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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

Response from the Employment Lawyers Association

24 March 2016

Employment Lawyers Association Response

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Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation.

A sub-committee, chaired by Eleanor Mannion of Renfrewshire Council was therefore reconvened under the auspices of ELA's Legislative and Policy Committee to comment on the Consultation document. Members of the sub-committee are listed in Appendix 1.

Question 1 Do you consider that the provisions in article 5 of the draft Order adequately reflect what is a Scottish Case?

Question 2 Do you feel that the provisions in Article 7 appropriately define those cases that have sufficient connection to Scotland?

1. We have found it easier to respond to these questions together, as the two draft Articles in combination will set limits on what cases may be presented to the Employment Tribunal or its successor in Scotland following the devolution of the Tribunal.

2. Currently the limits on the jurisdiction of the Employment Tribunals in Scotland to entertain a claim are set out in Rule 8 of the Employment Tribunals Rules of Procedure 2013 ('the 2013 Rules'). This rule is permissive, in the sense that it sets out which categories of case *may* be presented in England and Wales, and which *may* be presented in Scotland. The cases which *must* be presented in Scotland are currently those which do not satisfy any of the four criteria in Rule 8(2) but do satisfy at least one of the criteria in Rule 8(3): this is not explicitly stated but is a necessary consequence of the structure of the Rule.

3. The 2013 Rules were introduced following a careful review chaired by the then President of the Employment Appeal tribunal, Mr Justice Underhill, with Scottish representation on the working party (Brian Napier QC). The Rules have been generally well received, and we are not aware of any criticism of, or problems arising

in applying, Rule 8 in particular. We also note that it will be necessary as a consequence of the devolution of the Employment Tribunals in Scotland to amend the 2013 Rules as they continue to apply in England and Wales, for instance to remove Rule 8(3). However, the consultation document does not propose any amendment to the terms of Rule 8(2) governing the jurisdiction of the Tribunals in England and Wales. In particular there is no suggestion that there will be a category of cases which *must* be brought in England and Wales.

4. We do not see any reason to depart from the provisions of Rule 8 of the 2013 Rules setting out the limits to the jurisdiction of the Employment Tribunal following devolution. Moreover no reasons are given in the Consultation Document itself as to why there should be two categories of cases, Scottish and concurrent. As the draft Order stands, all cases which meet the conditions in Article 5 to be Scottish cases would also meet the conditions to be concurrent cases under art 7 (and would also meet the conditions to be within the jurisdiction of the ETs in Scotland under the 2013 Rules). The only practical consequences of a case being within Article 5 are that ETs in England and Wales would have no jurisdiction over the case, and (because of the wording of Article 8) there would be no power to transfer the case from Scotland to England and Wales. That would create serious inconvenience for parties to multiple cases involving claimants working for the same employer at establishments north and south of the Border, as the cases in each country would have to be managed and heard separately, thereby increasing the expense to all parties and the case load of the tribunals. There is no explanation in the consultation document as to why this is considered to be desirable, and we consider it to be entirely unnecessary.

5. Our conclusion is that

   (i) Art 5 should be omitted, and the references to it in arts 7 and 8 deleted; this would mean that any case meeting any of the conditions listed in art 7 could be brought in Scotland. These cases should be called 'Scottish cases' rather than 'concurrent cases' in order to comply with the requirement in the Scotland Bill to identify 'Scottish cases'). It would be a matter for the case management powers of the Presidents each side of the Border to deal with cases which it would be in the interests of justice to transfer. We are not aware of any problems arising over the use of these powers in the past and do not anticipate any in the future; and

   (ii) The wording of draft art 7 should be amended to incorporate the wording used in Rule 8(3) of the 2013 Rules. This wording, and the case law on jurisdiction based on it, is satisfactory and need not, and should not, be altered without good reason; and no good reason has been given.

6. We do however recognise that there would be some advantage in clarifying the jurisdiction of the Scottish tribunal over cases arising from employment offshore. We make proposals below for the extension of draft art 7 to cover this point.

7. We recognise that our primary proposals may not be accepted. If that is the case, we would wish to see some improvements in the drafting of art 7. Ideally it should simply replicate Rule 8(3) of the 2013 Rules. The comments that follow are additional points, made without prejudice to our preferred outcomes.

