may, on the application of an expert who has been required by the tribunal to prepare a report—

(a) require any person whom the tribunal is satisfied may have information which may be relevant to the question or matter on which the expert is required to report to furnish, in writing, such information as the tribunal may require;

(b) require any person to produce any documents which are in the possession, custody or power of that person and which the tribunal is satisfied may contain matter relevant to the question on which the expert is required to report.

(5B) A tribunal shall not make a requirement under paragraph (5A)—

(a) of a conciliation officer who has acted in connection with the complaint under section 18 of the 1996 Act, or

(b) if it is satisfied that the person so required would have good grounds for refusing to comply with the requirement if it were a requirement made in connection with a hearing before the tribunal.

(5C) A person, whether or not a party, upon whom a requirement has been made under paragraph (5A), may apply to the tribunal by notice to the Secretary before the appointed time at or within which the requirement is to be complied with to vary or set aside the requirement. Notice of such application shall be given to the parties and to the expert upon whose application the requirement was made.”; and

(b) for paragraphs (6) and (7), substitute—

“(6) Every document containing a requirement imposed under paragraph (5) or (5A) shall state that, under section 7(4) of the 1996 Act, any person who without reasonable excuse fails to comply with the requirement shall be liable on summary conviction to a fine, and the document shall state the amount of the current maximum fine.

(7) Where a requirement has been imposed under paragraph (1), (5) or (5A)—

(a) on a party in his absence; or

(b) on a person other than a party;

that party or person may apply to the tribunal by notice to the Secretary to vary or set aside the requirement. Such notice shall be given before the time at which or, as the case may be, the expiration of the time within which the requirement is to be complied with, and the Secretary shall give notice of the application to each party, or where applicable, each party other than the party making the application.”

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Insertion of rule 10A into Schedule 1

2. After rule 10 of Schedule 1, insert—

“Procedure relating to expert’s report

10A.—(1) In any case involving an equal value claim where a dispute arises as to whether work is of equal value to other work in terms of the demands made on the person employed on the work (for instance under such headings as effort, skill and decision) (in this rule, hereinafter referred to as “the question”) the tribunal shall, except in cases where it is satisfied that there are no reasonable grounds for determining the question in the affirmative, determine whether to require an expert to prepare a report with respect to the question.

(2) Before determining under paragraph (1) whether to require an expert to prepare a report the tribunal shall give the parties an opportunity to make representations to the tribunal as to whether an expert should be so required.

(3) Where the tribunal has determined not to require an expert to prepare a report it may nevertheless, at any time during its consideration of the question, require an expert to prepare a report, but shall not do so unless it has given the parties a further opportunity to make representations to the tribunal as to whether an expert should be so required.

(4) Any requirement to prepare a report shall be made in writing and shall set out—

- (a) the name and address of each of the parties;
- (b) the address of the establishment at which the applicant is (or, as the case may be, was) employed;
- (c) the question;
- (d) the identity of the person with reference to whose work the question arises;
- (e) the date by which the expert is required to send his report to the tribunal; and
- (f) the length of the intervals, during the currency of the requirement to prepare the report, before the expiration of which the expert must send progress reports pursuant to paragraph (8).

The Secretary shall send a copy of the requirement to each of the parties together with a notice informing them that a party who unreasonably delays the preparation of the expert’s report may have an award of expenses made against him, which may include an award in respect of the expert’s fees, or have his originating application or notice of appearance struck out.

(5) The requirement shall stipulate that the expert shall—

- (a) take account of all such information supplied and all such representations made to him as have a bearing on the question;
- (b) before drawing up his report, produce and send to the parties a written summary of the said information and representations and invite the representations of the parties upon the material contained therein;
- (c) make his report to the tribunal in a document which shall reproduce the summary and contain a brief account of any representations received from the parties upon it, any conclusion he may have reached upon the question and the reasons for that conclusion or, as the case may be, for his failure to reach such a conclusion;
- (d) take no account of the difference of sex and at all times act fairly.

(6) Where a tribunal requires an expert to prepare a report, it shall adjourn the hearing.

(7) In paragraphs (8), (9), (11) and (12), “the required date” means the most recent date specified as the date by which the expert must send his report to the tribunal either

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in the requirement made upon him under paragraph (4) or in a notice given to him under paragraph (11).

(8) Before the expiration of each interval specified in the requirement given to the expert under paragraph (4), the expert shall send a progress report to the tribunal—

- (a) stating whether he considers that he will be able to send his report to the tribunal by the required date; and
- (b) if he considers that he will be unable to do so, giving the reasons for the delay and the date by which he now expects to send his report to the tribunal.

Where a progress report states that the expert considers that he will be unable to send his report to the tribunal by the required date the Secretary shall send a copy to each party.

