Employment Tribunals in Scotland

Characteristics, Jurisdiction and the Resolution of Labour Conflicts pre and post Brexit

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History

- The tribunal has its origins in the Industrial Training Act 1964 but at that time the limited range of employment rights that existed had to be pursued in the civil courts.
- Donovan Commission led to the Industrial Relations Act 1971 – this marked the true beginning of the system we have now and was a significant development in the creation of individual employment rights.
- Industrial Tribunal procedure was to be "as informal and free from technicalities a possible". However, it is now quite a formal, adversarial process with more than half of litigants legally represented. Not much different to a court. Changed name to Employment Tribunal in 1998

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Extent of jurisdiction

- Geographical – ET(E and W) and ET(S)
- Employment law is not devolved to Scotland. It is controlled by the UK government. Employment law is the same in Scotland, England and Wales except for a very small number of mainly procedural differences. It is very similar but not the same in Northern Ireland – control of employment law is devolved to N.I.
- The ET can determine more than 100 different types of claim but it does not deal with claims about accidents at work nor does it deal with recognition of unions for collective bargaining- Central Arbitration Committee

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Constitutional matters

- Employment Tribunals are judicial bodies with the same guarantees of independence/freedom from state interference as the courts in England, Wales, Scotland and Northern Ireland
- Employment Judges are lawyers who must have been legally qualified for at least 5 years (in practice the vast majority are lawyers who have been in legal practice, specialising in employment law, for much longer than that when appointed).
- ET non legal members – employee and employer

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Constitutional matters

- These days Employment Judges will sit alone without members in many types of cases
- However non legal members must sit in final hearing of discrimination cases and a few other types of hearing
- They used to always sit in unfair dismissal cases but now only sit in about half of those cases
- Some people/organisations are not happy about decline in use of non legal members

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Focus on individual rights

- In the UK trade unions are much less powerful than they used to be. Far fewer working relationships are governed by collective agreements and industry wide agreements are virtually unheard of.
- Over the last 30 years the focus has been on extending individual employment rights, many of which come from EU law.
- Most claims in ET are brought by employees or workers (sometimes groups of them) against employers but the remit of the ET is wider than this.

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Additional claims within ET jurisdiction

- Appeals brought by employers against health and safety improvement and prohibition notices.
- Appeals by employers against training levy
- Appeals by employers against unlawful act notices issued by the Equality and Human Rights Commission
- Appeals by employers against notices issued by Wages Inspectors in connection with paying the national minimum wage
- Application by Secretary of State for order preventing a person/company/partnership from carrying on business as an employment agency

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Union related claims

- Unions can bring certain types of claim to ETs
- Failure to consult with recognised union in case of proposal to dismiss 20 or more employees because of redundancy
- Failure to consult with recognised union in case of transfer of undertaking
- ET s can deal with various claims brought by individuals against trade unions – these are individual claims

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Individual claims

- Normally brought by **employees** or **workers** against employers (or can be potential employer or former employer)
- Less commonly claims may be made by individuals against their trade union, government minister, their business partners, an employment agency, those responsible for appointing people to various public offices, bodies responsible for conferring qualifications, trustees of occupational pension schemes.

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Who benefits from individual rights?

- Most rights are conferred on those who fall within the definition of "employee". They get all the rights that "workers" get and more on top.
- Some rights are conferred on those who fall within the definition of "worker". Often EU derived rights are conferred on "workers" as well as "employees".
- Those who are truly "self employed" have no rights under employment law.
- This means there are often legal disputes about whether someone is an employee or a worker or truly self employed – e.g. major case involving Uber – drivers held to be workers.

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Definitions

- S230 Employment Rights Act 1996:
- '"Employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment';
- A '"contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.
- "Worker" means anyone who works under a "contract of employment" or "any other contract, whether express or implied and (if it is express)whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services" for another whose "status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by that individual".

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Definitions

- Equality Act 2010
- S.83 "Employment" means
  - 'Employment under a contract of employment, a contract of apprenticeship or a contract personally to do work';
  - Crown employment;
  - Employment as staff member in House of Commons or House of Lords
  - Provisions relating to employment apply to service in armed forces in same way as they apply to employment.
  - Police officers also covered by Equality Act provisions.
  - The differences between rights of workers and employees are under scrutiny – Workers (Definition and Rights) Bill – private member's bill

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Where is the law to be found

- Mainly in domestic legislation - Acts of the UK Parliament (not Scottish Parliament) and in Statutory Instruments (secondary legislation). We don't have a 'labour code' but our Acts of Parliament read together are similar in nature
- Common law has some relevance – contract law, assessment of damages, delict/tort. When it is that can give rise to some differences between Scotland and England/Wales but these are minor. Some procedural differences too between Scotland and England/Wales
- System of case precedent operates – higher courts bind the lower courts

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Where is the law to be found

- Law of E.U – European derived employment law mostly comes in form of EU Directives which require to be incorporated into domestic law – sometimes done in primary legislation but normally done by secondary legislation. Treaty Articles give some rights. For example Article 157 is about equal pay
- Directive sets out legally binding framework designed to achieve a particular effect. It is an instruction to member states – if not obeyed within time fixed then public sector employees/workers can rely on directive itself (if it is clear, precise and unconditional – doctrine of vertical direct effect) and private sector employees/workers can sue the state (under the Francovitch principle) - no horizontal direct effect
- EU Treaty Articles do not require to be incorporated. They have "direct applicability" and "direct effect"- can be relied upon against public and private employers (vertical and horizontal direct effect).