8. Subject to the foregoing, we have no objection to the proposed wording of draft Article 5(1) or 5(2) (b) or (c). We are however concerned at the proposed wording of Article 5(2)(a), and aspects of Article 7. The concerns we have are as follows:

   (i) The relevant wording of Rule 8 of the 2013 Rules is that a claim must relate to a contract under which the work is or has been performed 'partly' in either England and Wales (Rule 8(2)) or Scotland (Rule 8(3)). Article 5 of the Draft Order instead uses the words 'wholly or ordinarily', whilst draft Article 7 uses the phrase 'wholly or mainly'. We are concerned that the use of different language in the two articles (and in both cases language different from that used in the 2013 Rules) is confusing, implies different, but not easily ascertained, tests, and will lead to disputes about the precise limits of jurisdiction which could easily be avoided by the use of consistent language. We consider that the retention of the wording used in the 2013 Rules is least likely to lead to confusion, and provides a readily understandable and applicable test, and would wish to see Articles 5 and 7 amended by replacing 'wholly or ordinarily', and 'wholly or mainly' respectively with 'wholly or partly'.

   (ii) We consider it important that the Order in Council makes it clear that if a claim is presented to the Scottish Tribunal in accordance with Article 5 or 7, any counter-claim may be presented to the Scottish Tribunal. Again, we consider that it will be a matter for the Scottish Government and Parliament to decide in future whether to extend, or curtail, the right to make counter-claims in the Tribunal, rather than by way of separate proceedings in the Sheriff Court.

   (iii) We are concerned that there is no express reference in either Article 5 or Article 7 to cases relating to employment on oil and gas installations within the Scottish sector of the Continental Shelf. In particular we draw attention to the Equality Act 2010 (Offshore Work) Order 2010, SI 2010/1835, which allocates jurisdiction over claims under the Equality Act 2010 to the Employment Tribunals in England and Wales and Scotland respectively according to where the acts complained of take place. The Schedule to this

Order sets out the precise geographical boundary between the two jurisdictions. We consider that cases falling within the terms of this Order and which are allocated to the Scottish Tribunal by article 3 of the Order should be added to the categories of cases which can be brought in Scotland, as set out in draft Article 7 of the proposed Order (if it is decided that the separate category of Scottish cases is to be retained, we would accept that such cases should be categorised as Scottish cases). Further we consider that this division should apply equally to other categories of complaint which may be made to an Employment Tribunal arising from matters occurring on offshore installations within the Scottish area as so defined (see for instance Regulation 25B of the Working Time Regulations 1998, together with the definition of 'offshore work' in Regulation 2).

(iv) As a further point, the Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011, SI 2011/1171, apply Part 5 of the Equality Act 2010 to seafarers working wholly outwith Great Britain and adjacent waters, if certain conditions are met, including that the ship on which they work is registered to a port in Great Britain. For the avoidance of doubt we consider that it should be made clear that such cases may be brought in the Scottish Tribunal, at least if the port of registration is in Scotland.

(v) In general, these concerns around jurisdiction give rise to real access to justice issues given the very strict time limits in employment law and implications of choosing the wrong forum.

(vi) Without sight of what any new jurisdiction rules in England and Wales will be, we are only able to comment on part of the picture. Depending on what the new rules in England and Wales are, there may be an issue of those South of the border having greater scope to access the Scottish tribunal, than Scottish claimants would have to access the Tribunal in England and Wales. The rules should therefore be drafted to work together.

9. We wish to address a number of further points concerning the scope of the jurisdiction to be transferred under the Order in Council. The first point is the position of claims which have already been commenced but not yet finally determined at the date on which the Order comes into force. We take it as axiomatic that such claims will continue to be dealt with in Scotland, (and correspondingly, pending claims in England and Wales will be dealt with there) unless for any particular reason in an individual case it is more appropriate to have the case transferred from one jurisdiction to the other. The latter situation is appropriately catered for by draft Article 8. However there is no express provision conferring jurisdiction on the Scottish Tribunal over continuing proceedings; we think that in the interests of clarity and certainty there should be such a provision. We note that

the intention is for transitional provisions to be brought in and suggest that any such transitional provisions must deal with this issue.

10. The second point relates to the breadth of the definition of 'concurrent cases' in Article 7 and the concerns which have been widely articulated about the possibilities that the definition creates for 'forum shopping' by claimants bringing proceedings in Scotland which are essentially English cases, the facts of which have arisen entirely in England, relying for jurisdiction on the respondent having a place of business in Scotland. That will of course be the position for almost all major retailers, and many other large organisations, including some in the public sector, such as HMRC, the DWP and Network Rail. We are fully aware that this kind of 'forum shopping' is seen as a possible consequence, in particular, of the Scottish Government's stated intention to abolish fees for employment claims. On the other hand we note that the possibility of such forum shopping (in either direction) already exists under the terms of Rule 8 of the 2013 Rules.

