Justice Committee
Courts Reform (Scotland) Bill
Written submission from Unite the Union

“In our view the Court of Session should deal with only the most complex and important cases and the most routine litigation should be conducted in the Sheriff Court.”

Final Report of the Civil Justice Review, Chaired by Lord Gill

As far as Unite the Union are concerned there is no more important type of case than that involving a workplace injury or disease. It is vitally important to the victims and their families. Workplace cases also serve a vitally important role in securing and maintaining health and safety standards industrially and sectorally.

If all but the highest value workplace cases are now to be heard in the Sheriff Court, it is crucial that the importance of these cases are recognised and the new procedures in the Sheriff Court reflect that importance. The Bill, as currently drafted, fails in that respect. This submission will make positive recommendations that will remedy the situation.

Introduction

Unite the Union is the largest union in the United Kingdom with around 1.5 million members across 23 different private, public and voluntary sectors including manufacturing, public services, transport, food, finance and construction. In Scotland, Unite represents around 200,000 working people and their families.

Oral evidence

We would like to give oral evidence in support of this submission.

Unite the Union and the Civil Court System

All of Scotland’s trade unions are major users of the Scottish civil courts. As the largest trade union in Scotland, Unite the Union are a particularly significant court user.

We are a major user of the civil court system because we have long recognised that civil court cases, particularly cases for damages for workplace injury and disease, are an extremely effective means of representing not only individual members but entire workplaces, sectors and our entire membership. Unite the Union use the civil court system to serve two of our current fundamental objectives:

- Industrial and sectoral organising
- Membership recruitment and retention

The importance of the civil court process to Unite the Union and our current objectives should not be understated. Accordingly, this submission and the Court Reform (Scotland) Bill 2013 should be recognised as an issue of major importance to
Unite the Union. Our views on the Bill and the submissions have nothing to do with the solicitors who serve on our panel from time to time or their business interests. The submission is about the profound damage that the Bill, in its currently drafted form, will do to individual members in terms of access to justice and the damage that it will do to Unite’s legal services which, in turn, will impact upon our current core objectives for organising in Scotland.

Unite personal injury case profiles

Each year, we instruct our Scottish panel solicitors to represent Scottish members in around 800 workplace injury and disease cases. On average 52% of these cases have a value of more than £5000 and 48% have a value of less than £5000.

A summary our of concerns and recommendations

Concerns

- 52% of our members will no longer have an automatic right to employ Counsel
- Particularly because of the impact of Section 69 of the Enterprise and Regulatory Reform Act 2013 (the Enterprise Act), insurers will employ Counsel in every case before the new specialist court and all of our members, in that circumstance, will face an unlevel playing field and be at a significant disadvantage
- 48% of our members will lose the benefit of the specialist personal injury rules currently used in the Summary court process and will be forced to use inappropriate “Simple Procedure” in cases to be heard by Summary Sheriffs
- As a result of Section 69 of the Enterprise Act, there will be no simple work related personal injury cases and all work related cases should, therefore, be permitted to proceed at the specialist personal injury court with the benefit of Counsel
- In cases where our members are not given Sanction to employ Counsel but insurers do use Counsel, Unite will face the invidious choice of either having to find money to employ Counsel, burdening our already significantly stretched budget or leaving our members to be disadvantaged
- Assuming, as we must because it would appear to be based on the small claims procedure, the simple procedure will not allow our members to recover the cost of medical reports and full legal representation for cases below £5000, Unite will again face an invidious choice of either having to fund these costs and outlays in relation to 48% of our members’ cases or leave them disadvantaged and unlikely to win
- Collectively, these changes exacerbate and aggravate the damage that was recently done to workers’ rights and trade unions by Section 69 of the Enterprise Act
- Without the benefit of the specialist court and the right to employ Counsel, victims of workplace accident and injury will face a significant uphill struggle in securing justice; cases that ought to be won will be lost; workplace health and safety obligations will be ignored and standards dropped with a consequent increase in injury and death. This will impact heavily on Unite and our
reputation and in relation to our ability to organise, as well as our efforts in relation to membership recruitment and retention.

Proposal

- The Scottish Parliament may not believe that they can reverse Section 69 of the Enterprise Act but they can ensure that any legislation serves to mitigate the impact of the Act on Scottish workers
- Victims of all work related cases should have the right to have their case heard before the specialist injury court, irrespective of the value of the case
- (Obviously we are pro-choice and if victims of work related accidents wished to have their cases heard at their local court by Summary Sheriffs, that would be a matter for them and should not be excluded as an option)
- Victims of work related accidents who have their cases heard before the specialist court should have the automatic right to employ Counsel and, certainly, for all cases with a value of more than £5000.

Industrial and sectoral importance of civil court system

From the perspective of Unite, personal injury actions are the method for maintaining and ensuring workplace safety. The Health and Safety Executive (HSE) simply do not have the resources or the manpower to be an effective means of policing and enforcing health and safety. Recent statistics show that any form of enforcement action is taken in less than 0.5% of health and safety breaches. In our current time of austerity, with public sector cuts, this picture has got worse and will only continue to get worse.

