23 March 2016

Dear Sir/Madam

**Consultation on Draft Order in Council transferring specified functions of the Employment Tribunal to the First-tier Tribunal for Scotland**

The Equality and Human Rights Commission is the National Equality Body (NEB) for Scotland, England and Wales. We work to eliminate discrimination and promote equality across the nine protected grounds set out in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. We are an “A Status” National Human Rights Institution (NHRI) and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC).

We have been unable to use the online process effectively. Please accept this letter as our response to Q3 of the consultation.

**Expertise and Specialism**

Currently the Employment Tribunal deals with highly specialist and complex discrimination and equal pay cases, which require expert training and
experience on the part of the decision-makers. Legal members of the Employment Tribunal are experts in their field and the Commission would have concerns were this level of expertise to be lost or diluted. The Tribunals (Scotland) Act 2014 make provision for all legal members of the First-Tier Tribunal to sit in any chamber and it would appear that it is intended that this would be the case for the Employment Tribunal also.

The Mental Health Tribunal is recognised as a specialist tribunal within the first-tier tribunal system and sits in a chamber of its own. In the Commission’s view the Employment Tribunal should also be recognised as a specialist tribunal where only suitably trained and experienced specialist members can sit. This would assist in retaining and fostering the expertise and specialism that currently exists in Scotland.

Judicial Demographics

Schedule 2, Part 1 of the Draft Order appears to have the effect of removing judicial status from those hearing employment cases in Scotland, as section 3A of the Employment Tribunals Act 1996, the right to be referred to as Employment Judges, would be applicable only to those who sit in Employment Tribunals in England and Wales.

The demographics within the judiciary and legal members in tribunals in Scotland, show that men outnumber women. It appears that only 29% of High Court and Court of Session judges in Scotland are female. In the more balanced fora of the Mental Health Tribunal and the ASNTS men account for 56% and 54% respectively of legal members. The Employment Tribunal appears to be the only forum where judges are predominantly female. It is commendable that the Employment Tribunal attracts more women and the government will want to ensure that, in devolving the Employment Tribunal, nothing is done that would detract from that Tribunal's ability to attract women as well as men as legal members.

Appeal Procedure

While the draft Order does not consider the Employment Appeal Tribunal, the consultation paper, at paragraph 14, states that it envisages that appeal cases

1 http://www.scotland-judiciary.org.uk/34/0/Senators-of-the-College-of-Justice/a#List
2 https://www.asntscotland.gov.uk/content/conveners-and-members
will be heard in the Upper-Tier Tribunal. At present, decisions of the EAT are binding across Britain, no matter where the decision is made. The Commission would welcome further information on the relationship envisaged between the EAT and the Upper Tribunal.

**Conclusion**

The Commission is grateful for the opportunity to comment on the provisions for transferring specified functions of the Employment Tribunal to the First-tier Tribunal for Scotland. In line with our comments above we would ask the Scottish Government to bear in mind the complex and specialist nature of discrimination cases that are brought under the Equality Act 2010 and ensure that the new system will be equipped with adequate resources and the availability of specialist members to hear such cases in order to ensure that access to justice, is maintained and if possible, enhanced.

We hope this response is useful. If you have any questions, please do not hesitate to contact us.

Yours faithfully

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