11. Having identified the issue, however, we are not in a position to comment further on it, save for one point we address in paragraphs 12 and 13 below. The ELA, as has been explained in the introduction to this response, represents a range of employment practitioners, some of whom act wholly or mainly for claimants, some wholly or mainly for respondents, and some for both, and who individually have a range of views on the desirability of the situation we allude to above. As a non-partisan organisation, we consider that the decision whether to set the boundaries of the Scottish tribunal's jurisdiction in the terms currently set by draft Art 7 is ultimately a matter for the Scottish Government and Parliament, on which it would not be appropriate for us to express a view.

12. Thirdly, if, as we expect will be the position, fees for Employment Tribunal cases in Scotland are abolished, and if there is no such action for cases in England and Wales (and we note that the UK Government has not as yet made any proposal to abolish fees South of the Border), issues will arise about liability to pay fees when cases are transferred between the two jurisdictions. We consider it important that there be clarity as to what the consequences for fee liability are, in the event that a case is transferred (as may well occur where there are a large number of cases against the same employer, brought in both jurisdictions).

13. The Order in Council already envisages in Article 8 that the President will have the power to transfer proceedings to an Employment Tribunal in England and Wales if it is decided that the case could be more conveniently determined there, and it is presumed that the equivalent power currently given by the 2013 Rules to transfer a case from England and Wales to Scotland will be retained. However, it is not clear in the circumstances what the impact would be for any fees paid/due. In particular, if a case is started in England and then transferred to Scotland, we would expect that no

further fees would be payable, but would fees already paid become refundable? Similarly if a case is transferred from Scotland to England, would the parties become liable to pay fees for any subsequent stages of the case for which a fee is payable in English cases, and would there be any retrospective liability to pay an issue fee? These questions will be of obvious concern to parties and the tribunals should the fee regime differ North and South of the border; but even if the fees remain the same in both jurisdictions, there would need to be accounting mechanisms for transferring fees already paid etc. We consider that the position relating to these matters needs to be made clear as consequential points arising from the power to transfer cases between the two jurisdictions.

Question 3 Are you content with the draft Order's other provisions?

No

Question 4 Do you have any further comments you wish to make on the opportunities provided by qualified transfer of the Employment Tribunal to Scotland?

1. ELA is aware of user suggestions that the proposals may not be legally competent given the definition of a Scottish Tribunal in Clause 39 of the Scotland Bill. We are continuing to look at this and the potential ramifications of this competency risk.

2. We note the objectives of this Draft Order in Council are to meet the aims of the Smith Commission by effectively transferring the functions of the Employment Tribunals to the Scottish Ministers while maintaining the integrity of the tribunal system and ensuring a modern, efficient and effective tribunal system that allows users to effectively enforce their individual employment rights. These are aims are laudable; ones that ELA agrees should underpin the Order in Council. The thrust of the consultation document considers the definitions of what a Scottish case or a concurrent case would be post devolution. The proposal that the Employment Tribunal function would transfer to the First Tier Tribunal for Scotland (FTTS) is secondary in this. From ELA's perspective the consequences that will flow from this latter suggestion, that the Employment Tribunal functions will be transferred to sit within the FTTS as created by the Tribunal Scotland Act 2014, requires careful thought and consideration to ensure that Scottish users continue to have access to a robust and efficient decision making system on employment matters. This proposal will see the abolition of the separate pillar within which the Employment Tribunal and the Employment Appeal Tribunal (EAT) currently sit. No explanation or rationale

has been provided as to why this is seen as the best fit for the Employment Tribunal save for the desire outlined by the Scottish Government that they wish to ensure a modern and efficient tribunal system that is of the highest quality for users. It is an objective ELA sees as integral for access to justice and the proper adjudication of employment law in Scotland. However, ELA is of the view that abolishing the separate pillar will run counter to this objective.

