

**2010 No. 747 (L. 5)**

**TRIBUNALS AND INQUIRIES**

**The Tribunal Procedure (Upper Tribunal) (Amendment) Rules  
2010**

<i>Made</i> - - - -	<i>10th March 2010</i>
<i>Laid before Parliament</i>	<i>12th March 2010</i>
<i>Coming into force</i> - -	<i>6th April 2010</i>

After consulting in accordance with paragraph 28(1) of Schedule 5 to the Tribunals, Courts and Enforcement Act 2007(a), the Tribunal Procedure Committee has made the following Rules in exercise of the powers conferred by sections 9(3), 22, and 29(3) and (4) of, and Schedule 5 to, that Act and section 133(3) of the Financial Services and Markets Act 2000(b).

The Lord Chancellor has allowed the Rules in accordance with paragraph 28(3) of Schedule 5 to the Tribunals, Courts and Enforcement Act 2007.

**Citation and commencement**

1. These Rules may be cited as the Tribunal Procedure (Upper Tribunal) (Amendment) Rules 2010 and come into force on 6th April 2010.

**Amendments to the Tribunal Procedure (Upper Tribunal) Rules 2008**

2. The Tribunal Procedure (Upper Tribunal) Rules 2008(c) are amended as follows.

3. In the table of contents—

(a) after the entry for rule 26A insert—

“26B. Financial services cases”; and

(b) after the entry for Schedule 2 insert—

**“SCHEDULE 3**

**Procedure in financial services cases.**

4. In rule 1(3) (interpretation)—

(a) for the definition of “applicant” substitute—

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(a) 2007 c.15.

(b) 2000 c.8. Section 133 was substituted by S.I. 2010/22.

(c) S.I. 2008/2698; relevant amending instruments are S.I. 2009/274, 2009/1975, 2010/43 and 2010/44.

““applicant” means—

- (a) a person who applies for permission to bring, or does bring, judicial review proceedings before the Upper Tribunal and, in judicial review proceedings transferred to the Upper Tribunal from a court, includes a person who was a claimant or petitioner in the proceedings immediately before they were transferred; or
- (b) a person who refers a financial services case to the Upper Tribunal;”;
- (b) after the definition of “fast-track case” insert—
  - ““financial services case” means a reference to the Upper Tribunal in respect of—
  - (a) a decision of the Financial Services Authority;
  - (b) a decision of the Bank of England;
  - (c) a decision of the Pensions Regulator; or
  - (d) a decision of a person relating to the assessment of any compensation or consideration under the Banking (Special Provisions) Act 2008(a) or the Banking Act 2009(b);”;
- (c) in the definition of “interested party”—
  - (i) in sub-paragraph (a) for “(substitution and addition of parties)” substitute “(addition, substitution and removal of parties)”;
  - (ii) after sub-paragraph (a) omit “and”; and
  - (iii) after sub-paragraph (b) insert—

“and

- (c) in a financial services case, any person other than the applicant who could have referred the case to the Upper Tribunal and who has been added or substituted as an interested party under rule 9 (addition, substitution and removal of parties);”;
- (d) in the definition of “party” after “question” insert “or matter”;
- (e) after the definition of “practice direction” insert—
  - ““reference”, in a financial services case, includes an appeal;”;
- (f) in the definition of “respondent” after sub-paragraph (d)—
  - (i) omit “or”; and
  - (ii) insert—

“(da) in a financial services case, the maker of the decision in respect of which a reference has been made; or”

**5. In rule 5 (case management powers) after paragraph (4) insert—**

“(5) In a financial services case, the Upper Tribunal may direct that the effect of the decision in respect of which the reference has been made is to be suspended pending the determination of the reference, if it is satisfied that to do so would not prejudice—

- (a) the interests of any persons (whether consumers, investors or otherwise) intended to be protected by that notice; or
- (b) the smooth operation or integrity of any market intended to be protected by that notice.

(6) Paragraph (5) does not apply in the case of a reference in respect of a decision of the Pensions Regulator.”.

**6. In rule 10(3) (order for costs)—**

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(a) 2008 c.2.  
(b) 2009 c.1.

(a) after sub-paragraph (c) omit “or”; and

(b) after sub-paragraph (d) insert—

“or

(e) if, in a financial services case, the Upper Tribunal considers that the decision in respect of which the reference was made was unreasonable.”.

7. In rule 17 (withdrawal) after paragraph (5) insert—

“(6) Paragraph (3) does not apply to a financial services case other than a reference against a penalty.”.

8. In rule 23(1)(a) (notice of appeal) after “26A” insert “or 26B”.

9. After rule 26A insert—

**“Financial services cases**

**26B.** Schedule 3 makes provision for financial services cases.”.

10. In rule 44 (application for permission to appeal)—

(a) after paragraph (3C) insert—

“(3D) An application under paragraph (1) in respect of a decision in a financial services case must be sent or delivered to the Upper Tribunal so that it is received within 14 days after the date on which the Upper Tribunal sent to the person making the application—

(a) written notice of the decision;

(b) notification of amended reasons for, or correction of, the decision following a review; or

(c) notification that an application for the decision to be set aside has been unsuccessful.”;

(b) in paragraph (4) for “or (3A)” substitute “, (3A) or (3D)”;

(c) in paragraph (6) after “(3A)” insert “, (3D)”.

