Response ID ANON-JYZ6-7YQ9-D

Submitted to **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**
Submitted on **2016-03-24 10:03:30**

Introduction

1 Are you responding as an individual or an organisation?

Organisation

2 What is your name or your organisation's name?

Name/orgname:
Faculty of Advocates

3 What is your email address?

Email:
deans.secretariat@advocates.org.uk

4 The Scottish Government generally seeks to publish responses to a consultation, in summary and where possible in detail. We would like your permission to publish:

Your response along with your full name

5 We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

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

Do you consider that the provisions in article 5 of the draft Order adequately reflect what is a Scottish case?:
1. Article 5 sets out a new definition of what constitutes a ‘Scottish case’ and in so doing has departed from the rules that currently exist governing the presentation of employment tribunal claims in Scotland, namely Rule 8(3) of the 2013 Regulations.

2. The position as it now stands is that there is no prescriptive rule stating that a claim must be brought in either Scotland or England and Wales. A claim may be brought in either, provided that one or more of the four shared criteria (as set out in Rule 8(2) and (3)) is met. The only situation where a case must be presented in Scotland is where one or more of the criteria set out in Rule 8(3) is met, and none of the criteria in Rule 8(2) is met. The same rule applies, mutatis mutandis, to cases that must be started in England and Wales.

3. The draft order does not continue this regime. There is introduced (by Article 5) the concept of a ‘Scottish case’ defined in terms of three (cumulative) criteria. When these criteria are met, the claim must be presented in Scotland and cannot be presented in England and Wales, even if one or more of the criteria set by Article 7 for a ‘concurrent case’ (i.e. one that can be presented in either jurisdiction) is also met.

4. Article 5 provides that a Scottish case is an employment claim where

(a) The respondent resides or carries on business in Scotland
(b) The acts or omissions complained of took place in Scotland, and
(c) The claim relates to a contract under which the work is or has been performed wholly or ordinarily in Scotland

Schedule 1 Rule 8(3) provides:

A claim may be presented in Scotland if—

(a) the respondent, or one of the respondents, resides or carries on business in Scotland;
(b) one or more of the acts or omissions complained of took place in Scotland;
(c) the claim relates to a contract under which the work is or has been performed partly in Scotland; or
(d) the Tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is at least partly a connection with Scotland

5. There are important differences between the definition of a ‘Scottish case’ found in Article 5 of the Draft Order in Council and the current definition of what cases may be presented in Scotland, under Rule 8(3).

6. For the case to be one that may be presented in Scotland under the present rules, the requirement is that the work under the contract is or has been performed 'partly' in Scotland (Rule 8(3)(c) above). The draft Article 5(2)(c) states that the work under the contract is or has been performed 'wholly or ordinarily' in Scotland. Further confusion arises because Article 7, which deals with the definition of a 'concurrent case', refers to work being performed under a contract 'wholly or mainly' in Scotland.

7. We have the following concerns about the current drafting:

• Under the current rules, a claim may be presented in Scotland if any of the four conditions set by Rule 8(3) are met. The draft Article 5 in its definition of what is a 'Scottish case' takes a different and much more restrictive view, and it is unclear why this should be so. No information is provided on what amendments may be made to the Tribunal Rules that will apply for England and Wales in the light of the changes now under consideration, but we would assume that the rules for England and Wales will, in all important respects, mirror those found in the rules for Scotland. We would therefore assume that there will in the future be 'English cases' that cannot be presented in Scotland, as well as 'Scottish cases' that cannot be presented in England and Wales. Until there is confirmation that this will indeed be the case, it is difficult to express a concluded view on the adequacy of the definition of a 'Scottish case'.

• The bar contained in draft Article 8 ("Transfer of Proceedings") on there being, in relation to a Scottish case, a transfer of proceedings to England and Wales appears unnecessarily rigid. Only concurrent cases may be transferred. Changes in the circumstances of the parties involved in a case which is classed on presentation as a Scottish case may make it appropriate for the claim to be heard in England and Wales. Yet it seems that there can be no transfer of anything that starts its life as a 'Scottish case' even although one or more of the conditions set in what is presently Rule 8(2) are met. The rationale for such a restriction is again unclear. Again, it is at present unknown if there are to be similar provisions found in the new version of ET Rules that will be required for England and Wales. There would not appear to be any good reason why the two sets of rules should not adopt the same approach to jurisdiction. Obviously to have such congruence will make it easier for the many who will have to work with both sets of tribunal regulations. While it is not strictly speaking relevant to this consultation, we can see no good reason for restricting (for 'English cases') the bringing of claims in Scotland when one or more of the conditions currently found in Rule 8(3) are met.

