1

INTRODUCTION

1 GENERAL

Employment law has been the subject of as rapid a transformation as can have happened to any legal subject in recent times, and is certainly one of the most difficult areas of law in which to keep up to date. In some ways it is a curious mixture of ancient and modern, for much old law lies behind or at the basis of new statutory law and in some cases the old law continues to exist alongside the new (eg the continued existence of the separate actions for wrongful dismissal and unfair dismissal, the former being a common law action and the latter entirely a creation of statute). To take one small example, as late as 1969 it could still be seriously debated before the Court of Appeal[1] whether a general hiring of an employee (ie one not subject to any express time limitation) was a hiring only for a year, under the old 'presumption of a yearly hiring' which used to apply in the nineteenth century and before, principally in order to guarantee year-round employment for agricultural labourers, but which is now totally irrelevant to modern employment law. Ghosts can still clank their chains, particularly in the law relating to contracts of employment where a strictly contractual approach may not always lead to a realistic result. However, the subject is unrecognizable from what it was only 40 years ago with the enormous increase in statute law and the ever increasing volume of case law on the modern statutes. Thus, the intending student must be able to exercise the lawyer's skill in dealing both with extensive case law and with major statutes, sometimes of astounding complexity. Moreover, he or she must be able to deal with this mass of law with a certain amount of intelligence and discernment, for example being able to tell when a line of old cases, authoritative in themselves, may be so out of line with the modern approach to employment or industrial relations that they are unlikely to be applied in practice, or to tell when a case on a modern statutory provision is merely *illustrative* (however interesting) rather than setting a definite precedent on a point of interpretation, for if this distinction is not borne in mind the student will soon find himself or herself buried alive under the case law, particularly in an area such as unfair dismissal where so much is vested in the discretion of the tribunal and, furthermore, where any actual point of law which does arise should normally be approached primarily by reference to the wording of the statute; the student will soon realize when reading this book that while a desire to escape from over-legalism

[1] *Richardson v Koefod* [1969] 3 All ER 1264, [1969] 1 WLR 1812, CA.

in decision making on employment matters has been one of the dominant themes of modern employment law, it is regularly frustrated by the avalanche of modern legislation, often of great complexity. Case law of course remains important, but equally clearly some cases are more equal than others. While the approach of this book is avowedly legal, treating the subject as it now has to be treated as an important area of substantive law which leads in practice to a very considerable amount of litigation, at the same time it must be realized that in certain ways this is law with a difference; this must be reflected in the approach of the student, and it is hoped that it is reflected in this book, which in turn reflects the love–hate relationship to the law adopted by so many employment relations practitioners.

As well as a whole new body of law, employment law is also subject to a separate jurisdiction exercised by employment tribunals (with appeal to the Employment Appeal Tribunal (EAT), and only then into the ordinary court structure, with appeal to the Court of Appeal and then to the Supreme Court). Even though tribunals gained some common law jurisdiction (on termination of employment) in 1994, not all matters may go to a tribunal, for many common law actions must still go to the ordinary courts (eg an action for breach of the contract of employment during employment, or an action by an employer for an injunction to restrain illegal industrial action). However, the large majority of cases which are brought do in fact go before the tribunals, and for over a decade now the numbers of such cases have increased alarmingly.

This has led to a mushrooming in specialized sources and materials in employment law, many ephemeral, but some of major practical use to the industrial lawyer. The two main series of law reports are the Industrial Cases Reports (ICR)[2] and the Industrial Relations Law Reports (IRLR);[3] preference will be given to citation of these reports throughout this book. The Industrial Tribunal Reports (ITR) commenced publication in 1966 and have now ceased, to avoid further duplication. The leading academic journal is the *Industrial Law Journal*,[4] and the principal updating aids, so vital in this rapidly developing subject, are:

(1) The IDS Brief—published twice per month; IDS also publish occasional supplements with the brief, covering recent developments in one particular topic, and the more substantial IDS Handbooks which aim to update the reader on the major areas of the subject.

(2) The *Industrial Relations Law Bulletin* (IRLB)—also published twice a month, covering recent case law and 'guidance notes' on particular topics.

[2] These are the official reports, published by the Incorporated Council of Law Reporting for England and Wales; until 1974 they were called the 'Industrial Court Reports'.

[3] Published by LexisNexis UK. See also now their stablemate, the *Equality Law Reports*.

[4] Published for the Industrial Law Society by Oxford University Press.

(3) Various websites—some are of course private, subscription sites, but of particular use as open public services are the websites of the Department for Business, Innovation and Skills, the Office of Public Sector Information (particularly for new statutory instruments) and the Information Commissioner (for developments in relation to data protection issues).[5]

The leading practitioner work is *Harvey on Industrial Relations and Employment Law*,[6] a five-volume looseleaf work (updated seven times per year, with a monthly bulletin) which is used extensively by practitioners, advisers and tribunals, and is frequently cited in court judgments (especially in the EAT).

