Law Society of Scotland

Consultation Response

Changes to the procedure rules on the provision of written reasons for decisions

October 2024

Photo: Aerial view of Glasgow city

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Employment Law and Administrative Justice Law sub-committee's welcomes the opportunity to consider and respond to the Government's Tribunal Procedure Committee consultation: Changes to the procedure on the provision of written reasons for decisions[1]. The sub-committee has the following comments to put forward for consideration.

[1] Changes to the procedure rules on the provision of written reasons for decisions - GOV.UK (www.gov.uk)

Proposal 1: time limits for requesting written reason (paragraph 23 to 28)

Question 1: Do you agree that the time limit for requesting discretionary written reasons should, in general, be reduced to 14 days?

Please see comments in Question 13.

Question 2: Do you agree with the proposed exceptions? Should there e any other exceptions for other classes of case, and if so, why?

Please see comments in Question 13.

Question 3: Do you have any other observations about this proposal?

No comments.

Proposal 2: decisions and reasons in the First-tier Tribunal (Tax Chamber) (paragraph 29 to 31)

Question 4: Do you agree that rule 35(2) of the Tax Chamber rules should be amended to remove the obligation to provide the notice of decision within 28 days?

No comments.

Question 5: Do you agree that the consent of the parties should not be required in the Tax Chamber for an unreasoned written decision to be given provided sufficient oral reasons have been provided?

No comments.

Question 6: (A) Do you agree that full written reasons should be restricted to the unsuccessful party, where oral reasons have been given at a hearing?

(B) Do you agree that such reasons should be limited to the issues upon which the party was unsuccessful?

(C) Do you agree with the proposed definition of "unsuccessful party"?

The Employment Law Sub-Committee's knowledge and experience of tribunal litigation is principally confined to the Employment Tribunal (the "ET"). We have therefore elected to restrict the scope of specific parts of our responses to the ET, namely questions 6, 7 and 10.

A) No. We do not agree that the right to request full written reasons should be restricted to the unsuccessful party.

While we would agree that the stated aims of the SPT - to ensure proceedings are handled quickly and efficiently - are sensible, we are not aware of there being any investigation or statistical evidence provided demonstrating how much time would be saved by restricting the right to request to the unsuccessful party.

Whilst we are unaware of any figures, we would anticipate that a successful party is far less likely to apply for written reasons (for a number of reasons, including that they will not be appealing and that they have won). However, this does not mean that they should not have the option to do so without having to rely on an interest of justice application (proposed rule 62(12)).

If this proposal were pursued it may be helpful to provide further investigation into and clarity as to how much time is likely to be saved.

We would anticipate that when issuing an oral judgment, judges will still go through the same mental process of identifying the issues, determining the relevant facts, identifying the law and applying the law to the facts. While undoubtably additional time would be spent in documenting the process, where a successful party would like clarity as to why that decision was arrived at, we believe that this should be an option available to them. The tribunal process, like any litigation, can be extremely wearing for both sides, including the successful party. On one view, the parties have earned the right to have the decision fully explained, including a written document of this.

Decisions may have wider relevance and impact and the principles behind a decision may be relevant to the wider workforce. It may be highly relevant to a successful party to understand fully the rationale behind a decision, to enable it to assess its application in other circumstances, and to explain that to the wider workforce and its representatives.

We would support the observations made by the TPC in the consultation (*paragraph 77 to 79*), in particular: the proposal may introduce an asymmetrical

system of justice for the parties to a case, resulting in vastly different experience of access to justice. The successful party may have an equally strong desire to know the reasons for their success and the weight given to the relevant evidence. To prevent the successful party from applying for written reasons breaches the principle of natural justice that parties should understand the reasons for success or failure in their case and arguably runs contrary to the overriding objective of the employment tribunal (rule 2, ET rules) which is to ensure so far as practicable parties are on an equal footing.

We would also reiterate the observation of the TPC (*paragraph 74 and 84*) that we are unaware of other courts or systems of justice that restrict access to full written reasons in the manner proposed leading to a greater divergence in practice between the civil courts and the tribunals.