As a union we have invested heavily in training and education of workplace representatives in relation to health and safety. Our workplace health and safety representatives do an excellent job and regularly and effectively engage with management at an industrial and sectoral level. However, our experience clearly shows that organisation and representation by well-educated health and safety representatives only goes so far and they require the back up of robust and uncompromising approach to civil litigation that if standards slip, injuries occur.

If employers do not believe that damages claims will be brought against them or those claims are unlikely to succeed, they will no longer take their responsibilities towards health and safety seriously. Corners will be cut, standards dropped and injuries and fatalities shall occur. Section 69 of the Enterprise Act has profoundly changed the balance of power in relation to health and safety. Overnight, Section 69 made it significantly less likely that victims of industrial injury will obtain compensation. Victims require the assistance of specialist personal injury rules, specialist judges and Counsel more than ever and in every workplace case. The Court Reform (Scotland) Bill does not allow this. The Bill, as currently drafted, will have the practical impact of making it harder still for victims to being, and win, damages cases.

The Bill further undermines the ability of Unite the Union to promote workplace safety by aggravating the impact of Section 69 of the Enterprise Act.
Membership recruitment and retention

Membership recruitment and retention is a major challenge for the 21st century trade union. Recruitment and retention is a primary objective for Unite the Union. Our organising department have adopted novel and cutting edge approaches to deliver the union’s strategy for growth including our Community membership which is the first of its kind in UK trade union history.

Legal services have always been at the forefront and critical to the membership benefits which attract new and retain existing members. As matters currently stand, we can guarantee our members the best legal representation, high success rates and ensure that our members always retain 100% of their damages. We can do this while offering services that operate at no cost to Unite because of the model of trade union funding we operate. We will no longer be able to offer those guarantees if the Bill passes as currently drafted.

Trade union legal funding model

Unite and all trade unions operate their legal service model in a way that relies upon legal costs recovery. Trade unions are not insurers and operate their scheme in an entirely different way to insurers. Accordingly, in contrast to insurers, Unite cannot fund costs and outlays in a court case which we know cannot be recovered at the end of the day. Specifically, our model will not allow us to employ Counsel to represent our member if that cost will not be recovered even if an insurer/defender is using Counsel; and cannot fund expert reports, investigations and legal work which will not be recovered.

As the Bill is currently drafted, Unite will be left with an invidious choice to either leave our members fighting with one hand behind their back in terms of legal representation or find extra money in our already strained budgets. The truth is that the former is far more likely to be the only choice which we have because of other attacks from other areas on trade unions and trade union activities.

A simple black and white political choice for the Scottish Parliament

The coalition government at Westminster has delivered untold damage to workers’ rights through Section 69 of the Enterprise Act. The Scottish Parliament will no doubt be looking to see whether it possesses the legislative competence to reverse Section 69. That may however be very difficult and it will certainly take a very long time. Ultimately, the Scottish Parliament may decide that they do not have the legislative competence to reverse Section 69.

Nevertheless, nothing that the Scottish Parliament does is in a vacuum. The Scottish Parliament is morally and politically obliged to consider all the bills that it takes forward in the context of legislation from Westminster and, in particular Section 69 of the Enterprise Act. That Section 69 was not an Act of the Scottish Parliament’s making and that the Scottish Parliament no doubt find the legislation as reprehensible as the entire trade union movement and civic society do is irrelevant if
the Scottish Parliament fail to take full account of the legislation when introducing their own Bills.

The changes that were introduced by Section 69 of the Enterprise Act could not have been foreseen by anyone when the long process to civil court reform in Scotland began with the Gill Review. Indeed, no-one in Westminster even foresaw Section 69 of the Enterprise Act when the Bill was first introduced at the that parliament. The clause that became Section 69 was introduced, many thought by sleight of hand, after a public consultation and at the amendment stage of the Bill.

The Scottish Parliament must acknowledge that there has been a fundamental shift in the legal landscape since not only the Gill Review but since the Scottish Government itself first consulted on civil court reform. In acknowledging the fundamental shift in the legal landscape, the Scottish Parliament must decide whether that change requires the Scottish Parliament to react in the approach that it takes to its own legislation.

In Unite’s submission, in terms of the Court Reform (Scotland) Bill, the choice is a very simple one for the Scottish Parliament:

- Ignore the impact of Section 69 and carry on regardless with the civil court reform Bill with the direct consequence that the Scottish Parliament will be exacerbating and aggravating the impact of Section 69; or
- Acknowledge the damage caused by Section 69 and introduce minor amendments to the Court Reform (Scotland) Bill which will minimise and mitigate the impact of Section 69 of the Enterprise and Regulatory Reform Act 2013.

Unite the Union
18 March 2014