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EU:Interpretative approach

- European Law has primacy over domestic law (European Communities Act 1972). Where there is a conflict between domestic law and a directly effective provision of EU law the court or tribunal must disapply the offending domestic law if it cannot be read in a way to give effect to EU law.
- Where a provision of EU law does not have direct effect the courts must interpret domestic law, insofar as possible, to give effect to EU law – concept of indirect effect.
- If in doubt we can currently make a reference to the CJEU asking about meaning of EU law

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Impact of Human Rights Act 1998

- HRA 1998 incorporates in to UK law the European Convention on Human Rights – international convention between 47 states who are members of Council of Europe which is not the same as the European Union.
- S.3 HRA says "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
- UK Supreme Court can make a declaration of incompatibility if concludes that domestic law is incompatible with Convention rights – S4 HRA.
- Convention rights include right to a fair trial, freedom of thought and religion, respect for private and family life, freedom of assembly.

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Pre-claim procedure

- Advisory, Conciliation and Arbitration Service (Acas)
- Normally before a claim can be made to the Employment Tribunal the claimant must have contacted Acas to tell them about the situation and discuss whether they want Acas to approach the other party in the case (respondent) with a view to trying to resolve the dispute before the claim has to be made – early conciliation (EC). Time limit to bring the claim is stopped while this process goes on. Claimant does not have to agree to conciliation nor does respondent. What happens is confidential and can't be used against the parties if a claim is made to the ET.
- If claim then brought to ET then claimant needs an EC number
- Around 12% of claims settle at EC stage. Around 35% do not progress further. Remainder lead to claim to ET. Acas still have power to conciliate once claim is made to ET.

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Role of Acas

- More than 50% of the claims that are made to the ET are resolved with the assistance of Acas
- Acas also has a role in conciliation in collective disputes. They resolve around 90% of the collective disputes which are referred to them by trade unions and employers.
- Acas has a helpline which deals with around 800,000 calls each year from employers and employees.

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Overview of ET claims

- Common claims include
  - unfair dismissal, (all employees in GB have protection if employed for 2 years, unlike the position in Brazil?)
  - breach of employment contract
  - failure to provide a written statement of terms of employment
  - discrimination – sex (including pregnancy and maternity discrimination and equal pay), race, disability, gender reassignment, sexual orientation, religion and belief, age
  - various parental rights including maternity and paternity – dismissal or detriment, ……..

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Overview of claims

- various wage related claims (including national minimum wage)
- public interest disclosure (whistleblowing) detriment and dismissal,
- transfer of undertakings – detriment, dismissal, consultation
- redundancy and consultation rights,
- Flexible working – right to request and have seriously considered
- working time breaches, (control of working time like Brazil)
- Detrimental treatment for various reasons -part time workers, agency workers, acting as health and safety or union rep etc.

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Most common claims: unfair dismissal

- Employment Rights Act 1996 (not EU related)
  - S. 94 Unfair dismissal "An **employee** has the right not to be unfairly dismissed by his employer".
  - S.95 Dismissal occurs if contract terminated by employer, person is employed under fixed term contract and contract not renewed, employee terminates the contract in circumstances "in which he is entitled to terminate it without notice by reason of the employer's conduct." (Constructive dismissal)
  - Normally need to have been employed for two years to benefit from this right (up from 1 year on 6/4/12).

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Most common claims: unfair dismissal

- Special cases where no qualifying period of service needed include
  - where dismissal due to pregnancy or maternity/taking parental or paternity leave,
  - performing duties as health and safety rep or employee rep in redundancy situation,
  - making a "protected disclosure" (whistleblowing),
  - asserting a statutory right,
  - seeking national minimum wage,
  - because employee name appears on a "blacklist" (2010 right – scandal affecting trade union/H and S activists, those who had brought claim to ET etc.),
  - taking part in TU activities etc.

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Most common claims: unfair dismissal

- For the employer to show reason for dismissal
- Potentially fair reasons:
  - Capability (by reference to skill, aptitude, health)
  - Conduct (misconduct)
  - Redundancy
  - Continuing to employ would break the law
  - Some other substantial reason justifying dismissal

S98(4): determination of whether dismissal fair or unfair "depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it [i.e. reason for dismissal] as a sufficient reason for dismissing the employee". That is to be determined "in accordance with equity and the substantial merits of the case".