History of the Separate Pillar

3. Tribunals as a whole, both administrative and employment, were looked at in the Leggatt review and subsequent report in 2001 entitled "Tribunals for Users, One System, One Service". Leggatt considered how these diverse decision making bodies could be reformed so as to increase efficiency for users and ensure they were effective in their decision making. Leggatt noted that the Employment Tribunals were "not true administrative tribunals" and recognised the unique jurisdiction of the Employment Tribunal, one which was legally complex requiring a primarily adversarial approach. He pointed out the importance of the Employment Tribunal's role in improving the landscape of industrial relations since the Donovan Commission. He attributed the success of the Employment Tribunals to "the composition of the tribunal, the absence of fees and the proximity of Acas" and advised that this "should be risked only in the light of clear evidence that there is a substantial problem".

4. This unique jurisdiction was recognised again in the 2004 when the administration of the Employment Tribunal was transferred from the Department of Trade and Industry (the precursor to BIS today) to the Lord Chancellor's Department where it was shared by the Department of Trade and Industry and the Ministry of Justice. At that time, a guarantee was made in the Protocol detailing the transfer that "in recognition of the differences of party and party tribunals from the administrative tribunals which deal with disputes between party and state, the Employment Tribunal Service will retain a separate identity within the overall Tribunals Service, forming a distinct pillar within the organisation with administrative tribunals forming the other pillar." The separate pillar was again considered in the 2007 Government report "Transforming Tribunals" published as part of the consultation exercise before the implementation of the Tribunals, Courts and Enforcement Act 2007. Although establishing the UK wide First Tier Tribunal and Upper Tribunal that has been echoed in the Tribunals Scotland Act 2014, the report reiterated the guarantee outlined above from the 2004 Protocol as well as recognising the "degree of specialisation and expertise that makes the ET unique". It was therefore not surprising that the positioning of the Employment Tribunal and the EAT within the separate pillar was recognised in the consultation that took place in advance of

enacting the Tribunal Scotland Act 2014. This Act was preceded by a lengthy consultation document in 2012 that outlined the Scottish Government's position in relation to devolved Tribunals and the impetus for setting up the FTTS. The consultation paper was concerned that with the enactment of the Tribunals Courts and Enforcement Act 2007 which brought the UK reserved tribunals together in a single structure, Scotland would be left behind. There was no suggestion during that consultation that the Employment Tribunal would come within this structure and as a result stakeholders with an interest in the Employment Tribunal service were not engaged as part of this consultation. Rather, when setting out how the proposed structure may look in the context of the Scottish Courts and Tribunals structure as a whole, the consultation paper quite clearly set Employment Tribunals and the EAT apart from the Courts Service and the new FTTS and Upper Tribunal in a separate pillar.

Importance of Separate Pillar

5. The functions exercised by the Employment Tribunals are highly specialist and complex in nature. The volume, breadth and complexity of the legislation and associated case law which is dealt with in the Employment Tribunals on a day-to-day basis cannot be overemphasised. Not only do the Employment Judges and Employment Tribunal users have to be familiar and up-to-date with domestic law, but, to a large extent, the matters dealt with in the Employment Tribunals are underpinned by complex European law. This domestic and European jurisprudence is constantly evolving, and this fast paced nature of substantive employment law has a significant impact on employment rights and obligations. By way of example, over the last three years a significant change to the law surrounding holiday pay has occurred through a combination of domestic and European decisions, resulting in mass litigation collectively worth millions of pounds and significant policy changes and cost implications for employers across Great Britain. The Employment Tribunal currently has jurisdiction over 70 different types of actions and typically cases are not confined to just one jurisdiction.

6. Fundamentally, the nature of the disputes heard in Employment Tribunals and the dynamic between the parties (employer-employee) justify the existing separate pillar arrangement. The cases brought are "party v party" and are adversarial in nature. Given the complexity of applicable law, parties are regularly represented by lawyers and advocates with numerous witnesses giving evidence under oath to allow the Tribunal make findings of fact and law. In contrast to the cases dealt with in the FTT (with the exception of the private rented housing cases), the Employment Tribunals are a private, rather than an administrative law forum. Reflective of this, comparisons have consistently been drawn between the Employment Tribunals and

civil courts, which has recently been brought to the fore by a suggestion (as part of the Briggs Report) that it may be more appropriate for the functions undertaken by the ETs in England & Wales to be moved into an "Employment and Equality" court, sitting within the civil court structure. While this is, at this stage, simply a recommendation, there is a strong sense that it may be viewed by the UK Government as the right way forward for the ETs in England & Wales. This is considered further below at the section entitled **Future Proofing**.

