Law Society of Scotland

Consultation Response

Consultation on potential further changes to the Employment Tribunal Procedure Rules 2024

May 2025

Photo: Aerial view of Glasgow city

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the UK Government's consultation: Potential further changes to the Employment Tribunal Rules.[1] The sub-committee has the following comments to put forward for consideration.

[1] Potential further changes to the Employment Tribunal Rules - GOV.UK

Consultation Questions

Question 1: Do you agree with the proposed changes to rule 4 and the proposed rule 52(1)(f)? If not, why not?

We agree that the proposed change to Rule 4 and the proposed rule 52(1)(f) and consider that this will, in appropriate circumstances, promote early resolution of cases, particularly where one or more of the parties is unrepresented.

It is recognised that conducting a dispute resolution appointment may be more difficult in Scotland, in comparison to England/Wales, as witness statements will typically will not be available in Scottish cases to aid the assessment. In cases where it is deemed that there should be a dispute resolution appointment, the default position may be that written witness statements should be provided, although that is matter for Practice Direction, rather than the Rules. This would help to ensure that the Tribunal is provided with sufficient information to conduct a dispute resolution appointment.

Question 2: Do you agree with the proposed changes to rule 13(1)(b) and rule 18(1)? If not why, not?

We agree with the proposed change to rule 13(1)(b).

In our experience, it is not unusual for an ET1 to be presented with no grounds of claim set out (with the claimant merely ticking one or more of the boxes at section 8.1). As identified in the consultation document, such a situation is undesirable as it typically necessitates an order for the provision of additional information (thereby causing delay and potentially incurring additional expense).

We agree that the proposed change should discourage claimants from presenting ET1s with no grounds of claim set out, and therefore help to avoid that undesirable situation. We also agree that it would assist the process of initial judicial consideration.

As a further observation, we are conscious that the proposed change will not be a perfect solution. A very brief formulation of the grounds of claim – e.g. "I was unfairly dismissed because of an unfair procedure" – would meet the requirements of the proposed wording, but nevertheless still likely require an order for the provision of additional information. On balance, however, we do not consider it necessary for the rule to specify the required level of detail for the grounds of claim to be expressed (that issue is better dealt with by judges upon initial consideration on a case-by-case basis).

We agree with the proposed change to rule 18(1) for the same reasons as expressed above (albeit in our experience, the undesirable situation in question is less prevalent when it comes to ET3 responses).

Question 3: Do you agree with the proposed amendment to rule 26? If not, why not?

We agree with the proposed change to Rule 26.

The primary position will remain that it is incumbent upon the claimant to submit a response to the respondent's counterclaim within 28 days. That should remain the default position.

In practice, applications to allow a response to be received late are typically granted unless it is clear there is no relevant defense to the counter claim. The addition of rule 26(2)(d) makes clear the test to be applied by the employment tribunal in the exercise of its discretion whether or not to allow the late response.

Question 4: Do you agree with the proposed rule 30(4)? If not, why not?

Yes, in principle, but subject to our comments below.

We can see that in certain cases, requiring the party to prepare a draft order for consideration by the judge would be beneficial and in line with the ET's overriding objective of avoiding delay and saving expense (rule 3, ET rules). We would agree with the TPC, as identified in the consultation document, that the act of preparing the order may assist with focusing the party's mind on what it is they are looking for. To that end, and subject to review of the draft by the judge, it should improve the quality of the order produced and may well save judicial time. Indeed, our understanding is that some practitioners, for these very reasons, already issue a draft order along with their application (although clearly this is not currently a requirement under the ET rules).

