



Law Society
of Scotland

Consultation Response

Reforming the Employment Tribunal System

20 January 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Employment Law Sub-committee welcomes the opportunity to consider and respond to the UK Governments consultation: Reforming the Employment Tribunal System. The sub-committee has the following comments to put forward for consideration.

General Comments

The committee notes that the consultation makes reference to the UK Government being committed to transferring responsibility for the functions of the Employment Tribunal and Employment Appeal Tribunal (EAT) to the Scottish Government as set out in the Smith Agreement. As there has been no announcement from either Government as to when this is likely to occur, the committee has been unable to comment on how these changes will or will not impact upon a devolved tribunal in the future. On the one hand, the committee does not wish the Employment Tribunal and EAT in Scotland to miss out on any improvements or efficiencies that could be identified and introduced. However, with particular regard to the references in the consultation to 'ageing IT systems' and the move towards making more decisions online, the committee would be opposed to new systems being introduced UK-wide and then being replaced a short time later. This is a concern both in relation to the potential for wasted cost and also the risk that the credibility and authority of the Employment Tribunal and EAT generally could be undermined by the inevitable disruption caused by bringing in too many changes in a short space of time.

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Questions

1. Do you agree that with the right system in place the specific needs of users of Employment Tribunals and the Employment Appeal Tribunal can be accommodated in a more digitally based system?

Yes

No

Comment:

We agree that provided the specific needs of users identified in the consultation document are taken into account (including, for example, face to face assistance, telephone help service, online assistance and access to paper channels for those that require it) then a more digitally based system could be accommodated.

It is already the case that communication with parties engaging with the Employment Tribunal Service and the EAT is generally undertaken by email. We understand¹ that digitisation is likely to be undertaken in two stages, initially focusing on the background processing of applications, responses and communication with parties in advance of hearings and then moving on to virtual procedural and full hearings. Ultimately, we understand that the aim is to have the option of the determination of claims digitally without a video conference hearing even being required. We consider that a step by step process is appropriate, as it allows for new processes to be adopted as and when the technology, training and any pilots have been successfully completed.

We would welcome the sensible use of technology to allow cases coming before the Employment Tribunal to be dealt with expeditiously and proportionately, always bearing in mind the current position, that substantive hearings should generally take place in public. We would also welcome the opportunity to learn from innovative processes being piloted in other Tribunals, always keeping at the forefront of any consideration the special characteristics of Employment Tribunals.

¹ From discussions with representatives of the Department of Business, Energy & Industrial Strategy (BEIS), the Ministry of Justice (MOJ) and the Courts & Tribunals Service at a meeting held as part of the consultation process on 13 January 2017.

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2. What issues do you think need to be considered when deciding whether a claim would be suitable for online consideration? Please give reasons.

Comment:

We consider that clarity requires to be given as to the term “online consideration”. Does this refer to the processing of claims, using new technologies, or online consideration of decisions by employment judges?

We would welcome the use of technology such as portals for delivery and storage of documents relating to each case, to which Tribunal staff and parties and their representatives could have secure access. This would avoid the need for correspondence by more traditional means, including post and email and could have considerable advantages for example, in terms of case management, storage of documents electronically etc.

We would also welcome the extension of the use of digital means of communication in relation to the transmission of information about claimants’ earnings, for example, when an application for the remission of fees is made electronically (currently in Scotland, paper copies of earnings details are required although the provision of the claimant’s national insurance number should be sufficient).

Digitisation may facilitate the use of electronic document bundles which would avoid the need for numerous copies of documents to be provided for use at hearings. We are, however, concerned that it may be unreasonable to expect unrepresented claimants or respondents to be in a position to lodge joint electronic bundles. This is in contrast, for example, to the Commercial Court in the Court of Session where parties are generally always represented and electronic bundles are widely used. We consider that special arrangements would be required in order to allow the Tribunal Service to prepare the electronic bundles in some circumstances.

We understand² that the “online consideration of claims” in the sense of the judicial determination of claims online is not envisaged and that claims would not be determined online unless they were unopposed or both parties agreed to the consideration of the claim without the need for a hearing. We consider that in most contested cases, it would be appropriate and necessary for a hearing to take place at which both

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parties would be in a position to make oral submissions, unless all parties agreed that written representation would suffice.

3. What factors do you think should be taken into consideration when creating the scope to delegate judicial functions in Employment Tribunals and the Employment Appeal Tribunal? Please give reasons.

Comment:

We consider that the factors set out in Rule 12, which have already been the subject of careful consideration, would be a good starting point for preparing a list of factors to be taken into account when considering whether there should be delegation of judicial functions.