• It may be that there are economic or policy considerations in restricting the number of claims to be brought in Scotland but it is important that the legislation is as clear as possible to avoid unnecessary litigation.

• It is unclear why the draft Article 5 has changed the wording relating to the performance under a contract from 'partly' to 'wholly or ordinarily'. It is our view that this will mean claimants who should be considered as bringing a Scottish case are seen instead as having a 'concurrent case'. For example an employee whose employer resides in Scotland, who was dismissed and/or discriminated against in Scotland but happens to have a remit to sell goods in England as well as partly in Scotland should, in our view, be seen as having a Scottish case rather than a concurrent case, given the fairly tenuous connection with England and the strong connections with Scotland. In such a situation the individual will have no absolute right to go to tribunal in Scotland; he or she will have to apply to do so, and of course any such application may be opposed.

• The current drafting will mean that many Scottish claimants will need to bring claims under Article 6 and Article 7 concurrent jurisdiction, which may in turn lead to points of jurisdiction being argued before the First Tier Tribunal. In our view if the drafting in Article 5 is not wide enough to encompass all cases as per the example above then there will be the risk of litigation if respondents seek to argue (as we expect some will) that the claims should be raised in England because they do not meet the requirements of being a concurrent case, or because while they do meet the requirements there are good grounds for them not being heard in Scotland. This will add an extra procedural complication to the making of a claim - something which will raise costs and cause delay.

8. It is our view that using the existing language of 'partly' more fairly describes what should be seen as a Scottish case. Further such language will limit the need for preliminary hearings for those who meet all the conditions but work partly in Scotland rather than 'wholly or ordinarily'.

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

Do you feel that the provisions in article 7 appropriately define those cases that have a sufficient connection to Scotland?:
9. The current position is that, organisationally, the jurisdictions between Scotland and England & Wales are treated as distinct. The Employment Tribunal rules of procedure, namely the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, determine in which of the two jurisdictions a case should be heard.

10. Rule 8(3), which sets out the rules currently in force to determine where a claim may be heard in Scotland is excerpted above.

The proposed position

11. Article 7 of the draft order is in the following terms:

7. A 'concurrent case' is an employment claim which is not a Scottish case but in relation to which one or more of the following conditions is met
(a) the respondent or one of the respondents resides or carries on business in Scotland,
(b) the acts or omissions complained of took place wholly or mainly in Scotland.
(c) the claim relates to a contract under which the work is or has been performed wholly or mainly in Scotland, or
(d) the Tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is wholly or mainly a connection with Scotland.

12. The first point to note is that Article 7 effectively introduces a 2 step test. Article 7 makes clear that a concurrent case cannot be a Scottish case. Scottish cases are defined in the proposed Article 5. Accordingly Article 5 will require to be applied first and only then can one look to Article 7. Thus an additional level of complexity is introduced into jurisdictional questions and this is regrettable from the point of view of easy access to employment rights.

13. Does the proposed Article 7 appropriately define those non Scottish cases that have a sufficient connection with Scotland? We would suggest not. Article 7

speaks of a connection which is ‘wholly or mainly’ but what does that mean? Without further guidance, Article 7 does not appropriately define what is intended by a sufficient connection with Scotland other than in terms of sections (a)-(c) which would in any event provide jurisdiction in Scotland in terms of Article 5. One might think of a situation where the connection is with the UK as a whole, rather than with any geographical region. For example, the situation where there is a civilian employee who is working abroad for the purposes of the UK armed forces. In that situation the connection is as much with England and Wales as it is with Scotland, and it is not clear why, in such a situation, the claim should not be seen as giving rise to a ‘concurrent case’, allowing the claimant to choose where to litigate.

14. ‘Wholly or mainly’ is not a criterion used in Rule 8. The draft order does not reflect the mirrored wording of Rule 8, detailed above. The potential result is that not only will there be inconsistency and uncertainty between the jurisdiction rules for the First Tier Tribunal and the Employment Tribunal of England and Wales going forward but also the whole body of case law on jurisdiction in employment tribunal cases, built up to date, will be of limited assistance standing the different criteria. One can well foresee preliminary points being taken that the connection is not ‘wholly or mainly with Scotland’, thereby adding another layer to the resolution of the employment disputes.