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Most common claims: discrimination

- Equality Act 2010 prohibits discrimination of various types relating to "protected characteristics":
  - Age
  - Disability
  - Gender reassignment
  - Marriage and civil partnership
  - Pregnancy and maternity
  - Race
  - Religion or belief
  - Sex
  - Sexual orientation

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Equality Act coverage

- Protects employees, workers, job applicants, contract workers, partners in firms, barristers/advocates, office holders
- In employment context as well as employers, covers qualifications bodies, employment service providers, trade unions' treatment of members.

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EA – Prohibited conduct

- **S13 Direct discrimination** – A discriminates against B if, *because of* a protected characteristic, A treats B less favourably than A treats or would treat others – involves a comparison even if only hypothetical.
- No direct age discrimination if treatment of B is a "proportionate means of achieving a legitimate aim".
- **S15 Discrimination arising from disability** – A discriminates against a disabled person (B), if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show the treatment is a "proportionate means of achieving a legitimate aim" but if A shows did not know and could not reasonably be expected to know B disabled then not liable.

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EA – prohibited conduct

- A discriminates against a woman if, **in the protected period** in relation to a pregnancy of hers, A "treats her unfavourably" because of the pregnancy or because of illness suffered by her as a result of it (heavily influenced by EU law – PWD and case law of CJEU)
- A discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave, is exercising, trying to exercise or has exercised the right to ordinary or additional ML
- Protected period – (essentially)from when pregnancy begins to return after maternity leave

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EA – prohibited conduct

- Indirect discrimination – A discriminates against B if A applies to B a provision, criterion or practice which is discriminatory in relation to a protected characteristic of B.
- A provision , criterion or practice will be discriminatory if A applies to all but it puts people with whom B shares the protected characteristic at a particular disadvantage compared to others, it puts or would put B at that disadvantage and A cannot show it to be a "proportionate means of achieving a legitimate aim".

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EA – Prohibited conduct

- **Harassment –** A harasses B if:
- A engages in unwanted conduct related to a relevant protected characteristic which has the purpose or effect of
  - (a) violating B's dignity, or
  - (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B
  - In deciding if conduct has this effect account must be taken of the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

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EA – Prohibited conduct

- **Victimisation** A victimises B if A subjects B to a detriment because:
  - B has done a protected Act
    - bringing proceedings under EA
    - Giving evidence or information in connection with such proceedings
    - Doing any other thing for the purposes of or in connection with the EA
    - Making an allegation that A or another person has contravened the EA
    - No protection if evidence/information is false, allegation is false or allegation made in bad faith.

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Adjustments for disabled people

- S.20 Where a provision, criterion or practice puts a disabled person at a substantial disadvantage in relation to people who are not disabled then A (the employer) must take "such steps as it is reasonable to have to take to avoid the disadvantage".
- If physical feature (design/access to/fixture and furnishings etc of buildings) puts disabled person at substantial disadvantage – A must take reasonable steps to avoid the disadvantage
- A must take reasonable steps to provide an auxiliary aid if it would avoid disabled person being put at disadvantage.

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Most common claims: discrimination and EU law

- While Great Britain had its own laws outlawing discrimination on grounds of race and gender pay discrimination (although not yet in force in 1972) when a man and woman were doing the same job before we joined the EU in 1972, and we had protection against disability discrimination before it was part of EU law, this is an area of the law in which the EU has had a great impact.
- It was as a result of EU law that UK equal pay law had to be changed so that men and women doing jobs of "equal value" had to be paid the same. This has had a major impact in recent years. *Commission v UK* [1982] ICR 578

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Equal Pay – focus

- Equal pay claims huge focus of attention in UK over last 15 years. Mostly in public sector and focused on claims of equal pay for work of equal value. But now moved into private sector (e.g. supermarkets). In Scotland alone we are dealing with around 50,000 claims at the moment although many in process of settling. Many cases have gone to Supreme Court
- Still a significant gender pay gap in UK. Mean gender pay gap for full time workers in 2018 was 13.7%, widens for 12 years after birth of 1st child. Worse at highest pay levels – fewer women at top.
- Mandatory gender pay gap reporting was introduced in public and private sector (250+ employees) from April 2018
- Company can be fined but ? marks over enforcement .