We consider that the processing of claims and purely administrative decisions which require to be taken in the run up to a hearing will generally be capable of delegation, always recognising that administrative decisions often have a substantial effect on the outcome of the hearing, and that it should always be open to parties to seek a review of such an administrative decision by an employment judge where one of the parties is unhappy.³

We agree that it may be more efficient to allow administrative decisions to be taken by case workers where there is no controversy, however, where what would appear to be an administrative decision could have a material effect on the outcome of the case, or where it is clear that the decision will be controversial and likely to be the subject of review, we consider that it would generally be appropriate for a case worker to refer the decision to an employment judge to avoid the need for duplication of effort between case workers and employment judges.

We agree that with the right safeguards in place, the use of properly trained caseworkers would be appropriate in many instances. An example of such a safeguard would be that a party, who was unhappy with the decision taken under a delegated provision, could apply to the Tribunal in writing for the decision to be considered afresh by a judge and that any delegation would generally fall short of the substantive consideration and determination of an individual's employment rights.

³ It is our understanding that this is what is proposed.

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4. Are there any specialist skills that a caseworker dealing with Employment Tribunals and the Employment Appeal Tribunal would need, distinct and different from those required for carrying out casework in other tribunals? Please give details.

Comment:

We consider that the answer to this question is very much dependent on whether delegated decisions will require case workers to have knowledge of employment law. If decisions are purely administrative then we would envisage that the skills that a caseworker dealing with Employment Tribunals and the EAT would need would not necessarily be distinct and different from those required by caseworkers undertaking this role in other Tribunals. Case workers would require an understanding of the administrative rules and the need to take decisions fairly, giving each party an opportunity to be heard on any matter of controversy. In the event that, following implementation of the proposed reforms, case workers were in a position to take decisions which required knowledge of employment law, then, of course, it would be necessary for employment law training to be provided and, in appropriate cases, for case workers to be legally qualified.

5. Are there specific issues relating to Employment Tribunals and the Employment Appeal Tribunal that need to be taken into consideration in relation to making changes to the law regarding panel composition? Please give details.

Comment:

We would welcome flexibility in determining the composition of a panel depending on the type and complexity of the case to be heard. We consider that it might be appropriate for such decisions to be taken by the employment judge allocated to hear the case, albeit with the necessary safeguards put in place. We consider that there are some types of cases, for example where there are particular complexities or where there is a need for a person with knowledge of a particular industry to advise or where it is likely that public confidence in a decision taken would be enhanced by the panel including not only an employment judge but also lay members, then it would be appropriate to allow for that. We consider that this would be particularly apt in cases which are likely to set a precedent.

The Sub-Committee would wish to avoid the default position being that a single employment judge would sit since, in practice, that is likely to mean that there will be no proper consideration given to the matter. We would prefer to have a situation where the Employment Tribunal Judge always determined the composition of the panel, rather than there being a rule for certain types of case. We consider that the Employment Judge assigned to the case is likely to be in the best position to determine whether it would be appropriate for lay members to be appointed in any particular case.

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6. What criteria should be used to determine the appointment of the new employment practitioner member of the Tribunal Procedure Committee? Please give reasons.

Comment:

We consider that it would be useful for an employment lawyer member to be appointed to the Tribunal Procedure Committee (as envisaged in England and Wales) and for an employment lawyer member to be appointed to any equivalent committee in Scotland. We would suggest that an experienced solicitor who practises regularly in the Employment Tribunals and the EAT would be an appropriate appointee, however, we suggest that it may also be appropriate to appoint an employment practitioner with an understanding of the difficulties which lay people (whether claimants or respondents) may experience in seeking to interpret legal rules, with a view to simplifying the language of any rules to be changed.

7. Do you agree that the proposed legislative changes will provide sufficient flexibility to make sure that the specific features of Employment Tribunals and the Employment Appeal Tribunal can be appropriately recognised in the reformed justice system?

Yes

No

Please give reasons.

Comment:

We consider that the proposed legislative changes should be sufficiently flexible to allow specific features of the Employment Tribunals and the EAT to be recognised provided appropriate safeguards are put in place. However, we recognise that the devolution of Tribunals to the Scottish Government requires to be taken into account in relation to any reforms to be made meantime.

8. Do you anticipate the impacts of the proposed reform to be disproportionately large for small or micro sized businesses? Please explain your answer, referring to evidence as necessary.

Comment:

We consider that the needs of small and micro-sized businesses, as well as the needs of individual claimants, require to be taken into account in relation to any proposed reforms. Specifically, simple

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language should be used wherever possible. The safeguards referred to in relation to the introduction of digital processing of claims should be sufficient to allow small or micro sized businesses to be accommodated.

9. Do you agree that we have correctly identified the range of equalities impacts, as set out in the accompanying Equalities Impact Assessment, resulting from these proposals? Please give reasons.

Yes

No

Comment:

As we have commented above, a stage by stage approach would allow considerations of equality to be addressed incrementally in order to reduce the risk of adverse impact on specific needs of users identified in the consultation document (including, as observed above, face to face assistance, telephone help service, online assistance and access to paper channels for those that require it).

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