15. To illustrate the differences in criteria, Rule 8(3)(b) provides that one or more of the acts or omissions complained of took place in Scotland. The proposed Article 7 provides that the acts or omissions took place wholly or mainly in Scotland.

16. Rule 8(3)(c) provides that the claim relates to a contract under which the work is or has been performed partly in Scotland. The proposed Article 7 provides that the claim relates to a contract under which the work is or has been performed wholly or mainly in Scotland.

17. Rule 8(3)(d) provides that the Tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is at least partly a connection with Scotland. The proposed Article 7 provides that the tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is wholly or mainly a connection with Scotland.

18. It is not clear from the consultation materials why different criteria have been suggested and drafted in the framing of Article 7. However, what seems a likely outcome is that claims that can presently be pursued in Scotland may not be able to be so pursued under the proposed Article 7. That raises important considerations of access to justice. There is the potential for claimants to be denied access to Employment Tribunals in Scotland.

19. By way of example, consider a claim of discrimination brought by an employee living in Newcastle and working for an employer based in Newcastle, the alleged discrimination being a number of acts over a number of years (a “continuing act”). Although most of the acts are alleged to have taken place in England, the most significant of the acts are alleged to have taken place in Scotland. Under the present rule 8, a claim could be pursued in Scotland. However under the proposed Article 5 and 7, a claim could not be pursued in Scotland, the reason being that the case would not be a ‘Scottish case’ and nor would it be a ‘concurrent case’ and that notwithstanding that Scotland is the place where the most significant events took place. Also in the same example, what if an equal number of significant acts occurred in England and Scotland. If an equal number, can one say that the acts or omissions took place wholly or mainly in Scotland? In such cases, the current Rule 8 appears more equitable.

20. Further, Article 7(d) as currently drafted would probably cause difficulties in the common North Sea scenario where, for example, a peripatetic worker might live in Grimsby and fly from there to his Gas Platform in the Dutch Sector of the North Sea and yet all the administration for his employment is managed by his American employer from their offices in Aberdeen. Who has jurisdiction? Under the present rule 8, Aberdeen has a permissible and a sensible jurisdiction. Under the proposed Article 7(d), the connection would be with Grimsby.

21. These examples illustrate possible confusion and demonstrate circumstances in which Claimants may be denied access to justice in Scotland.

22. It is interesting to note that the criteria employed in the draft Article 7 is also at odds with the approach adopted by the Civil Jurisdiction and Judgements Act 1982. Paragraph 4 of Schedule 8 of the 1982 Act provides:

4 (1) In matters relating to individual contracts of employment, jurisdiction shall be determined by this rule, without prejudice to rule 2(f).

(2) An employer may be sued—
(a) in the courts for the place where he is domiciled; or
(b) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so [emphasis added]; or
(c) if the employee does not or did not habitually carry out his work in any one place, in the courts for the place where the business which engaged the employee is or was situated.

(3) An employer may bring proceedings only in the courts for the place in which the employee is domiciled.

(4) The provisions of this rule shall not affect the right to bring a counter-claim in the court in which, in accordance with this rule, the original claim is pending.

(5) The provisions of this rule may be departed from only by an agreement on jurisdiction—
(a) which is entered into after the dispute has arisen; or
(b) which allows the employee to bring proceedings in courts other than those indicated in this rule.

23. It is submitted that the provisions of the 1982 Act, in so far as they relate to employment matters, are more akin to Rule 8 than the proposed Article 7, and are worthy of consideration as showing an alternative approach.

24. With the increase in workers working flexibly, there is a danger that the proposed Article 7 will occasion unnecessary uncertainty, unnecessary inconsistency and limit access to Employment Tribunals in Scotland.

8 Are you content with the draft Order’s other provisions?

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

25. We are concerned that a move to integrate the present system of employment tribunals in Scotland within the structure of the First Tier Tribunal will be damaging to what, in our view, must be the primary objective of the reforms now under consideration: the maintenance of a high level of judicial expertise that ensures the effective adjudication of contested employment rights. We believe that, in the 50 years of its existence, the employment tribunal system (both in England and Wales and in Scotland) has established itself as a body that delivers a specialist knowledge of the law and one which has a good practical understanding of the realities of working relationships. We are concerned that this reputation will, at least in part, be lost in Scotland if the separate identity of employment tribunals is not carried through into legislation.

