



The Scotland Bill – Consultation on Draft Order in Council for The Transfer of Specified Functions of the Employment Tribunal to the First-tier Tribunal for Scotland - ASLEF's Response

The Associated Society of Locomotive Engineers and Firemen (ASLEF) is the UK's largest train driver's union representing approximately 20,000 members in train operating companies and freight companies as well as London Underground and light rail systems. The union has just under 1800 members in Scotland.

Overall, ASLEF does not feel the measures being consulted on go far enough and simple represent, at best, the lightest form of devolution of the Employment Tribunal system. This is therefore a missed opportunity.

**Question 1:**

**Do you consider that the provisions in article 5 of the draft Order adequately reflect what is a Scottish case?**

Yes but there are still issues around mass claims against an employer who has workplaces in Scotland and England. A Scottish worker who is part of a mass claim but most of heard colleagues reside in England would not be able have their case heard together. The cost and time of running such a case would therefore double.

**Question 2:**

**Do you feel that the provisions in article 7 appropriately define those cases that have a sufficient connection to Scotland?**

Yes however, the issue of "wholly and mainly" means that the test for hearing a case in Scotland is higher than it currently is.

If the current definition continues it means that those individuals falling into this category may have more of a hurdle in accessing justice than they would currently, or indeed they would if they lived in England and Wales.

**Questions 3:**

**Are you content with the draft Order's other provisions?**

No.

From an access to justice perspective there are several issues with the proposed Order in Council.

Firstly, the current Order does not provide any power in relation to awards of expenses to the Scottish Ministers.

Undoubtedly there is a direct link between Tribunal rules and processes and access to justice. The introduction of Employment Tribunal lodging fees led to the number of applications to the Employment Tribunal Service reducing. Tribunal fees is one issue that the Scottish Parliament will no doubt wish to address. There are however various other important issues in relation to the Employment Tribunal process and rules which do have an impact on access to justice. It is essential that the Scottish Parliament have the widest legislative powers over issues that impact on access to justice.

The power over Tribunal rules under the 2014 Act lie with the Court of Session by Act of Sederunt. This power is directly delegated under the Order by the Secretary of State and not the Scottish Ministers

Therefore the Scottish Parliament have no powers over the rules of the Employment Tribunal. This effectively denies the elected Scottish Parliament the opportunity to develop procedural rules for Scottish Employment Tribunals now, or at any point in the future.

To resolve this, it is suggested that the rules of procedure are devolved to Scottish Ministers. If, in the future and after consultation with Employment Tribunal users, Ministers wish to pass these powers to the Lord President this can be done via regulations and/or further Scottish Parliamentary legislation.

Additionally there is a democratic deficit in the current proposals that disadvantage Scottish users when compared with England and Wales. It is highly doubtful that placing control of rules of procedure for devolved Employment Tribunals within the powers of the Lord President would result in any opportunities to make progressive changes towards how Employment Tribunals operate in Scotland. This would include any consideration of returning to having the involvement of lay members (the industrial jury) in unfair dismissal cases, the issues of expenses for parties and witnesses and repealing other attacks on the Employment Tribunal system in recent years. These rules have a material impact on the outcome of disputes. The balance they strike between the interests of employer and employee should therefore be the subject of political oversight.

This raises questions as to consistency in the way Tribunals would operate. Under the proposals, changes in rules of procedure in England and Wales would continue to be political decisions made by the Lord Chancellor and/or a Government Minister, whereas in Scotland any proposed changes would be judicially driven. While there has been limited success in influencing the former Lord President on civil court reform this is not likely to be the easiest or most democratic method of informing public policy in this area.

There are further issues with the incorporation of the Scottish Employment Tribunals into the First Tier Tribunal which can be summarised as a stand-alone Employment Tribunal service disappearing and hearings no longer be heard by specialist judges.

Employment Tribunals are taken into the general work of the Scottish Tribunal Service than there is a real threat to the specialism of both judicial and lay members with members sitting on hearing on Tribunals dealing with matters other than employment disputes. The only current Tribunal dealing with reserved matters, the Social Entitlement (Social Security and Child Support Appeals) has its own dedicated Chamber with its own President but the current Order in Council does not make it clear if this is to be the case for Employment Tribunals.