11. In paragraph 2 of Schedule 1 (procedure after the notice of appeal in appeals against decision of traffic commissioners) for “(substitution and addition of parties)” substitute “(addition, substitution and removal of parties)”.

12. In paragraph 9(b) of Schedule 2 (additional procedure in national security certificate cases) after “Upper Tribunal” insert “so that the Upper Tribunal receives the notice within 14 days of the date that the Minister received notice of the proposal”.

13. After Schedule 2 insert—

## “SCHEDULE 3

Rule 26B

### Procedure in financial services cases

#### **Interpretation**

1. In this Schedule—

“further material” means documents which—

(a) were considered by the respondent in reaching or maintaining the decision to give the notice in respect of which the reference has been made; or

- (b) were obtained by the respondent in connection with the matter to which that notice relates (whether they were obtained before or after giving the notice) but which were not considered by it in reaching or maintaining that decision;

but does not include documents on which the respondent relies in support of the referred action;

“reference notice” means the written notice required in making a reference in a financial services case;

“referred action” means the act (or proposed act) on the part of the respondent that gave rise to the reference; and

“the 2000 Act” means the Financial Services and Markets Act 2000(a).

### **Reference notice**

2.—(1) A reference notice must be signed by or on behalf of the applicant and sent or delivered by the applicant to the Upper Tribunal.

(2) A reference notice must be received by the Upper Tribunal no later than 28 days after notice was given of the decision in respect of which the reference is made.

(3) The reference notice must state—

- (a) the name and address of the applicant;
- (b) the name and address of the applicant’s representative (if any);
- (c) if no representative is named under sub-paragraph (b), an address where documents for the applicant may be sent or delivered; and
- (d) the issues that the applicant wishes the Upper Tribunal to consider.

(4) The applicant must send or deliver to the Upper Tribunal with the reference notice a copy of the notice of the decision in respect of which the reference has been made.

(5) At the same time the applicant must send a copy of the reference notice to the respondent.

### **Register of references and decisions**

3.—(1) The Upper Tribunal must keep a register of references and decisions in financial services cases.

(2) The register must be open to inspection by any person without charge and at all reasonable hours.

(3) The Upper Tribunal may direct that the register is not to include particulars of a reference if it is satisfied that it is necessary to do so having regard in particular to any unfairness to the applicant or prejudice to the interests of consumers that might otherwise result.

(4) Upon receiving a reference notice, the Upper Tribunal must—

- (a) subject to any direction given under sub-paragraph (3), enter particulars of the reference in the register; and
- (b) notify the parties either that it has done so or that it will not include particulars in the register, as the case may be.

### **Respondent’s statement of case**

4.—(1) The respondent must send or deliver a written statement (“a statement of case”) in support of the referred action so that it is received by the Upper Tribunal no later than 28

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(a) 2000 c.8.

days after the day on which the respondent received from the Upper Tribunal the notification required by paragraph 3(4)(b).

(2) The statement of case must—

- (a) identify the statutory provisions providing for the referred action;
- (b) state the reasons for the referred action; and
- (c) set out all the matters and facts upon which the respondent relies to support the referred action.

(3) The respondent must provide with the statement of case a list of—

- (a) any documents on which the respondent relies in support of the referred action; and
- (b) any further material which in the opinion of the respondent might undermine the decision to take that action.

(4) At the same time as it sends or delivers the statement of case, the respondent must send to the applicant a copy of the statement of case and of the list referred to in sub-paragraph (3).

### **Applicant's reply**

**5.—**(1) The applicant must send or deliver a written reply so that it is received by the Upper Tribunal no later than 28 days after—

- (a) the date on which the applicant received a copy of the statement of case; or
- (b) if the respondent amends its statement of case, the date on which the applicant received a copy of the amended statement of case.

(2) The reply must—

- (a) state the grounds on which the applicant relies in the reference;
- (b) identify all matters contained in the statement of case which are disputed by the applicant; and
- (c) state the applicant's reasons for disputing them.

(3) The applicant must send with the reply a list of all the documents on which the applicant relies in support of his case.

(4) At the same time the applicant must send to the respondent a copy of the reply and of the list referred to in sub-paragraph (3).

### **Secondary disclosure by the respondent**

**6.—**(1) After the applicant's reply has been sent or delivered, if there is any further material which might reasonably be expected to assist the applicant's case as disclosed by the applicant's reply and which is not listed in the list provided in accordance with paragraph 4(3), the respondent must send or deliver to the Upper Tribunal a list of such further material.

(2) Any list required to be sent or delivered by sub-paragraph (1) must be sent or delivered so that it is received no later than 14 days after the day on which the respondent received the applicant's reply.

(3) At the same time as it sends or delivers any list required by sub-paragraph (1) the respondent must send a copy to the applicant.