7. Whilst there are many synergies between the nature of the cases dealt with by the Employment Tribunal and those dealt with in the civil courts, it has always been recognised that the Employment Tribunal has a unique and distinctive culture. This culture is, to a large extent, borne out of the balance which Employment Judges seek to achieve between the effective determination of adversarial litigation; minimising formality; and ensuring parties, particularly unrepresented parties, are placed on an equal footing. This unique blend of solemnness and informality is what many would regard as the hallmark of the Employment Tribunal system as it current stands, and is perhaps what explains the historic and current resistance to moving the functions undertaken by the Employment Tribunal into what is considered to be inappropriate forum.

8. The separate pillar arrangement also accommodates the existence of specialist Employment Judges, capable of handling the wide-ranging and complex law applicable to the disputes being heard, whilst ensuring that there is no unnecessary formality to proceedings, and that, in particular, unrepresented parties are assisted throughout the process. Testament to the specialist nature of the duties they perform, the Employment Judges currently sitting in the ETs Scotland have a vast degree of experience in these specialist judicial offices and in terms of the substantive law they are applying. As outlined in paragraphs 29 - 32 of this response, there is a significant and very real concern that if the proposal is implemented, the contribution of such specialist Judges will be lost, particularly given the FTT structure and underlying legislation.

Implications of removing the Separate Pillar

9. The removal of the separate pillar and the transfer of the Employment Tribunal and the EAT into the FTTS will have significant and wide ranging implications in respect of the following areas:

- Access to Justice
- The Employment Appeal Tribunal
- The Judiciary

- Future proofing

Access to Justice

10. Paragraph 7 of the Consultation document sets out the Scottish Government's aim of having a "modern, efficient and effective tribunals system". Reference is also made to contributing to specific National Outcomes in terms of creating a devolved Employment Tribunal for Scotland, namely:

- Tackling significant inequalities in Scottish society; and
- Ensuring Scotland's public services are high quality, continually improving , efficient and responsive to local people's needs.

11. In this regard, ELA believe the following particular points require to be fully considered. The proposal would see the Employment Tribunal in Scotland cease to be a distinct legal tribunal, being absorbed into the existing FTTS. At present there is no formal indication as to whether the Employment Tribunal in Scotland would become a stand-alone chamber within the FTTS. It is ELA's view that transferring the Employment Tribunal in Scotland into the multi-purpose FTTS may have the consequence of downgrading the present status of the Employment Tribunals in Scotland, reducing the confidence of service users of the effectiveness of such a tribunal, acting as a disincentive to parties seeking to take disputes before the Employment Tribunals in Scotland. The title "Employment Tribunal" carries with it brand recognition and goodwill. It is something that has built up over the years as landmark or interesting tribunal cases seep into the public consciousness. Regular people on the street are aware that if there have difficulties with their employer, they can take a case to the Employment Tribunal. We understand that the desire under this proposal is for a single portal or point of entry within which users can access all manner of Tribunals. Getting the First Tier Tribunal for Scotland (Employment Chamber) (if this were to be the official title) to the current level of recognition will take years of information and marketing campaigns. It is noted that the GB run reserved First Tier Tribunals that have been in place since 2007 do not have the same brand recognition or goodwill that the Employment Tribunal experiences among potential users. Given the short time frame within which users have to lodge claims, this could further disadvantage them if they are unaware where to bring their claim. When you factor in the continuing existence of the Employment Tribunals in England and Wales, ELA is of the view that the FTTS dealing with employment issues in Scotland will not be viewed by users of the service as a tribunal of equal importance and standing as the Employment Tribunal in England and Wales. Simply put, having two tribunals, with one called the Employment

Tribunal and the other called the FTTS, will lead to an assumption by users that the latter tribunal is a downgraded version of the former.

12. It is noted that the current tribunals which presently form the FTTS are almost exclusively involved with determinations in respect of regulatory matters or disputes between private individuals and the state. ELA believes that incorporating the Employment Tribunal in Scotland into the FTTS, which presently deals with disputes raised party against party, will have the consequence of again depriving service users of access to a tribunal system which is designed to deal with a more traditional form of legal claim.

13. Should incorporation into the FTTS be viewed as downgrading the legal status of the Employment Tribunal of Scotland, there may be consequences in terms of the availability of Legal Aid for claimants. Given the significant cuts made to the Scottish Legal Aid budget in recent years, it has become ever more difficult for claimants who are of limited financial means to obtain Advice & Assistance and Advice By Way of Representation from the Scottish Legal Aid Board to obtain legal representation before the Employment Tribunal. Given the complex nature of employment law rights, the absence of such legal representation can dissuade claimants from pursuing their rights. Should the incorporation of the Employment Tribunal in Scotland into the FTTS result in a further limitation of the availability of legal aid this may prevent claimant service users from being able to effectively pursue their legal rights.