B) No. It can be difficult to separate issues without providing a full context. To give limited written reasons without clarifying the basis of the rest of the decision will be a recipe for confusion for both the parties and the public (as it is proposed such limited written reasons still be entered on the register under revised rule 67).

It would, we anticipate, create issues with any appeal. The unsuccessful party would be at a disadvantage in that they would not be in a position to understand the full mindset of the tribunal when assessing whether they have grounds for an appeal (assuming the only document of the tribunal's findings are the limited written reasons). Quite apart from needing to understand the full reasoning of the tribunal in formulating its decision and the weight it attributed to the evidence before it, lack of adequate reasons can also of itself provide grounds for appeal (see Meek v City of Birmingham DC [1987] IRLR 250).

The appeal tribunal may also be at a disadvantage if it only has limited written reasons before it in assessing the appeal. (On this point we are unclear as to whether proposed rule 62(10) is intended to apply to all appeals or only on specific request by the appeal tribunal.) If an unsuccessful party were only given limited written reasons, but the appeal tribunal then request full written reasons under 62(10), there will essentially be two sets of written reasons in circulation. We would again suggest this is a recipe for confusion.

The successful party (we assume, but it is not clear) will receive a copy of the limited written reasons if these are requested by the unsuccessful party. If the successful party is defending an appeal, a full record of the tribunals reasoning would also be appropriate and in some cases necessary to formulate a response.

If the unsuccessful party only receives written reasons based on the unsuccessful part of the claim and these are the only parts of the decision entered on the register, this will create issues with case precedent. Clarity will be limited as to why a claim is likely to fail; not when it may be a success.

Again, we support the observations made by the TPC at *paragraph 86* of the consultation document. When a party wins some issues but not others and both "unsuccessful" parties apply for limited written reasons restricted to the issues they lost, the judge will be issuing a patchwork of written reasons depending on the applying party.

C) In terms of the definition of "unsuccessful party" (i.e. a party who has been unsuccessful in whole or in part) there may be cases where confusion arises as to whether a party has been unsuccessful. For example, if a claimant in an unfair dismissal claim applies primarily for reinstatement or re-engagement but receives compensation instead, are they considered an unsuccessful party? If a claimant seeks a certain level of compensation but the award falls short of this, are they an unsuccessful party? If they are not, they will not be entitled to written reasons clarifying how the amount has been calculated.

Question 7: (A) Do you agree that an "interests of justice" test will be sufficient to address any concerns raised by the TPC (and any other observations you may have)?

(B) Are the proposals consistent with the principle of open justice or nonetheless desirable to achieve greater efficiencies in the system?

A) No. We don't think it is fair that a successful party or an unsuccessful party who would like full written reasons (rather than limited written reasons), would be required to rely on a catch all provision to exercise what should be a right to an accessible and clear written judgement in their case. Judges will be forced to decide applications under proposed rule 62(12) on an ad hoc basis rather than having a uniform system of procedure.

B) We do not consider the proposals are consistent with the principle of open justice. Again, we support the observations made by the TPC in the consultation on this point (*paragraph 80 to 82*) and, in particular, the need for transparency in a legal system.

In Ameyaw v PricewaterhouseCoopers Services Ltd UKEAT/0244/18/LA, Mrs Justice Eady QC In the context of considering an application under rule 50, ET rules) observed that the principle of open justice whether derived from the common law or from the ECHR is a fundamental aspect of the rule of law. "*It is a principle that does not simply require that judicial hearings should generally take place in public; it also requires that Judgments will generally be publicly available (see, e.g., Pretto v Italy [1984] 6 EHRR 182 at paragraphs 21 to 23). This is not only a consequence of the right to a fair trial under Article 6 ECHR, it is also an aspect of the Article 10 right of freedom of expression, which encompasses the right to impart and receive information*..." (paragraph 33). In considering whether the proposals meet the principles of open justice therefore, consideration should be given to both Article 6 (the right to a fair trial) and Article 10 (the right to freedom of expression). In A v Burke and Hare UKEATS/0020/20/DT principles of open justice were also considered in the

context of an anonymity order under rule 50. Lord Summers held in a postscript to the case that the principle of open justice was its strongest when it restricts or interferes with reporting or publishing the merits of the case, usually at the point when evidence is led (paragraph 69). Open justice can increase candour if witnesses are clear that their evidence will be reported and can be accessed by people who are aware of the true position (paragraph 39).