(9) If at any time when a progress report under paragraph (8) is not imminent, the expert comes to the view that he will be unable to send his report to the tribunal by the required date, he shall give notice in writing to the tribunal—

- (a) stating that fact; and
- (b) giving the reasons for the delay and the date by which he now expects to send his report to the tribunal.

The Secretary shall send a copy of any such notice to each party.

(10) In giving the reasons for any delay, pursuant to paragraph (8) or (9), the expert shall, in particular, state whether he considers that any action (including an omission) by a party has contributed to the delay and, if he so considers—

- (i) identify the party,
- (ii) give particulars of the action,
- (iii) describe how it has contributed to the delay, and
- (iv) give an assessment of the extent to which the delay is attributable to it.

(11) On receiving a progress report under paragraph (8) or a notice under paragraph (9) stating that the expert considers that he will be unable to send his report to the tribunal by the required date, the tribunal shall do one of the following—

- (a) give written notice to the expert that he is still required to send the report by the required date;
- (b) give written notice to the expert substituting a later date as the required date; or
- (c) if, but only if, it considers that it would be in the interests of justice to replace the expert, revoke, by notice in writing to the expert, the requirement to prepare a report,

but shall not do so before it has informed the parties of the action it proposes to take and given each party the opportunity to make representations.

(12) Paragraph (11) shall also apply where the expert does not send his report to the tribunal by the required date but as if sub-paragraph (a) were excluded.

(13) Where, acting under paragraph (11), a tribunal has revoked the requirement made upon an expert to prepare a report it shall require another expert to prepare a report by proceeding under this rule as if it had just determined to require an expert to prepare a report, and the rule shall apply accordingly.

(14) Where in giving the reasons for any delay pursuant to paragraph (8) or (9), the expert has, in accordance with paragraph (10), stated that an action by a party has contributed to the delay, the tribunal shall consider whether the party has unreasonably delayed the preparation of the expert's report and, if it so considers, shall either—

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- (a) make an order under and in accordance with rule 14, or
- (b) strike out the whole or part of the originating application, or, as the case may be of the notice of appearance and, where appropriate, direct that a respondent shall be debarred from defending altogether;

but the tribunal shall not exercise its powers under this paragraph without giving the party an opportunity to make representations.

(15) Notwithstanding rule 14(1)(b), the tribunal may, in making an order under rule 14 in pursuance of paragraph (14), order that a party shall pay to the Secretary of State the whole, or any part, of any fees and allowances paid or payable to the expert in respect of the time so far spent by him in carrying out work pursuant to the requirement to prepare a report.

(16) Where a tribunal has received the report of an expert, it shall send a copy of the report to each party and fix a date for the hearing of the case to be resumed; and the date so fixed shall be the earliest reasonably practicable date, but shall be no less than 14 days after the date on which the report is sent to the parties.

(17) Upon the resumption of the hearing of the case in accordance with paragraph (16) the report shall be admitted as evidence in the case unless the tribunal has exercised its power under paragraph (18) not to admit the report.

(18) Where the tribunal, on the application of one or more of the parties or otherwise, forms the view—

- (a) that the expert has not complied with a stipulation in paragraph (5), or
- (b) that the conclusion contained in the report is one which, taking due account of the information supplied and representations made to the expert, could not reasonably have been reached, or
- (c) that for some other material reason (other than disagreement with the conclusion that the applicant's work is or is not of equal value or with the reasoning leading to that conclusion) the report is unsatisfactory,

the tribunal may, if it thinks fit, determine not to admit the report, and in such a case the tribunal shall proceed under this rule as if it had just determined to require an expert to prepare a report, and the rule shall apply accordingly.

(19) In forming its view on the matters contained in paragraph (18)(a), (b) and (c) the tribunal shall take account of any representations of the parties thereon and may in that connection, subject to rule 11(2A) and (2B), permit any party to give evidence upon, to call witnesses and to question any witness upon any matter relevant thereto.

(20) The tribunal may, at any time after it has received the report of an expert, require that expert (or, if that is impracticable, another expert) to explain any matter contained in that report or, having regard to such matters as may be set out in the requirement, to give further consideration to the question.

(21) A requirement under paragraph (20) shall stipulate that the expert shall make his reply in writing to the tribunal, giving his explanation or, as the case may be, setting down any conclusion which may result from his further consideration and his reasons for that conclusion.

(22) Paragraphs (4), (7) to (12), (14) and (15) shall apply in relation to a requirement under paragraph (20) as if that requirement was a requirement to prepare a report except that—

- (a) the duty on the Secretary under paragraph (4) to send a notice concerning unreasonable delay by the parties of the preparation of the expert's report shall not apply;

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(b) for the purpose of such application the following sub-paragraphs shall be substituted for the sub-paragraphs of paragraph (11)—

- “(a) give written notice to the expert that he is still required to send the reply by the required date;
- (b) give written notice to the expert substituting a later date as the required date;
- (c) notify the expert in writing that the requirement is cancelled without requiring another expert to fulfil it; or
- (d) so notify the expert and require another expert to fulfil the requirement in accordance with paragraph (20);” and;
- (c) the tribunal may decide not to require the expert to send progress reports to the tribunal if it considers the requirement to be inappropriate in the circumstances and in that event—
- (i) paragraphs (4)(f) and (8) shall not apply; and
- (ii) paragraph (9) shall apply if the expert at any time comes to the view that he will be unable to send his reply to the tribunal by the required date.