14. ELA also believe that the proposal to remove judicial status from Employment Judges and have employment disputes determined by legal members is an issue that requires careful consideration. This is discussed further in paragraphs 29-32 but looking at it from the point of view of access to justice, ELA believe that the potential loss of experienced and skilled Employment Judges create a real risk of employment disputes not being determined properly or appropriately at first instance. This may create a further loss of confidence in the adjudication of employment law matters in Scotland. Equally, the lack of skilled Employment Judges may leave many service users receiving unjust decisions, creating a culture where only those parties who have the financial means to appeal the outcome of any dispute to a higher court or tribunal will obtain justice. This could have consequences for both claimants and respondents.

The Employment Appeal Tribunal

15. The Draft Order in Council is concerned with the Employment Tribunals only. Be that as it may the Consultation paper at paragraph 14 states "Whilst the draft Order does

not deal specifically with the Employment Appeal Tribunal (EAT), it is envisaged that equivalent provisions for the EAT will be made in relation to Scottish cases, so that these can be heard in Scotland's Upper Tribunal." The Consultation paper therefore anticipates "equivalent provisions" although none have yet been published. ELA is aware that the ministerial intention is for the EAT to transfer at the same time as the Employment Tribunal for consistency purposes. We also understand that there will be a written consultation on the proposals for the EAT. The concern for users and practitioners is that once a decision is made about the Employment Tribunal and whether it sits with the FTTS system, decisions about the EAT will be a fait accompli. It will have to transfer into the Upper Tribunal. That being so, comment on the likely impact on the EAT of proposed changes to it is bound to be speculative.

16. The Policy and Drafting Note for the Order records that Clause 39 of the Scotland Bill makes provision for a qualified transfer of specified tribunal functions to a relevant Scottish tribunal. Further, it records that the Order must specify the functions to which the transfer relates and the particular Scottish tribunal to which those functions are being transferred. That being so, any Order dealing specifically with the EAT will require to specify the functions to which it relates and the particular Scottish Tribunal to which those functions are being transferred.

17. The Consultation paper anticipates that the EAT's functions will be transferred to Scotland's Upper Tribunal. This reference to the Upper Tribunal is to one established under section 1(1)(b) of the Tribunals (Scotland) Act 2014. Section 12 of that Act sets out that the guiding principle is the need for proceedings before the Scottish Tribunals (a) to be accessible and fair, and (b) to be handled quickly and effectively. Section 23 of the 2014 Act sets out that the Upper Tribunal is to be organised into a number of divisions, having regard to (a) the different subject-matters falling within the Tribunal's jurisdiction, and (b) any other factors relevant in relation to the exercise of the Tribunal's functions, that organisation to be done by regulations made by Scottish Ministers. It is possible to speculate therefore that a new division of the Scottish Upper Tribunal would be created and would deal with the functions of the EAT.

18. Section 17 of the 2014 Act contains the provisions for those eligible to act as a member of the Upper Tribunal.

19. Those eligible to act as a member of the Upper Tribunal are:-

- A judge of the Court of Session, or,
- The Chairman of the Scottish Land Court, or
- A sheriff.

20. Section 17 also sets out the detail of whose authority and approval is required for any of them to act.

21. Speculating based on the current statutory framework and the guiding principle, it is probable that on the authority of the President of Tribunals and with the Lord President's approval, a judge of the Court of Session would act as the member of the Upper Tribunal for the relevant division, although we accept that the 2014 Act permits a wider selection pool than currently is the case. This approach would be consistent with the principles of accessibility, fairness and effectiveness.

22. An obvious consequence of the creation of a division within the Scottish Upper Tribunal performing the functions of the EAT is the loss of the EAT as it is currently constituted, that is, as a unitary court with jurisdiction in England and Wales and in Scotland. We assume that the EAT will continue as a court in England and Wales only.

23. A consequence of that loss is that the practice of Scottish judges sitting in the English EAT, and vice versa, would cease. The practice of cross-border judicial sitting has been in existence for some time and continues. That fact of itself suggests that the practice is of value both for the EAT as a court and for the judges who do so. It is also a way of ensuring that individual rights are effectively enforced across the UK, an aim set out in the Consultation paper. This proposal would result in the loss of it. In ELA's view that is a loss in both jurisdictions.