26. We note that the present proposed reforms would appear to have their origins in a wish to re-order the administrative arrangements for the running of Employment Tribunals. No doubt there can be improvements made in this area to reflect the political decision to devolve additional powers to the Scottish Parliament, but it is significant that there has been no pressure from the professional users of the system for the kind of change that is now under consultation. Put simply, we believe that, especially in the light of the important improvements brought about by the new Rules of Procedure adopted in 2013, the tribunals do excellent work in interpreting and applying the law, and we do not believe that the changes now being considered will lead to any improvement of the service which the Employment Tribunals offer to those who use the system. Indeed, we fear the very opposite will result.

27. The concerns we have may be placed under three headings: (1) the role and status of employment judges; (2) the quality of legal decision-making; (3) public perceptions of change.

Role and status of employment judges

28. We are aware that the proposal to remove, by reason of amendment of section 3A of the Employment Tribunals Act 1996, the title of "employment judge" from those who presently hold it has occasioned much protest from the judges themselves. We have no brief to defend the judges, though we sympathise with the views that have been expressed, to the effect that the changes proposed will tend to devalue the office of employment judge. We do not detect any intention to bring about such a result, but that is not really the point. At the very least it is likely that there will be a loss of identity and cohesion among this group if specialist employment judges instead become part of the cohort of legal members of the First Tier Tribunal. That is something we see as likely to affect morale and feelings of self-worth, particularly when associated with a loss of opportunity for legal specialisation. We believe that such a change, when taken together with the replacement of existing judicial tenure with fixed term appointments for a period of five years, will make the office of employment tribunal judge much less attractive.

29. In the short term we would expect the majority of existing judges to exercise a right not to transfer into the new First Tier Tribunal; in the longer term it will make appointment as a legal member of the First Tier Tribunal less attractive, and therefore likely to attract candidates of lesser calibre. We take it as axiomatic that if less talented candidates are appointed as judges/legal members, this will impact adversely on the effectiveness of the system so far as employment law is concerned, and that this will not be in accord with the declared policy aim of Scottish Government (Consultation Document, para.7) that "Scotland has a modern, efficient and effective tribunals system that meets the need of the Scottish people." If, as is anticipated, existing judges choose, in the main, not to transfer to become legal members of the First Tier Tribunal then there will, over some period of time, be a two-tier judiciary that will deal with first instance employment litigation. (That, of course, is on the assumption that in line with assurances given by the Advocate General for Scotland in the House of Lords there will be no pressure on existing judges to transfer, and that the services of existing employment judges are retained so that they can operate within the new regime.) It would be, at the least, confusing to have two categories of employment judges operating in Scotland – the "old" employment judges with one status as members of the United Kingdom Tribunals Service and associated terms of service, and the "new" First Tier Tribunal members, with a different status and set of terms.

30. We are left unsure how appeals from Scottish employment cases will be regulated. The Consultation Document states that it is envisaged that appeals will go to the Upper Tribunal for Scotland, instead of, as at present, the Employment Appeal Tribunal. We believe that there is considerable value in retaining existing arrangements, whereby there is cross-fertilization between Scotland and England and Wales in the operation of the EAT. The regular participation of the President of the EAT in Scottish cases has been of great value in ensuring consistency between the jurisdictions and uniformity of standards. We also believe that it is useful for the Senator who chairs the EAT when it sits in Scotland to have the opportunity of sitting as a judge in London and to share with his or her English colleagues views on how the law is developing and issues of common concern.

31. Under the Tribunals (Scotland) Act 2014 it is competent for all who hold the office of Sheriff to sit in the First Tier tribunal for Scotland, and in principle this would allow a Sheriff to be appointed to an Employment Chamber (were this to be created) of the First Tier tribunal hearing appeals on employment matters. The prospect of such non-specialist judges deciding appeals on employment law issues (which may raise complex points of European as well as domestic law) is worrying, and again we cannot see how such a change would bring any improvement to the system we presently have. We do not believe that any substantial changes should be made to the system for hearing first-instance cases without there being clarity as to what is envisaged by way of appeal.

The quality of judicial decision-making

32. To an extent this has been covered above. It is worth emphasising however that the nature of employment law is such that there is particular benefit in having a cohort of specialised judges with experience and expertise. If this is lost as a consequence of integration within a general First Tier Tribunal, this will have a serious impact on the quality of justice provided.