Currently Employment Tribunals (Scotland), together with its equivalent in England and Wales as well as the Employment Appeal Tribunal (EAT) are a “separate pillar”, sitting outside of the First Tier and Upper Tribunals created by the Tribunals, Courts and Enforcement Act 2007. This arrangement reflected the fact that Employment Tribunals are a forum distinct from other Tribunals. They are party v party, private law, adversarial forums which operate very similarly to the civil courts. It was also a reflection of the fact that a highly specialist judiciary has been established due to the need to be able to conduct lengthy proofs on matters of increasing complexity. Further, it was an appreciation that over the years and there is an increasingly raft of legislation in relation to Employment law from both the UK courts and the European Court of Justice meaning that employment law has become vastly more complex than it was when the Industrial Tribunals system was first devised.

In addition, a recent report commissioned in England and Wales (The Briggs Report) suggested that there is an ever increasing view that the Employment Tribunals should become part of an Employment and Equalities Court.

It may be that in England and Wales, Employment Tribunals will, in time, move to become a division of the Civil Court and should that happen then it may well make sense for Scotland to be on a par and for Scottish Employment Tribunals to be part of the Civil justice system for Scotland. In that way employment and equality matters could be dealt with in the Sheriff Court in a specialised court that covers Equality Act goods and services cases as well as existing jurisdictions.

#### **Question 4:**

#### **Do you have any further comments you wish to make on the opportunities provided by qualified transfer of the Employment Tribunals to Scotland?**

The issues of powers of rules and procedure and the concerns over the First Tier Tribunal could be resolved in the following ways:

The Scotland Bill at clause 37 envisages that “functions” of currently reserved Tribunals (i.e. those Tribunals that deal with law reserved to the UK Parliament) can be transferred to a Scottish Tribunal where the functions are to be exercised in relation to “Scottish cases”.

The biggest reserved Tribunals operating in Scotland are First Tier (Social Entitlement) (dealing with social security appeals etc), First Tier (Immigration and Asylum) and Employment Tribunals (Scotland).

However, the Employment Tribunal is different because it is already a free standing entity with a specific Scottish jurisdiction. Social Entitlement is a Great Britain wide Tribunal and Immigration and Asylum is United Kingdom wide.

This is an important distinction because it means that the Employment Tribunals in Scotland can already be described as a "Scottish Tribunal". It does not need to be detached from a Great Britain or United Kingdom wide judicial body.

It follows that it does not need to be transferred into a Scottish Tribunal at all because it is already operating on that basis. The easiest and least disruptive course would be to keep Employment Tribunals (Scotland) in its current format as a free standing Tribunal with Employment Judges, as now, rather than legal members.

Employment Tribunals in Scotland would still come under the Employment Tribunals Act 1996. Power could be transferred from the UK Government Department Ministers currently responsible (the Secretary of State for Business, Innovation and Skills and the Lord Chancellor) to Scottish Ministers. The importance of this is that Employment Tribunals in Scotland would still be so called which would minimise the legislative disruption involved in shifting them into the First Tier Tribunal for Scotland.

Furthermore if Employment Tribunals are kept separate then it is easier to detach that separate entity and move it across into the Sheriff Court as a specialist employment and equality division. This could happen at the same time (if it does happen) that a similar change goes ahead in England and Wales (as per the Briggs Review) thereby keeping the employment law adjudication process on a par north and south of the border.

This outcome can be achieved fairly simply by amending the Order in Council and the Employment Tribunals Act 1996. The Order in Council would specify the Tribunal for the purpose of Schedule 5 of the 1998 Act as the Tribunal established by the Scottish Ministers under Section (1A) of the 1996 Act. In turn the 1996 would be amended to add a new Section 1 (1A) empowering the Scottish Ministers by regulation to make provision for the establishment of Tribunals in Scotland to be known as Scottish Employment Tribunals.

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