The additional reason provided by the TPC, that preparation of a draft order can make it more likely that the parties will agree on the terms of the order, is less clear. Our understanding from the wording of the suggested rule 30(4) is that the draft order goes straight from party to judge for consideration. On this basis, it would seem (correctly in our view) that there would be no requirement to send to the other party for approval first. In some cases, the party preparing the order may have already asked the other party for information / assistance etc on a voluntary basis. Usually, it is when this is refused that the party must then ask the tribunal to step in and produce an order. As such, we would not anticipate that it should be expected or required to have the other party agree the terms of the order before it is issued to the judge (and our reading of rule 30(4) is that there is no such proposed requirement). Exceptions to this may include orders based on more minor administrative matters like correction of a typographical error or minor changes to the ET1 or ET3 where agreement and co-operation of the opposing party may be easily obtained.

Similarly, will it be the case that the party preparing the draft order will be required to send it to the other party for information / comment at the same time as

sending it to the judge (mirroring the wording of rule 31(2) regarding the initial application)? We could see that this approach would provide the other party opportunity to raise relevant objections to the wording of the order and the detail. However, it may add further time to the process (especially if the opposing party had already been asked for objections to the original written application under rule 31(2)). It may be helpful to be clear if this is in fact a requirement from either the wording of the rule itself or (if flexibility wanted to be maintained) the specific direction from the judge to the party drafting the order.

The consultation document references the Civil Procedure Rules in England and Wales and the existing requirement there to provide a draft order. There is a divergence here with Scottish civil court practice. In Scotland, in the civil court, there is generally no requirement under court rules to prepare draft orders (although some areas of practice may be subject to specific Practice Note requirements).If you are enrolling a motion, a party may use language that they want the court to mirror in its interlocutor but even that is not always necessary. This is the case regardless of whether the party is represented. While this divergence in civil court process would not necessarily preclude the practice being adopted in the Scottish ET, we raise it as a matter of awareness for the TPC.

We note that the four grounds identified by the TPC as areas where a draft order may be requested do not distinguish between represented and unrepresented parties. Certainly, we would anticipate that unrepresented parties will struggle more with the requirement to provide draft orders than those who have the benefit of legal expertise and experience. The TPC recognise in the consultation document that providing a draft order will generally be easier for a professional representative than someone representing themselves (we agree). However, it goes on to suggest that more straightforward orders (for which a standard form draft may already exist), will be more easily and efficiently prepared by judges (paragraph 39, consultation document). We can appreciate the rationale here. However, our concern with this, is that the more complex orders are those that a party will be asked to prepare and where that party is unrepresented there will be difficulties with this.

The Equal Treatment Bench Book 2024 highlights some areas of difficulty that litigants in person face including for example, being unfamiliar with the language and specialist vocabulary of legal proceedings, having little knowledge of the procedures involved and difficulty applying the rules and lack of objectivity and emotional distance from the case.[2] To ensure compliance with the ET's overriding objective of ensuring parties are on an equal footing, and the spirit of the ETBB, it may be helpful to consider ways to mitigate any difficulties for unrepresented parties and / or provide assistance. This is especially the case if unrepresented parties may be asked to draft orders of a more complex nature. For example, could standard form orders by accessed online so that the unrepresented party

[2] Equal Treatment Bench Book 2024, Chapter 1 (Litigants in person and lay representatives), paragraph 15

can be directed to these as examples of orders so that they can see what is expected (with clear direction that these be tailored to individual cases)?

Question 5: Do you agree with the proposed change to rule 65? If not, why not?

We also agree to the proposed change to rule 65.

In circumstances where repeated reconsideration applications will only be made in the extreme minority of cases, and that this proposed exception to the rule would only be applied when substantially the same application has already been made and refused, we do not believe that this would pose any risk to the principle of open justice. Therefore, we agree with the TPC's preliminary view in that regard.

We do not believe that this would impact on the transparency of the Tribunal's decisions given that the same or a very similar application would already have been responded to and published.

Therefore, in our view, the introduction of this exception is a proportionate and fair measure to reduce additional administrative burden on the Tribunal, without risking any impact on open justice and the importance of having reasoned Judgments made publicly available.

For further information, please contact:

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