33. The nature of employment law disputes also marks them off from other contentious issues that come before the generality of tribunals. Employment tribunals deal with disputes between private parties; they are not concerned (save incidentally) with disputes between the state and citizens, as occurs in areas such as tax or social welfare. Although the procedure is less formal, employment tribunals have, at present, much in common with ordinary courts in the way in which cases are managed, evidence is taken, and reasoned decisions delivered. The special status of the employment tribunal was recognised in the creation, under the Tribunals, Courts and Enforcement Act 2007, of a "separate pillar", comprising the ETs and the EAT. If that identity is lost as part of a process of amalgamation with other tribunals falling within the ambit of the First Tier Tribunal, there is a danger that there may be a movement away from a court to a tribunal model, with less emphasis on the protection of rights. We do not understand why the arguments that saw employment tribunals (and the EAT) being placed in a different category from other tribunals are now, apparently, being ignored. There is, we note, nothing in the Consultation Document that addresses the significance or desirability of moving from one model of adjudication to another.

34. If the changes mean that judges who do not have experience in employment law sit as legal members within an Employment Chamber of the First Tier Tribunal, we believe that they will require extensive training before they will be able to deliver decisions of the standard that is achieved by the existing cohort of judges. We do not see how such a change is likely to bring improvements to the present system. Similarly we see a major disadvantage in appeals from first instance hearings to an appellate body where there are non-specialist judges presiding.

35. It would be regrettable if, as a result of the changes under consideration, the level of judicial decision-making in Scotland were to be perceived as lower than that found in England and Wales. While we do not question the ability of non-specialist Scottish judges at first instance and appellate levels to acquire skills in employment law if given appropriate training, we believe there is likely to be a perception amongst users of the system that the system has been downgraded. That will mean that decisions which come out of Scotland dealing with reserved matters of employment law will be seen as less authoritative or persuasive than those emanating from England and Wales. We think that this is a particular danger at the level of the EAT unless the present arrangements allowing for cross-border co-operation and cross-fertilization continues.

36. We note that during the debate on Clause 37 in the House of Lords, it was suggested (by Lord Wallace of Tankerness) that provision should continue to be made for tribunal judges in Scotland to sit in England and Wales, and vice versa. That seems to us a very helpful proposal that will assist in maintaining appropriate standards of judicial expertise and we would accordingly endorse it.

Public perception of change

37. Over the 50 years of their existence, employment tribunals have earned a place in the public consciousness as specialist labour courts that work well. If they are replaced by a chamber of a First Tier Tribunal it is, we think, likely that ordinary people will take this as a sign that employment rights (and their adjudication) have come to be seen as less important than they were. Put simply, the changes will be seen by those who use the system as amounting to a downgrading of employment and equality law. We do not believe that it is the Scottish Government's intention to encourage any such revaluing of the system of employment law as it operates in Scotland, and we hope that some thought can be given to how the "brand" of the employment tribunal can be maintained. It would be unfortunate if, as seems entirely possible, the impression were to be given that in respect of reserved employment rights there was within Great Britain a "two-tier" system, with Scotland providing a generally lower standard of judicial decision-making.

38. One possibility would be to retain the name of "Employment Tribunal" for whatever body is appointed to carry out adjudicatory functions after the changes envisaged by Clause 37 of the Scotland Bill. We can see no reason why, even if the body known as "Employment Tribunal" were to sit within the formal administrative framework of the First Tier Tribunal, it should not do so while retaining its present name. Similarly we would wish to see the Employment Appeal Tribunal retaining its name, in preference to becoming simply a named chamber of the Upper Tier Tribunal. The rationale for maintaining the present nomenclature is twofold: first, that it will minimise the confusion that otherwise will result from a change of name, and, secondly, it would continue the thinking that underpinned the Tribunals, Courts and Enforcement Act 2007, that saw the Employment Tribunals/EAT as distinct from the other tribunals (of an administrative nature) comprising the unified Tribunal Service that it sat alongside.

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

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

39. No.

Evaluation

10 Please help us improve our consultations by answering the questions below. (Responses to the evaluation will not be published.)

Matrix 1 - How satisfied were you with this consultation?:

Please enter comments here.:
The Faculty of Advocates would like to offer a meeting with some or all of the members who drafted this response, if the Scottish Government would find that helpful.

Matrix 1 - How would you rate your satisfaction with using Citizen Space to respond to consultations?:

Please enter comments here.: