



EMPLOYMENT TRIBUNALS (SCOTLAND)

Response to “Employment Law Hearing Structures” Law Commission of England & Wales consultation paper

General comments

1. We have had the advantage of seeing the consultation response submitted by the Council of Employment Judges (CEJ) on behalf of its members across the United Kingdom, including Scotland. We agree with the terms of the CEJ response and therefore will confine ourselves to making some specific observations which are focused on the proposed devolution of functions of Employment Tribunals in Scotland and the implications of that for the issues arising from this consultation paper.
2. We note that in para 1.26 of the consultation paper it is asserted that “the subject matter of this consultation paper is due to be devolved to the Scottish Parliament Government under the Scotland Act 1998, as amended by the Scotland Act 2016”. While technically it is correct that power in relation to “Employment Law Hearing Structures” is to devolve we consider it important to note that not all of the powers engaged in the questions and proposals in this consultation paper are due to be devolved.
3. The legislative provisions now set out in Schedule 5, part III, para 2A of the Scotland Act 1998 follow upon the recommendation of the Smith Commission (“Report of the Smith Commission for further devolution of powers to the Scottish Parliament”)¹. Paragraph 63 of that report states that “all powers over the management and operation of all Reserved Tribunals... will be devolved” but paragraph 64 goes on to state that “despite paragraph 63 the laws providing for the underlying reserved substantive rights and duties will continue to remain reserved (although they may be applied by the newly devolved tribunals)”.
4. As far as we are aware it remains the case that there are no plans to devolve power in connection with employment law provisions which set out “substantive rights and duties”. We accept there will be scope for debate about where the line falls as between powers which relate to the ‘operation’ of Employment Tribunals (Scotland) and ‘laws providing for the underlying substantive rights and duties’. However, we are unaware of any suggestion that control over provisions governing qualification for access to substantive rights, such as time limits for bringing claims and the test to be applied to extend time etc., or provisions

¹ https://webarchive.nationalarchives.gov.uk/20151202171029/http://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf

relating to compensation limits for breach of those rights, will devolve. That being so, a significant number of the proposals in this consultation paper appear to relate to legislative provisions which, as we understand it, will remain reserved following devolution of functions. It is not difficult to understand why that is likely to be so; following devolution many cases will be “concurrent cases” (ie claims that could be brought in Employment Tribunals (England & Wales) or in the tribunal which will replace Employment Tribunals (Scotland)). If time limits for bringing claims, or the level of compensation that could be awarded in respect of a particular type of employment law breach, differed North and South of the border this would be highly likely to lead to “forum shopping” with litigants choosing the most beneficial forum from their perspective.

5. It should also be borne in mind that many employers operate on a UK or GB wide basis so it is not difficult to understand the problems which might arise if employees working for the same employer North and South of the border, who are subject to exactly the same substantive employment law breach and who have the same losses, could obtain different levels of compensation if statutory compensation caps were fixed at different levels in each jurisdiction. Similarly, it is not difficult to envisage the problems arising if employees working for the employer, say in Scotland, could not bring a claim because it was time barred but employees subjected to the same unlawful conduct on the same day could bring a claim in England because the time limit for bringing the claim was more generous in England. We further note that it is stated at paragraph 1.27 of the consultation paper that “employment legislation is at present, with minor exceptions, the same throughout Great Britain”. We consider it important to bear in mind that this will remain the position following devolution of functions and that this is taken into account when the Commission sets out its proposals following this consultation exercise.
6. It follows from what we say above that we question the accuracy of the assertion, given the scope of the proposals in the consultation paper, that “if and when any recommendation for law reform is taken forward in England & Wales, it will be a matter for the Scottish Government to decide whether they wish to bring forward similar measures in Scotland” (paragraph 1.27). We think the position is much more nuanced than that given the extent of the powers that will remain reserved to the United Kingdom Government.
7. While the timescale for implementation of any of the proposals in this consultation document accepted by the United Kingdom Government is unclear it may be worth noting that it now appears to be generally accepted that the earliest point at which devolution of functions may occur is 2021.

Specific Issues

8. **Time limits** - So far as the issue of extension of time limits for bringing claims is concerned (paragraphs 2.59 and 2.61), the time limits for claims are set out in primary legislation (for example in the Employment Rights Act 1996 and the Equality Act 2010) rather than in procedural rules. As already noted we understand that provisions of this nature are to remain reserved and so it would follow that any changes made to time limits would apply not just to claims brought in England & Wales but also to those brought in Scotland.

9. The same point can be made in connection with any changes made to the test which applies to the extension of any time limits for bringing claims (paragraphs 2.59 and 2.62).
10. **Contractual Jurisdiction** – Although there are separate Employment Tribunals (Extension of Jurisdiction) Orders for England & Wales and Scotland (SI1994/1623 & SI1994/1624) these Orders are to be treated as made under Section 3 of the Employment Tribunals Act 1996. Each Order sets out the scope of the Tribunals’ jurisdiction, the time limits within which complaints must be brought and the limits on compensation which may be awarded for breach of contract. As already noted it has not been suggested to date that legislative power concerning matters of this type would be devolved on devolution of functions. One could easily envisage the difficulties that might arise were changes to be made to the amount of compensation which can be awarded for breach of contract, and the scope of the tribunals jurisdiction to deal with such cases in England & Wales but not in Scotland. It would result in a situation where litigants in Scotland would have less beneficial rights than those in England & Wales in exactly the same type of employment dispute. The difficulties would be particularly acute where a respondent employer operates on a cross-border basis. Forum shopping could well occur, given the high number of employment claims where there is likely to be cross-border jurisdiction even following upon devolution of functions.
11. **Interpretation and construction of contracts of employment** – We suggest that powers in connection with interpretation or construction of contracts of employment, related to the tribunals’ jurisdiction under part I of the Employment Rights Act 1996, lie squarely within the province of reserved law and that any change to the tribunals’ powers in this regard would apply both in Scotland and in England & Wales.
12. **Unauthorised deduction from wages** – the matters considered in paragraphs 4.80 to 4.108 appear to us to lie within the confines of reserved law and therefore any changes made to the relevant statutory provisions would apply in Scotland as well as in England & Wales.

Summary

13. As noted at the outset we are generally content with the answers to the consultation questions given by the Council of Employment Judges. What we have sought to do by means of the foregoing comments is to draw attention to the fact that the division of powers, as between the United Kingdom and Scottish Governments, and the Westminster and Scottish Parliaments, and the consequences of that division of powers, will result in a rather more complex state of affairs than appears to be envisaged in paragraph 1.27, given the scope of the issues and proposals raised in the Commission’s consultation document.

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