In terms of achieving efficiencies in the system, we would comment:

- As we say above, it is unclear exactly how much time is likely to be saved should the proposals go ahead. As the judge will be required in any event to go through that mental process to arrive at the oral decision, will efficiencies be much greater? If the system of justice is less clear, we would suggest there is greater potential for satellite litigation. This may include litigation around what is in the "interests of justice".
- If the right to request full written reasons is more limited, with the result that there is less case authority potentially, there may be more litigation from parties who are unaware of why or how the law is developing in a particular area (especially so if written reasons are limited to points a party has failed on, rather than succeeded on). Case precedent and the doctrine of common law underpins our legal system. If decisions are increasingly made in the dark, this will represent a substantial move away from a cornerstone of the Scottish hybrid and English common law systems.

Proposal 3: General Regulatory Chamber tracks and reasons (paragraph 32 to 46)

Question 8: Do you agree with the introduction of the “standard track” and the “open track” in proceedings before the General Regulatory Chamber?

No comments.

Question 9: Do you agree:

A) That the rules should make provision for the GRC to identify the “principal issues” in standard track cases; and

B) that reasons that reasons in a standard track case may focus on its conclusions on the principal issues in the proceeding.

A) No comments.

B) No comments.

Proposal 4: Employment Tribunals (paragraph 47 to 54)

Question 10: Do you agree with the introduction of short-form and full reasons in the Employment Tribunals?

Subject to certain safeguards and to guidance being given as to when short form and full reasons should be given, we would agree with the introduction of short form reasons.

The proposal states that "would be directed solely to the parties, who will already be familiar with the case, the issues, and the legal framework. Short-form reasons could be crafted specifically with the parties in mind, especially where one party does not benefit from legal representation."

We consider that it is of paramount importance that the Tribunal recognise that in most cases where a party is unrepresented, that party is likely to only have a limited understanding of the issues and legal framework applicable to their case. In such circumstances, issuing short form reasons would, in most cases, be inappropriate.

We would recommend that short-form reasons be restricted in the main to cases where parties are legally represented. Guidance should be issued to ET Judges as to the limited circumstances where short-form responses would be appropriate (e.g. in cases involving a small number of discrete issues, where the Judge is satisfied (and can demonstrate) that an unrepresented party has demonstrated an understanding of the issues and legal framework relative to the matter.

Question 11: Should the time limit for requesting short form reasons be 7 or 14 days?

Please see comments in question 13.

Question 12: Do you agree with the omission of rule 61(3) of the ET Rules?

Yes.

All Proposals

Question 13: Do you have any other observations about any aspect of the proposals?

1. We are grateful for the opportunity to comment on the proposed changes to the procedural rules for all Chambers of the First-tier Tribunal, the Employment Tribunal (England and Wales) and the Employment Tribunals (Scotland), with particular

regard to the rules for requesting written reasons for decisions and other case management measures. Parts of this response have been prepared by our Employment Law Sub Committee and relate specifically to the Employment Tribunal, whilst our Administrative Justice Sub Committee have submitted more general observations and concerns about the nature of some of the proposed change from a wider administrative justice perspective.

2. We observe that, as opposed to courts, tribunals are intended to be informal, user-friendly and accessible to users. With regard to the extent to which these proposals accord with the stated statutory aims of the Tribunals Procedure Committee (TPC) in exercising its rule-making function, paragraph 4 of the consultation states that the TPC seeks, among other things, to:

   (a) make the rules as simple and streamlined and possible;

   (b) avoid unnecessary technical language;

   (c) enable tribunals to continue to operate tried and tested procedures which have been shown to work well; and

   (d) adopt common rules across tribunals wherever possible.

3. We would suggest that, in overall terms, the consultation proposals fail to meet these aims in respect of items (a), (d) and possibly also item (b). The underlying reasoning behind the proposed changes requires to be simplified for a clearer understanding. We would suggest the adoption of common rules across tribunals appears to have been overlooked, with proposals for different time limits for different tribunal jurisdictions and within jurisdictions, without any reasons for such differences being clear. Tribunals are intended to be accessible to their users, many of whom will not have the benefit of legal representation, we would suggest there must be more clarity and consistency of the proposed rules promoting more simple and transparent processes.

4. We would suggest that time limits should be clear and consistent across all tribunals. Paragraph 25 highlights the various current time limits for requesting written reasons, namely **28 days** in the **Immigration and Asylum Chamber** and **Tax Chamber**; **one month** in the **Property Chamber** and **Social Entitlement Chamber** and **42 days** in the **War Pensions and Armed Forces Compensation Chamber**. It is our understanding that these were the respective time limits which applied in those jurisdictions before they came into the unified tribunal system and which have remained ever since.

5. Time limits should only be reduced where there is a clear evidence base for doing so and suitable safeguards are in place. The proposal to lower any of the current time limits to 14 days in some instances could be considered unreasonable as it does not provide sufficient time for some users to decide whether there may be a need for full reasons to enable an informed decision to be taken on the merits of making an onward appeal. We would suggest that reducing time limits to 14 days also fails to take account of inherent delays which may occur in the UK postal system. We also note that the proposed 14 day default limit is then subject to a number of exceptions, which are applicable to different jurisdictions within the same tribunal Chamber. If the proposed changes are to take effect, there may be a risk of confusion from tribunal users who are not familiar with the system.

6. Whilst we note that the time limit for requesting a written record of full reasons in the Employment Tribunal will remain at the current 14 days, this is not a reduction but rather a retention of the status quo. From experience, we consider that the current 14-day time limit works satisfactorily and should not be reduced.

   We note, however, that proposal 4 also envisages a 7-day time limit to request a written record of short-form reasons in circumstances where a short-form oral judgment has been given. We disagree with this, and consider that a time limit of at least 14-days would be more appropriate as:

   - We consider having two different time limits for similar requests creates considerable scope for confusion and error (particularly amongst non-legally represented parties). This risks injustice in itself, and would likely lead to a significant number of applications to excuse a missed time limit. ETs having to deal with a significant number of such applications would be antithetical to the proposals' overriding objective, i.e. reducing delay and improving efficiency.

   - The proposal appears to compel parties who have received an adverse short-form oral judgment to take a two-stage approach to requesting a written record of full reasons (i.e. such a party must initially request a written record of short-form reasons, and thereafter subsequently request a written record of full reasons). This forcibly two-stage approach again appears antithetical to reducing delay and improving efficiency.

   - Under the proposal, requesting a written record of short-form reasons is an unavoidable interim step for a party that wishes to appeal an adverse short-form oral judgment. A party who is considering whether or not to appeal is unlikely to have formed a final decision within 7 days of receiving the short-form oral judgment. Accordingly, we envisage that a practice may arise of unsuccessful parties "automatically" requesting a written record of short-form reasons as a matter of course (which, once again, appears antithetical to reducing delay and improving efficiency).

7. As previously highlighted, we do not recommend that the default time limit to request written reasons should be less than 14 days, and ideally all time limits should be consistent. Paragraph 27 of the consultation states '*this proposal has been formulated on the basis that whether to make a request for written reasons is not a complicated decision and requires little effort*'. We would suggest that any decision to request written reasons is intrinsically linked to enabling an informed decision to be taken on the merit of pursuing an onward appeal, which could involve an appellant in significant legal costs.

8. We would suggest that the TPC adopt a default time limit across all jurisdictions for consistency, no lower than 14 days, but ideally up to 28. We would further suggest there be no provisions for exceptions, but rather, provision for time to be extended

for ‘good cause’. This would allow for a clearer understanding for both tribunal users and tribunal judiciary, resulting in being streamlined with the TPC’s stated aims to (a) make the rules as simple and streamlined as possible and (d) adopt common rules across tribunals, wherever possible.

For further information, please contact:

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