Codes of practice are of ever increasing importance in employment law, allowing the statute to lay down merely the general principle on a topic and then amplifying that principle in a way that is likely to be of more use to the people concerned; so far, they have been used in the fields of unfair dismissal, employment protection, union rights, picketing, the closed shop, health and safety at work and disability discrimination, and they should be consulted whenever appropriate. Also, much useful information can be obtained from the annual reports of ACAS. In the collective sphere the Donovan Report[7] should still be consulted in any historic context, for it formed the analytical background to many of the reforms (successful or unsuccessful) in this area. Finally, many of the bodies connected with industrial relations in the widest sense publish from time to time reports or studies with important impacts upon the legal framework.[8]

2 A BRIEF HISTORY OF LEGAL INTERVENTION AND THE LEGISLATION

(i) ORIGINS

The subject of employment law may be split, for convenience if not for accuracy, into three principal areas: industrial safety law, individual employment law and the law relating to employment relations. Each has a different legal and social background, and until recently the level (and type) of legal involvement was markedly different in each. Industrial safety law has a history of statutory intervention dating back to the beginning of the nineteenth century, with a formidable volume of case law on the statutes and on the actions which could be brought by an injured employee. Individual

[5] These are at, respectively, <http://www.bis.gov.uk/>; <http://www.opsi.gov.uk>; and <http://www.informationcommissioner.gov.uk>. In more specialized contexts, the websites of the Equality and Human Rights Commission, ACAS and the Health and Safety Executive may be of use.

[6] Published by LexisNexis Butterworths.

[7] Report of the Royal Commission on Trade Unions and Employers' Associations (Cmnd 3623, 1968).

[8] The annual reports of ACAS, the CAC, the Certification Officer, the European Court of Human Rights and the Health and Safety Commission are particularly useful sources of information.

employment law, however, was based almost entirely upon the common law concept of the contract of employment; it attracted little statutory intervention and even much of the common law, though extensive in theory, was a dead letter in practice, principally due to the inadequacies of the remedies for breach of the employment contract by the employer. Employment relations law was characterized by the voluntary principle and the abstention of the law (once legislation had been used in the latter part of the nineteenth century and the first part of the twentieth to legalize the operations and purposes of trade unions and to protect them and their members from tortious liability for industrial action);[9] it is true that wage negotiation in certain industries used to be encouraged by Wages Councils which were the creation of statute, but even here the law merely provided a minimum framework and did not attempt to impose legal rights and duties on the substance of the negotiation itself.

Major developments have occurred in the last four decades which have changed this previous picture, in some areas out of all recognition. In the industrial safety sphere, the first of two revolutionary changes came with the Health and Safety at Work etc Act 1974 which creates administrative machinery, provides for more effective enforcement procedures and widens the general duties owed by employers (and others). Secondly, the substance of our safety laws has now been subject to major reform from a different source, namely the EU, with increased emphasis on attempting to harmonize laws on major safety matters throughout the Community.[10] Due to constraints on the size of a book such as this, industrial safety law is no longer covered here in detail.

Individual employment law has been the subject of major revision by the provision of new statutory rights for those in employment (and, in the area of sex, race, disability, sexual orientation, religion/belief and age discrimination, for those seeking employment); moreover, these rights (which usually have little or no dependence upon the theoretical contractual basis of employment) are now the subject of *realistic* enforcement procedures through the tribunal system and so are doubly preferable to most common law rights. These rights are many and various, from what is now a relatively minor matter such as minimum periods of notice according to length of service, to the more important employment protection rights; clearly the most important is the right not to be unfairly dismissed, and these cases have always constituted a major part of the tribunals' caseload.

Employment relations law suffered a great upheaval under a Conservative government with the Industrial Relations Act 1971, which unsuccessfully attempted to impose an overall legislative framework on industrial relations, giving rights and imposing duties by law as is done in some other jurisdictions. The Act was repealed

[9] This culminated in the Trade Disputes Act 1906 which gave a trade union complete legal immunity and its officers and members an immunity applying to all acts 'in contemplation or furtherance of a trade dispute'. This underpinning of the voluntary system and the withdrawal of the law from industrial disputes lasted until the Employment Act 1982.