24. On the issue of access to a first level of appeal, the current position is that an appeal lies to the EAT on any question of law arising from any decision of or arising in any proceedings before an employment tribunal in the various jurisdictions listed at Section 21 of the Employment Tribunals Act 1996. In the regime proposed, a first level appeal would be on a point of law only and require permission of either the FTTS or the Upper Tribunal. The requirement that first level appellants would require to obtain permission from the FTTS would be an additional requirement which may deter appellants. The interpretation of law that allows for changes to be effected comes about more often than not through the appeal process as Tribunal decisions are not binding, but rather persuasive. The recent holiday pay cases would not have led to a change in how employers view annual leave payments without authoritative decisions from the EAT in Scotland. This could make an appeal less accessible and would create a substantive divergence north and south of the border, one that is not to Scotland's benefit.

25. The current position on a proposed appeal from the EAT is that leave is required from the EAT or if refused from the Court of Session on an application to the Inner

House. The question is whether there is a probabilis causa in relation to a genuine point of law.

26. If the appellate function transfers to the Scottish Upper Tribunal, this also has implications on the test for appeal from the Upper Tribunal to the Court of Session (a second appeal). Neither the Upper Tribunal nor the Court of Session may give permission to the making of a second appeal unless also satisfied that the matter in question either would raise an important point of principle or practice, or there is some other compelling reason for allowing a second appeal to proceed. The "test" in the proposed regime for an appeal progressing to the Court of Session is arguably more stringent that that in the current regime. This could deter or prevent the progress of an appeal which in the present regime would be heard and would create a substantive divergence north and south of the border.

27. Currently, as a single appellate court the EAT's decisions are binding on all employment tribunals, whether those decisions are made in England or Scotland. The decisions of higher courts are binding on the EAT. The EAT is bound, therefore, to follow decisions of the Supreme Court. It must also follow decisions of the Court of Appeal (when hearing an appeal instituted in England) and the Court of Session (Inner House) (when hearing an appeal instituted in Scotland). The English Court of Appeal has said that while Scottish Inner House decisions are not binding on lower English Tribunals, those decisions "should be followed".

28. In the regime proposed, with the loss of a single appellate court, there is a risk that decisions at the first level of appeal in one jurisdiction are no longer binding in the other. There is a risk that for example, the EAT in England considers itself not to be bound by decisions of the Scottish Upper Tribunal employment division and that this will lead to a gradual divergence in certain areas. The various issues noted here could well deter litigants from making claims in Scotland, particularly large multiple claims in the vein of the equal pay litigation that is now taking shape in the private sector. This along with potentially fewer appeals to the Upper Tribunal and even fewer to the Court of Session could reduce the impact or relevance of the Scottish courts in employment law jurisprudence generally. Scotland could become the "poor man" in that regime where decisions of its appellate bodies are less well regarded than those in England and Wales. This would not contribute to the national outcome of high quality and continually improving public services response to Scottish people's needs.

The Judiciary

29. The Tribunals (Scotland) Act 2014 outlines three types of member who can sit in the FTTS – ordinary members, legal members and judicial members. Judicial members are Sheriffs. Therefore, the current Employment Judges would not be seen as judicial members within the FTTS but rather legal members. We are concerned that this change downgrades the status of current Employment Judges, who will if they agree to transfer to the FTTS have to do so as legal members with a loss of status, title and (most concerningly) tenure. Under the 2014 Act appointments of legal members to the FTTS are for only five years with no guarantee of renewal. One reason outlined in the Act for not renewing this fixed five year term is redundancy. Current salaried Employment Judges hold office until retirement with statutory guarantees of judicial independence. Alongside this statutory guarantee is the accepted principle that tenure is required for judicial independence. Furthermore, public confidence in the independence of the decision maker is of paramount importance, particularly in Scotland given the large number of employees of the state, whether that is the NHS, Local Government or other state agencies. Any perception that the decision makers on employment rights are less than independent because of their type of employment is very concerning indeed.

30. The limited tenure issue may well also impact upon the identity of those who apply for any posts in the future. We are concerned that this may dissuade those who would see an appointment as an Employment Tribunal Judge as a career, rather than a period in which to spend the last years of their career. We are concerned about the impact on the numbers of women who might, in those circumstances, seek appointment to the role in the future. Currently the sitting judiciary of the Employment Tribunal has a higher proportion of female judges than other areas of the Scottish judiciary. We are not aware of an Equality Impact Assessment Report having been conducted in respect of this proposal. If this has been undertaken, we would be interested to see the findings.

