

Consultation Response

Possible Changes to the Employment Tribunal Rules

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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 sub-committee welcomes the opportunity to consider and respond to the UK Government consultation: *Possible Changes to the Employment Tribunal Rules*.¹ The sub-committee has the following comments to put forward for consideration.

Consultation Questions

Question 1: Do you agree with the TPC's proposed approach to the remaking of the Rules? If not, why not?

Broadly yes. In particular, we note the following observation within the consultation document with which we are in agreement:

"The TPC does not anticipate making significant changes in relation to most of the existing Rules. On balance the TPC believes the existing Rules are working well."

We agree that the current Rules of Procedure do not require to be re-written in their entirety and that insofar as possible the TPC's Rules should replicate the current Schedule 1 of the 2013 Regulations.

We note that two tranches of changes are anticipated which will be subject to further consultation. We would welcome such further consultation prior to changes being implemented as many of the noted potential changes are material, for example changes to the rules relating to unless orders and strike out.

We note that one of the stated aims of the TPC when making Rules is to seek to adopt common Rules across tribunals where appropriate. We would observe that employment tribunals were created to provide a specific and accessible forum for deciding disputes between workers and employers. There is a risk that the specificity of employment tribunals is undermined by applying blanket rules to all types of tribunal. We would suggest that this should be considered by the TPC when deciding whether or not to make amendments.

¹ [Possible changes to the Employment Tribunal Rules - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/possible-changes-to-the-employment-tribunal-rules)



Question 2: Do you agree with the TPC's proposed approach to Schedules 2 & 3? If not, why not?

Yes. Again, we note the following observation within the consultation document and are in agreement with it:

"Although the TPC considered seeking to incorporate Schedules 2 and 3 into the main body of the Rules, its preliminary view is that those Schedules should be retained in their existing form. As noted above, the TPC believes that, broadly, the Rules are working well."

Question 3: Do you agree that the rules should give the Senior President power to delegate any judicial function under to the rules to staff, subject to a fresh consideration by a Judge? If not, why not?

We have a nuanced view in relation to this question. While we recognise the potential benefits in delegating decision making to legal officers in some circumstances, we do not agree that the Senior President should have power to delegate *any* judicial function to staff.

We agree it is appropriate for Tribunals to have the power to delegate decision making on the matters listed in Regulation 10B. The introduction of decision-making by legal officers in Scotland is a relatively new development and anecdotal evidence from our members suggests there have been instances of incorrect decision-making in relation to minor uncontested matters. As such, until the current arrangements in relation to powers exercised by legal officers are working well, we consider expanding those powers would be premature.

Currently, legal officers' functions are restricted to what might be broadly classed as procedural and/or uncontested matters.

We have reservations about legal officers' functions being extended to matters that would be classed as substantive and/or contested. This is because:

- Such matters generally have a greater impact on the eventual outcome of a case, and therefore benefit from the expertise and experience of an Employment Judge. We would note that often substantive decisions in employment tribunal cases (for example regarding extensions of time) require consideration and analysis of complex legal principles derived from case law.
- Decisions on such matters are likely to constitute a successful outcome for one party, and an unsuccessful outcome for another party. We are concerned that a practice may emerge of an unsuccessful party routinely (or, even, automatically) applying for such decisions to be considered afresh by an Employment Judge. Such a practice, if it emerged, would defeat many of the benefits of the legal officer role and would add to the workload of the Tribunal, rather than increasing the efficiency of same.



Having made the above observation, however, we note that the TPC's expectations regarding additional authority for legal officers (listed at paragraph 59 of the consultation document) are broadly limited to additional procedural and/or uncontested matters. We agree that it would be appropriate for legal officers to have decision-making powers in respect of the matters listed at paragraph 59.

In any event, we agree that the "safety net" of the right to have any legal officer decision considered afresh by an Employment Judge should be maintained. We observe that in some situations, even decisions that appear procedural and routine may actually be substantive and/or contested due to the precise circumstances of the case.

Question 4: Should the rules require that the Senior President of Tribunals' power of delegation be exercised through a Practice Direction? If so, why?

No

Question 5: Do you have any other comment on this draft Rule?

We restate our reservations (articulated above) about legal officers' functions being extended to matters that would be classed as substantive and/or contested.

Question 6: Do you agree with the TPC's proposal to remake regulation 12, while moving the power to prescribe the claim and response forms from the Secretary of State to the Presidents of Employment Tribunals in each jurisdiction? If not, why not?

Yes. We consider that this proposal would bring welcome flexibility, particularly at a time when the process of running an Employment Tribunal case is likely to be subject to ongoing changes with the gradual adoption of the HMCTS portal.

Rule 99 Transfer of Proceedings between Scotland and England & Wales

Question 7: Do you agree with the proposed changes to Rule 99? If not, why not?

Yes. The proposal would bring welcome flexibility, and help to avoid operational delays.





For further information, please contact:

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