



GUIDANCE TO TRIBUNAL MEMBERS No 05/2018

POSTPONEMENTS, SUSPENSION, PRELIMINARY PROCEDURE AND INTRODUCTIONS

Purpose of this Guidance

1. The purpose of this guidance is to clarify the procedure and processes to be employed when considering whether to postpone a hearing or claim or suspend a reference or claim, and to ensure that parties are clear as to expectations and the tribunal adopts an enabling approach when dealing with references and claims.

Postponements¹

2. The First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (“the 2018 Rules”) empower a legal member on his or her own initiative, or on application by either party to postpone any hearing of a reference.
3. A postponement will only be granted where it is in the interest of justice. In considering any request to postpone the hearing the legal member must have regard to the overriding objective².
4. In deciding whether a postponement should be granted, the legal member should have regard to whether it is possible to take evidence by alternative means such as evidence by way of written statement and reports; calling another witness who may be able to speak to the same evidence; taking evidence by way of conference call or video link; or part hearing the case, enabling the evidence of a particular witness to be taken on a subsequent date.
5. If the postponement application is granted, a fresh date for the hearing must be arranged at the time the postponement is granted or as soon thereafter as possible.

¹ The 2018 Rules, rule 42 and 88

² The 2018 Rules, rule 2

Suspensions³

6. Rule 24(1)(a) of the 2018 Rules empowers a legal member or a tribunal at a hearing if both parties are agreed to suspend proceedings in respect of a reference pending the outcome of mediation or dispute resolution under section 15 or 16 of the Education (Additional Support for Learning) (Scotland Act 2004).
7. Rules 24(1)(b) and 70(1) of the 2018 Rules empower a legal member or a tribunal on the application of either party, or on their own initiative, to suspend proceedings if it is fair and just to do so.
8. It is not appropriate to suspend proceedings where a reference or claim concerns failure to assess or to meet the timescales and opposition is withdrawn. In such cases the legal member ought simply to proceed to determine the reference or claim under rules 37 or 83 (power to decide reference without hearing) of the 2018 Rules, as applicable.
9. Where a party or parties request further time:
 - to reach agreement or for additional assessment to take place
 - for a trial placement at a school
 - for any other reason,proceedings should not be suspended but, instead, the hearing originally arranged should be postponed for an appropriate period. A conference call should be scheduled to take place at least two weeks before the next hearing date.
10. The circumstances in which suspension of proceedings is appropriate include:
 - where there is an appeal to the Upper Tribunal on a preliminary issue in the reference or claim.
 - where there is an appeal to the Upper Tribunal in another case which is dealing with the same legal issue raised in the case before the tribunal.
 - illness of the child making it uncertain if an appeal will continue.
 - any other circumstances in which the resolution of the outstanding issue is beyond the control of the parties.
11. Where the application is a joint motion by both parties that the proceedings in respect of a reference be suspended pending the outcome of mediation or dispute resolution the tribunal may suspend the proceedings. The tribunal is not bound to do so.

Preliminary Procedure and Introductions

12. The hearing will proceed more smoothly where the parties are clear as to expectations from the outset.
13. The following strategies (which have been developed in consultation with tribunal users) should normally be adopted to ensure that the tribunal discharges its enabling role.
 - the legal member plays the key role in managing the reference or claim but the pre-hearing review with the ordinary members is of the utmost importance in identifying the issues and clarifying how the tribunal will proceed, for example agreeing which member will take the lead in questioning any particular witness.
 - a conference call to discuss the conduct of the hearing must be held by the legal member at least 2 weeks before the hearing date. Where there are pre-hearing issues which require to be resolved, more than one conference call can take place. Only one case conference call payment will be made to the legal member (even when multiple conference calls are held).
 - parties should be advised in advance in what order witnesses will be led, be invited to give an indication of how long witnesses are likely to take and when witnesses should be asked to attend. The tribunal may give guidance on the ordering of witnesses if required.
 - the issues discussed at the conference call should, where time allows, be captured in a note prepared by the legal member. The legal member should also consider whether it is desirable to issue directions to either or both parties under rule 35 or 71 of the 2018 Rules, as applicable.
 - at the start of the hearing the legal member should outline how the proceedings will be conducted and provide an opportunity for parties to raise any preliminary issues which have not been previously highlighted.
 - when witnesses enter the hearing room to give their evidence they should be advised of the identities of those present in the room and told how the questioning will proceed.
 - parties and witnesses should be advised at the start of the hearing that there will be appropriate breaks in proceedings and given an indication of when those breaks will be. Parties should also be advised that it is open to them to ask for a break in proceedings should they feel that this would be beneficial and the tribunal will consider any such request.

May Dunsmuir
President
January 2018