(23) Where the tribunal has received a reply from the expert under paragraph (21), it shall send a copy of the reply to each of the parties and shall allow the parties to make representations thereon, and the reply shall be treated as information furnished to the tribunal and be given such weight as the tribunal thinks fit.

(24) Where a tribunal has determined not to admit a report under paragraph (18), that report shall be treated for all purposes (other than the award of expenses or allowances under rule 14) connected with the proceedings as if it had not been received by the tribunal and no further account shall be taken of it, and the requirement on the expert to prepare a report shall lapse.”

Modification of rule 11 of Schedule 1

3. For paragraphs (1) and (2) of rule 11 of Schedule 1, substitute—

“Procedure at hearing

11.—(1) The tribunal shall, so far as it appears to it appropriate, seek to avoid formality in its proceedings and shall not be bound by any enactment or rule of law relating to the admissibility of evidence in proceedings before the courts of law. The tribunal shall make such enquiries of persons appearing before it and witnesses as it considers appropriate and, subject to paragraphs (2A), (2B), (2C), (2D) and (2E), shall otherwise conduct the hearing in such manner as it considers most suitable to the clarification of the issues before it and generally to the just handling of the proceedings.

(2) Subject to paragraphs (1), (2A), (2B), (2C), and (2D), at the hearing of the originating application a party shall be entitled to give evidence, to call witnesses, to question any witnesses and to address the tribunal.

(2A) The tribunal may, and shall upon the application of a party, require the attendance of an expert who has prepared a report in connection with an equal value claim in any hearing relating to that claim. Where an expert attends in compliance with such requirement any party may, subject to paragraph (1), cross-examine the expert on his report and on any other matter pertaining to the question on which the expert was required to report.

(2B) At any time after the tribunal has received the report of the expert, any party may, on giving reasonable notice of his intention to do so to the tribunal and to any other party to

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the claim, call one witness to give expert evidence on the question on which the tribunal has required the expert to prepare a report; and where such evidence is given, any other party may cross-examine the person giving that evidence upon it.

(2C) Except as provided in rule 10A(19) or by paragraph (2D), no party may give evidence upon, or question any witness upon, any matter of fact upon which a conclusion in the report of the expert is based.

(2D) Subject to paragraphs (2A) and (2B), a tribunal may, notwithstanding paragraph (2C), permit a party to give evidence upon, to call witnesses and to question any witness upon any such matters of fact as are referred to in paragraph (2C) if either—

- (a) the matter of fact is relevant to and is raised in connection with the issue contained in subsection (3) of section 1 of the 1970 Act (defence of genuine material factor) upon which the determination of the tribunal is being sought; or
- (b) the report of the expert contains no conclusion on the question of whether the applicant's work and the work of the person identified in the requirement of the tribunal under rule 10A(4) are of equal value and the tribunal is satisfied that the absence of that conclusion is wholly or mainly due to the refusal or deliberate omission of a person required by the tribunal under rule 4(5A) to furnish information or to produce documents to comply with that requirement.

(2E) A tribunal may, on the application of a party, if in the circumstances of the case, having regard to the considerations expressed in paragraph (1), it considers that it is appropriate so to proceed, hear evidence upon and permit the parties to address it upon the issue contained in subsection (3) of section 1 of the 1970 Act (defence of genuine material factor) before determining whether to require an expert to prepare a report under rule 10A.”

Modification of rule 12 of Schedule 1

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

(a) after paragraph (4), insert—

“(4A) There shall be appended to the document referred to in paragraph (3) a copy of the report (if any) of an expert received by the tribunal in the course of the proceedings.”;

(b) for paragraph (5) substitute—

“(5) The clerk shall transmit the documents referred to in paragraphs (2) and (3) and the copy of the report referred to in paragraph (4A), if any, to the Secretary who shall enter them in the Register and shall send a copy of the entry to each of the parties and where the proceedings were referred to the tribunal by a sheriff, to that sheriff.”; and

(c) for paragraph (6) substitute—

“(6) The document referred to in paragraph (3) and the copy of the report referred to in paragraph (4A), if any, shall be omitted from the Register in any case in which evidence had been heard in private and the tribunal so directs. In such a case the Secretary shall send that document to each of the parties; and where there are proceedings before an appellate court relating to the decision in question, he shall send the document to that court, together with a copy of the entry in the Register of the document referred to in paragraph (2).”