31. We note that the Minister in charge of clause 37(as it was then called) in the House of Lords, Lord Keen of Elie, made the point when this clause was considered in Committee that current Employment Judges will be able to choose whether to transfer to the new system. If (as we fear may happen), many do not, this would represent a serious loss of accumulated expertise and weaken the standing of the tribunal as an interpreter and enforcer of the law. This is particularly the case as the Employment Tribunal in England and Wales will continue with judges deciding the cases that come before them. Some members have raised the concern that if and when fees are abolished in Scotland, users will see that if they pay a premium, their case will be decided by a judge rather than a legal member, something that is relevant when multiple claims are brought to test legislation or expand existing laws.

32. By placing the Employment Tribunal within the FTTS rather than continuing in a separate pillar, there will be a much greater risk that legal members of the FTTS who, whatever their skills and experience, are not familiar with and have no background of experience in employment law will be assigned to hear employment cases; this would devalue the system both absolutely and by comparison with the English tribunals, which are not in a position of facing the dilution of judicial talent. Employment legislation has become so complex that it is vital that the judges who apply it have experience and expertise in this area of the law, particularly in cases where the power to award compensation is unlimited. We refer again to the 2004 Protocol which guaranteed that "the existing statutory requirements for sitting on the Employment Tribunals and EAT panels will be retained as will, as a minimum, existing training requirements. Employment expertise in the Employment Tribunals will not be diluted." No such guarantee is outlined within this draft Order in Council or accompanying guidance.

Future proofing

33. In order to ensure a modern efficient tribunal for users, any proposals need to include an element of future proofing. ELA is of the view that should the employment tribunal function be transferred to the FTTS, there is very little room for manoeuvre in terms of future proofing the Tribunal. After a lengthy period of transferring over the functions to the FTTS and the required changes made to all pieces of legislation that refers to Employment Tribunals, it is unlikely there will be any appetite to consider changing the Employment Tribunal further. Discussions are ongoing in England and Wales at this time on the proposals outlined in the interim Briggs report which suggests change is needed across the board in the civil courts structure. When considering the Employment Tribunal, Briggs has three suggestions:

    (a) To leave the ET (and the EAT) where they are.

    (b) To bring both tribunals broadly under the wing of the structure of the civil courts.

    (c) To make both tribunals part of the Tribunal Structure, as First Tier and Upper Tribunals respectively.

34. Option (c) was rejected, albeit without much explanation, and option (b) is the preferred option. As outlined above, although this is simply a recommendation at present, it is a recommendation that is gathering steam among stakeholders. It may be that the Scottish Government wishes to take their own route in terms of how employment matters will be adjudicated and what the devolved Employment

Tribunal will look like. This is a political point that we do not intend to comment on except to request that more detailed consultation is engaged in so that stakeholders and users can comprehensively feed into how the devolved Tribunal may look, to ensure that users can effectively enforce their rights contained in reserved employment law and policy. To have a wholly different Tribunal to what is currently provided simply as an unintended consequence of devolution would be very disappointing. We however would remind all parties of the underlying concern leading up the enactment of the Tribunal Scotland Act 2014 that Scotland would be "left behind" without a unified structure for the devolved administrative tribunals to sit within. It would be unfortunate if the same feeling arose if and when the Briggs proposals are brought forward.

What Next?

35. Suggestions have been made throughout the consultation period that to deal with the concerns raised, a separate Employment Chamber could be created under the Tribunals (Scotland) Act 2014. The Chamber would handle employment matters exclusively and the definition of judiciary would be expanded to include the current Employment Tribunal judiciary. This will require extensive legislative changes, not only to the Tribunals (Scotland) Act 2014 which was enacted to streamline and unify devolved Tribunals rather than allow for exceptions to the rule, but also to every piece of legislation that refers to the Employment Tribunals (Scotland). It also does not deal with concerns raised surrounding the EAT and the right of appeal or the potential to future proof the Tribunal.

36. Users have also suggested that the creation of a Scottish separate pillar is the best way forward, pointing to the fact that it would mirror what is currently in place and include an element of future proofing.

37. Given all that is outlined above, particularly in light of a potential consultation on the EAT, ELA is of the view that a second more detailed consultation is required. This would provide reasoned options for users and stakeholders to comment upon to ensure the devolved Employment Tribunal will fulfil the objectives set out by BIS and the Scottish Government in their consultation documents.

Appendix 1 Sub-Committee members

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