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Procedural handling: Grouping individual claims

- If large numbers of employees making the same type of claim (e.g. equal pay) the claims are grouped together and one or more lead cases are selected for hearing. When a decision is made it is applied to all the claims in the group – this is a very efficient way of dealing with groups of claims
- This process is controlled by rules in the Employment Tribunals Rules of Procedure 2013

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Discrimination and EU law

- It was as a result of EU law that the UK had to remove the cap which it had placed on compensation for discrimination – compensation for discrimination (financial loss and injury to feelings and psychiatric damage) is currently unlimited.
- It was as a result of EU law that UK extended its protection against discrimination to include discrimination on grounds of gender reassignment – P v S and Cornwall County Council

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Impact of Brexit

- The EU Withdrawal Act 2018 – if deal it comes into effect at end of transition period, if no deal then comes into effect when leave EU
- S1 says European Communities Act 1972 is repealed on exit day
- S2 says EU derived domestic law continues to have effect on and after exit day
- On exit day we will retain most general principles of EU law, most EU rights and obligations that currently exist in domestic law, relevant case law of CJEU issued before exit day, domestic law passed to implement EU law – "retained EU law" but any retained EU law can be amended after exit day
- We lose the principle of supremacy of EU law in relation any legislation passed on or after exit day but that principle continues to apply so far as relevant to the interpretation or disapplication of any legislation passed before exit day.
- Lose ability to refer case to CJEU and no obligation to follow post Brexit CJEU jurisprudence after exit day (can 'have regard' to decisions)
- Will not be required to introduce any new EU employment law into domestic law

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Brexit: What employment rights might be under threat

- That will depend on political ideology of future UK governments and the influence which employers may have in pushing for "deregulation" of the labour market. UK Gov. often refers to UK having lightly regulated labour market and suggests this is good for business.
- We can see what could happen when we look at recent changes to unfair dismissal law (not an EU right) – in 2012 the government increased the qualifying period of service to 2 years from 1 year and in 2013 reduced maximum compensation that can be awarded for financial loss – limited to£86,444 or *one year's gross salary, whichever is lower*.

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What rights might be under threat

- Currently no limit on financial compensation for discrimination as a result of "full and effective remedy" provisions in EU law (*Marshall No. 2*). Could be that a cap is imposed again (including equal pay) once EU protection is removed. Generally strong enforcement mechanisms for EU derived rights – these will be removed (e.g. Francovich action no longer possible, no CJEU ref.)
- Working time restrictions and fully paid holiday – UK Gov. not happy at the time about having to implement Working Time Directive (secured partial opt out, delayed implementing). Some employers not happy about having to pay employees full pay (including sum to cover commission, bonus, overtime pay normally received) and about right to carry over leave and holiday pay to the next year in certain circumstances. Area in which UK employers often lost cases at CJEU.
- Many EU derived rights given to 'worker' category – could be removed from wider grouping and restricted to employees

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What rights might be under threat

- Legislation protecting Agency Workers – at moment EU Directive on temporary agency work implemented in domestic law in Agency Workers Regulations 2010 but UK Gov. strongly opposed the original directive and implemented minimum protection they judged possible.
- Atypical worker protection – especially fixed term employees protection. Previous UK Governments resisted attempts to give rights to atypical workers. (But note shift in public opinion – zero hours contracts under scrutiny.)
- Some of the protection given to employees on transfer of undertakings (business sales/ contract transfers) – rights come from EU Acquired Rights Directive, implemented by TUPE Regs 2006. Post Brexit could be changes to make it easier to harmonise terms and conditions.
- Rights connected to worker consultation and information sharing. Prior to EU rights UK law had little to say in this area.

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Change in interpretive approach

- CJEU tends to take a "purposive" interpretation approach. It interprets EU employment law widely/expansively, looking to the purpose of the legislation whereas UK Courts tend to interpret UK statutes "narrowly" focusing on the specific words in the statute. UK courts have had adapt their general approach when interpreting legislation designed to implement EU rights but can still be a tension between these styles. CJEU approach will not influence British courts in the same way following BREXIT.

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Post Brexit

- Very difficult to be sure at this point in time what the full impact of Brexit will be in the employment sphere but there will be no dramatic curtailment of existing rights on

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Other matters of interest

- Vast majority of claims must be brought within three months of the dismissal or action of employer that is subject of complaint (extended by up to one month if Early Conciliation is taking place) – very limited compared to Brazil?
- Our hearings can last many days and sometimes weeks for a single case.
- We undertake detailed case management of complex cases to narrow down issues in advance etc.
- Most Employment Judges are trained mediators and we offer judicial mediation in some types of cases but voluntary.
- You have much better powers in Brazil to enforce your judgments than we have in UK

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Volume of claims in G.B.

- In 2018 in G.B.
  - 118,339 claims to ET (remember Acas role)
  - 193,595 complaints (claims can include more than one complaint, e.g. unfair dismissal + discrimination)
  - 27,894 complaints about equal pay
  - 22,099 unlawful deductions from wages
  - 21,607 complaints about unfair dismissal
  - 9,226 complaints about sex discrimination
  - 32.4 million people in work in 2018 but that includes the self employed (4.8 million are self employed)

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Any questions?

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