



BIRMINGHAM LAW SOCIETY

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**Consultation on Draft Order in Council for
The Transfer of Specified Functions of the
Employment Tribunal to the First-tier
Tribunal for Scotland**

The Scottish Government
January 2016

March 2016

THE SCOTLAND BILL – CONSULTATION ON DRAFT ORDER IN COUNCIL: The Transfer of Specified Functions of the Employment Tribunal to the First Tier Tribunal for Scotland

Response of Birmingham Law Society

QUESTION 2 RESPONSE

Q.2 Do you feel that the provisions in article 7 appropriately define those cases that have a sufficient connection to Scotland?

A.2 No

Summary

1. We note that the concurrent jurisdiction provisions in article 7 would enable a claimant, who would be ordinarily able to (or, perhaps, would expect to) bring a claim in England and Wales (referring to the wording in Article 7 to “*an employment claim that is not a Scottish case*”) could instead take the opportunity to have their employment tribunal claim heard in Scotland.
2. We note that the Scottish government announced in its 'Programme for government agenda for 2015/16' that it "*will abolish fees for Employment Tribunals, when [it is] clear on how the transfer of powers and responsibilities will work.*" In the recently published consultation on the draft devolution Order, we observe that the Scottish government has reiterated its commitment to abolishing fees in the Employment Tribunal.
3. We would be concerned that an abolition of tribunal fees in Scotland, where a fee paying regime remains in England and Wales, could potentially have the consequence of encouraging forum shopping where claimants may take steps to have their case heard in Scotland when, in the ordinary course of events, their case would not be heard in Scotland.

4. We note that this category of “concurrent cases” encompasses cases that have links with both Scotland and England/Wales but which can be heard in a Scottish tribunal and it is under this category that we believe the risk of forum shopping may lie.
5. Our concern is that the conditions for a claim to be heard in Scotland require only one of the conditions set down in article 7 to be met. We consider that the conditions at (b) to (d) are sensibly cases that would, we believe, be expected to be heard in Scotland.
6. We are concerned at the apparent breadth of (a), in particular the suggestions that:-
 - a. “...one of the respondents resides in Scotland”. The requirement that one of the respondents might reside in Scotland could give rise to claims being heard in Scotland where, for example, in a discrimination claim there is an employer respondent and several named individual respondents. It seems incongruous that if only one of the named individual respondents resides in Scotland, that the entire claim could be heard in Scotland. Additionally, this provision might encourage claimants to name Respondents with a tenuous link to their case only for that respondent (or respondents) to be dropped at a later stage; and
 - b. “the respondent or one of the respondents....carries on business in Scotland”. It is not clear what “carries on business” means in this context, but we would be concerned that it appears to be a broad definition. For example, there seems to be no reason why it would not capture a national retailer who operates a number of retail stores within Great Britain, including in Scotland. Would such a business, even with a limited Scottish presence, be deemed to “carry on business” in Scotland for the purpose of this condition? We believe it would be incongruous if, for example, an employee of a retailer who is dismissed from his job working at his employer’s

London Head Office could seek to bring a claim in the Scottish Employment Tribunal by virtue of his employer operating a retail store in Edinburgh (i.e. carrying on business); or likewise, an employee who is dismissed from his role working in London is able to bring a claim in Scotland by virtue of the fact that his employer's head office is in Glasgow.

7. Our concern is that employers may find themselves, unexpectedly, the subject of Scottish employment tribunal jurisdiction by virtue of the breadth of these conditions in article 7(a). This may also have the unintended consequence of over burdening the Scottish system with "forum shoppers".
8. We observe that in the Consultation Document (at paragraph 21) it states that the concurrent jurisdiction provisions are intended to cover cases that have a "*substantial connection*" with Scotland, yet the examples we have set out above are instances of cases where it could be said that the connection is not a substantial one. There is, we believe, a real risk that the stated intentions will be undermined by the potential breadth of this draft wording. Accordingly, we believe that Article 7(a) needs to be tightened up to take account of the above, potential, anomalies.

QUESTION 3 RESPONSE

Q.3 Are you content with the draft order's other provisions?

A.3 No.

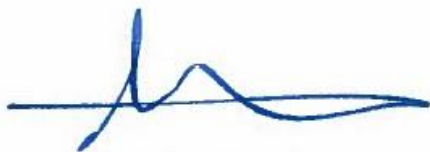
Summary

1. We have had the opportunity of considering the draft response prepared on behalf of the Scottish Employment Tribunals User Group. We support the points made within that detailed response and, in particular, we too would be concerned that the proposal in Article 2 of the draft order to

transfer the functions of Employment Tribunals (Scotland) into the First Tier Tribunal for Scotland, if implemented, may undermine the quality and efficiency of the system for the adjudication of employment disputes in Scotland (contrary to what the Scottish Government has indicated it is seeking to achieve in the process of tribunal reform). We would also be concerned that what is planned could result in respect for the system being diminished in comparison with its counterpart in England and Wales, unnecessary legislative change, and confusion for system users, particularly those that operate across Great Britain. We also consider that what is proposed could result in a legal challenge, given that it undermines the independence of the judiciary and their terms and conditions more generally.

2. We also consider that what is proposed might be seen as unnecessary as Employment Tribunals (Scotland) is already a “Scottish tribunal” (unlike the other currently “reserved” tribunals). It is already constitutionally separate from Employment Tribunals (England and Wales). Under s. 1 of the Employment Tribunals Act 1996 (ETA 1996) the Secretary of State has the power to “make provisions for the establishment of tribunals to be known as employment tribunals”.

11 March 2016



Mushtaq Khan

President

Birmingham Law Society