### **Exceptions to disclosure**

**7.—**(1) A list provided in accordance with paragraph 4(3) or 6(1) need not include any document that relates to a case involving a person other than the applicant which was taken

into account by the respondent in the applicant's case only for the purposes of comparison with other cases.

(2) A list provided in accordance with paragraph 4(3), 5(3) or 6(1) need not include any document that is material the disclosure of which for the purposes of or in connection with any legal proceedings is prohibited by section 17 of the Regulation of Investigatory Powers Act 2000(a).

(3) A list provided in accordance with paragraph 4(3), 5(3) or 6(1) need not include any document in respect of which an application has been or is being made under sub-paragraph (4).

(4) A party may apply to the Upper Tribunal (without giving notice to any other party) for a direction authorising the party making the application not to include in the list required by paragraph 4(3), 5(3) or 6(1) a document on the ground that disclosure of the document—

- (a) would not be in the public interest; or
- (b) would not be fair, having regard to—
  - (i) the likely significance of the document to the applicant in relation to the matter referred to the Upper Tribunal; and
  - (ii) the potential prejudice to the commercial interests of a person other than the applicant which would be caused by disclosure of the document.

(5) For the purpose of deciding an application by a party under sub-paragraph (4), the Upper Tribunal may—

- (a) require the document to be produced to the Upper Tribunal together with a statement of the reasons why its inclusion in the list would—
  - (i) in the case of an application under sub-paragraph (4)(a), not be in the public interest; or
  - (ii) in the case of an application under sub-paragraph (4)(b), not be fair; and
- (b) invite any other party to make representations.

(6) If the Upper Tribunal refuses an application under sub-paragraph (4), it must direct the party—

- (a) to revise its list so as to include the document; and
- (b) to send or deliver a copy of the revised list to the Upper Tribunal and to any other party.

(7) A party who has sent or delivered a list under paragraph 4(3), 5(3) or 6(1) must, upon the request of another party, provide that other party with a copy of any document specified in the list or make any such document available to that party for inspection or copying.

(8) Sub-paragraph (7) does not apply to any document that is a protected item.

(9) In this paragraph “protected item” has the meaning provided by section 413 of the 2000 Act, section 311(2) of the Pensions Act 2004(b) or article 283(2) of the Pensions (Northern Ireland) Order 2005(c).

### **Subsequent notices in relation to the referred action**

**8.** Where, after a reference notice has been sent or delivered, the respondent gives the applicant any further, amended or supplementary notice in relation to the referred action, the respondent must without delay send or deliver a copy of that notice to the Upper Tribunal.

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(a) 2000 c.23.

(b) 2004 c.35.

(c) S.I. 2005/255 (N.I. 1).

### References by third parties

9.—(1) In the case of any reference made by an applicant under section 393 of the 2000 Act (third party rights) these rules apply subject to the modifications set out in this paragraph.

(2) In this paragraph—

- (a) if the reference was made under section 393(9) of the 2000 Act (reference to the Upper Tribunal by a third party to whom a decision notice was copied), the notice of the decision in respect of which the reference has been made is the decision notice which was copied to the applicant by the respondent; and
- (b) if the reference was made under section 393(11) of the 2000 Act (reference to the Upper Tribunal by a third party who alleges that they were not given a copy of a decision notice), the notice of the decision in respect of which the reference has been made is the decision notice which the applicant alleges was not copied to them.

(3) If the reference was made under section 393(11) of the 2000 Act, paragraph 2(4) does not apply.

(4) The duties of the respondent to set out information under paragraph 4(2) or to list material under paragraph 4(3) or 6(1) apply only to information, documents or material which relate to the matters referred to the Upper Tribunal in accordance with section 393(9) or (as the case may be) section 393(11) of the 2000 Act.”.

*Patrick Elias*  
*Carolyn Kirby*  
*Philip Brook-Smith QC*  
*Peter Lane*  
*Bronwyn McKenna*  
*Douglas May QC*  
*Mark Rowland*  
*Alison McKenna*  
*Nicholas Warren*  
*Lesley Clare*

I allow these Rules  
Signed by authority of the Lord Chancellor

10th March 2010

*Michael Wills*  
Minister of State  
Ministry of Justice

## EXPLANATORY NOTE

*(This note is not part of the Rules)*

These Rules amend the Tribunal Procedure (Upper Tribunal) Rules 2008.

These rules make provision for procedure in financial services cases formerly dealt with by the Pensions Regulator Tribunal and the Financial Services and Markets Tribunal. The Transfer of Tribunal Functions Order 2010 transferred the functions of the Pensions Regulator Tribunal (with the exception of the functions of that Tribunal exercisable in relation to Northern Ireland) and the Financial Services and Markets Tribunal to the Upper Tribunal on 6 April 2010. The Pensions Regulator Tribunal (Transfer of Functions) Act (Northern Ireland) 2010 transferred the functions of the Pensions Regulator Tribunal exercisable in relation to Northern Ireland on 6 April 2010.

Rule 12 corrects an omission in paragraph 9 of Schedule 2 to the Tribunal Procedure (Upper Tribunal) Rules 2008.

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