Modification of rule 14 of Schedule 1

5. After paragraph (2) of rule 14 of Schedule 1 (expenses), insert—

“(2A) For the purposes of paragraph (1)(a), the expenses in respect of which a tribunal may make an order include expenses incurred by the party in whose favour the order is to

be made in or in connection with any investigations carried out by an expert in preparing his report.”

Modification of rule 15 of Schedule 1

6. In rule 15 of Schedule 1 (miscellaneous powers)—

(a) for paragraph (5) substitute—

“(5) A tribunal may, before determining an application under rule 4 or rule 19, require the party making the application or, in the case of an application under rule 4(5A), the expert, to give notice of it to every other party (or, in the case of an application by the expert, to the parties and any other person on whom the tribunal is asked, in the application, to impose a requirement). The notice shall give particulars of the application and indicate the address to which and the time within which any objection to the application shall be made, being an address and time specified for the purposes of the application by the tribunal.”; and

(b) after paragraph (6), insert—

“(6A) Without prejudice to paragraph (7), the tribunal shall, before proceeding to hear the parties on an equal value claim, invite them to apply for an adjournment for the purpose of seeking to reach a settlement of the claim and shall, if both or all the parties agree to such a course, grant an adjournment for that purpose.

(6B) If, after the tribunal has adjourned the hearing under rule 10A(6) but before the tribunal has received the report of the expert, the applicant gives notice under paragraph (2) (a), the tribunal shall notify the expert that the requirement to prepare a report has ceased. The notice shall be without prejudice to the operation of rule 14(2A).”

Modification of rule 23 of Schedule 1

7. For paragraph (6) of rule 23 of Schedule 1 (notices etc.), substitute—

“(6) The recorded delivery service shall be used instead of the ordinary post—

- (a) when a second set of notices or documents is sent to a respondent who has not entered an appearance under rule 3(1); and
- (b) for service of an order made under rule 4(5) or (5A).”

PART II

—national security cases

Modification of rule 4 of Schedule 1

1. At the end of rule 4 of Schedule 1 (case management) insert—

“(9) Where—

- (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), (5) or (5A) on any person,

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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 the requirement under paragraph (1), (5) or (5A), 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."

Insertion of rule 7B into Schedule 1

2. For rule 7B of Schedule 1 (as referred to in paragraph 4 of Schedule 2), substitute—

"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), and the report (if any) of an expert received by the tribunal in the course of the proceedings, 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), and the copy of the report referred to in paragraph (1), in the Register he shall send a copy of those documents 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) and the report referred to in paragraph (1) shall not be disclosed to any person who was excluded from all or part of the proceedings;
- (b) direct the tribunal 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;
- (c) direct the tribunal that no further document setting out the tribunal's reasons for its decision should be prepared;
- (d) direct the tribunal that a further copy of the report referred to in paragraph (1) be prepared, with the omission of such parts of the report as are specified in the direction;
- (e) direct the tribunal that no further report referred to in paragraph (1) be prepared.

(4) Where the Minister has directed the tribunal in accordance with paragraph (3)(b) or (d), any document prepared pursuant to that direction shall be signed by the chairman and marked in each place where an omission has been made."

Modification of rule 11 of Schedule 1

3. For paragraph 2 of rule 11 of Schedule 1 (procedure) substitute—

"(2) Subject to paragraphs (1), (2A), (2B), (2C) and (2D), and to any direction of a Minister of the Crown under rule 8(1)(b) or (c) or order of the tribunal under rule 8(2)(a) read with 8(1)(b) or (c), at the hearing of the 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

4. In rule 12 of Schedule 1 (decision of tribunal) after paragraph (5), insert—

“(5A) Where the Minister has directed the tribunal as referred to in rule 7B(3)(b) or (d) (keeping secret certain reasons for the tribunal’s decision or certain parts of the expert’s report), the clerk shall transmit any 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 the excluded person. The clerk shall also transmit the document referred to in paragraph (3) and a copy of the report referred to in paragraph (4A), if any, to the Secretary. Those documents shall be omitted from the Register but the Secretary shall send a copy of them, the document referred to in paragraph (2) and any document prepared pursuant to the direction under rule 7B(3)(b) or (d) in accordance with paragraph (5D).

(5B) Where the Minister has directed the tribunal as referred to in rule 7B(3)(c) or (e) (keeping secret all of the reasons for the tribunal’s decision or all of the expert’s report), 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) and a copy of the report referred to in paragraph (4A), if any, to the Secretary. Those documents shall be omitted from the Register but the Secretary shall send a copy of them 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) and a copy of the report referred to in paragraph (4A), if any, to the Secretary. Those documents shall be omitted from the Register but the Secretary shall send a copy of them, the document referred to in paragraph (2) and any 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.”