[10] See Smith, Goddard, Killalea and Randall *Health and Safety: the Modern Legal Framework* (2nd edn, 2002).

in toto in 1974 (except for the unfair dismissal provisions, which were re-enacted), but ironically we then saw under the same Labour government the enactment of significant new legal rights for trade unions which were capable of having an effect on some of the most fundamental aspects of collective labour relations, such as recognition, bargaining information, standardization of terms and conditions throughout an industry, prior consultation on impending redundancies and direct union involvement in safety procedures. Certainly, where employment relations remain on a collective level (and there has been a significant decline in collective bargaining over the past three decades), such relations are still on a voluntary basis and voluntary procedures remain paramount; however, this field is no longer devoid of legal intervention, and the modern legislation has also played an important part in setting up machinery for the settlement of certain industrial disputes (in particular, the Advisory, Conciliation and Arbitration Service and the Central Arbitration Committee) and subsequently in placing stringent limitations on what the previous Conservative government saw as unacceptable forms of industrial action or unacceptable purposes behind such industrial action, while at the same time they sought ever greater deregulation of the labour market itself.

(ii) THE EARLY LEGISLATION

The whole subject is thus heavily overlaid with modern statutes.[11] In the employment law area, this process started with the Contracts of Employment Act 1963 (consolidated in 1972) which introduced new rules on notice periods, required an employer to give his employee a written statement of terms of employment, and laid down for the first time the statutory rules on 'continuity of employment' which were to take on much greater significance when more extensive employee rights were later enacted which depended on the concept of continuity (either for qualification for rights or computation of benefits, or both). The first of these rights was the right to a redundancy payment under the Redundancy Payments Act 1965. As well as attempting to introduce a new, but politically unacceptable, framework for industrial relations, the Industrial Relations Act 1971 was notable for introducing the new law on unfair dismissal, and this was re-enacted by the Trade Union and Labour Relations Act 1974 which repealed the 1971 Act and (1) restored the essentially voluntary nature of industrial relations (abolishing, in the process, the National Industrial Relations Court which had adjudicated cases arising under the 1971 Act) and (2) consolidated the law relating to trade union immunities and internal affairs; the 1974 Act was itself amended by the Trade Union and Labour Relations (Amendment) Act 1976 which made the immunities more watertight, abolished the statutory action against a union for unfair expulsion or exclusion, and tightened up the law on the closed shop.

[11] The statutes currently in force are set out, with annotations, in *Harvey*, Division Q.

The Employment Protection Act 1975 made significant steps forward in many directions. On the collective side, it gave statutory backing to ACAS, set up the CAC and introduced the important new trade union rights mentioned above; it also set up the Employment Appeal Tribunal (to take the place of the NIRC) and modernized the provisions relating to wages councils. On the individual employment side, it introduced new employment protection rights (eg guarantee payments, time off work for union purposes, a right not to be discriminated against on trade union grounds and the rights relating to maternity pay and leave) and it made significant alterations to the law on unfair dismissal (particularly as regards the available remedies). By this time, the statute law was something of a jungle and indeed was on one occasion castigated in the House of Lords as a bad example of legislation by reference, in that it was frequently the case that a point of law could only be discovered by referring to separate but complementary provisions in two or more Acts. The *individual* aspects were therefore consolidated into the Employment Protection (Consolidation) Act 1978 which covered particulars of terms of employment, employment protection rights, termination of employment, unfair dismissal, redundancy payments, and industrial (now employment) tribunals and the EAT, and was for years the principal statute.

(iii) THE CONSERVATIVE GOVERNMENTS 1979–97

The Employment Act 1980 marked a major change of direction after the election in 1979 of a Conservative government under Mrs Thatcher with a radically new political agenda based on free market economics. Although it adopted, at the very beginning of that government, a 'softly, softly' approach, avoiding a rerun of the Industrial Relations Act 1971, it started the remarkable transformation of employment law that marked the 1980s. On the collective side, it affected statutory trade union rights by repealing the provisions of the Employment Protection Act 1975 relating to the statutory recognition procedure and the extension of terms and conditions of employment by the CAC ('Schedule 11 claims'). It also affected the internal government of trade unions by allowing financial support for union elections and by reinstating a statutory right of complaint to a tribunal for people unreasonably expelled or excluded from a union where there was a closed shop in operation. The law relating to picketing was altered, and new curbs introduced on secondary industrial action. On the individual side, the Act altered certain aspects of unfair dismissal law (principally those relating to the burden of proof, the closed shop and compensation) and made changes in the rules governing maternity rights and guarantee pay.

The Employment Act 1982, an altogether 'drier' statute by a more established government, contained some new provisions (eg altering the law of unfair dismissal in cases where the persons dismissed were on strike) and a host of minor amendments. However, it was principally designed to tighten up the 1980 Act in two areas—the closed shop and the law on industrial disputes. With regard to the former, it imposed more stringent procedural requirements of balloting, radically increased the compensation payable to an employee unfairly dismissed because of a closed shop, and made

it more likely that in such a case compensation will in fact be paid by the union rather than the employer. Also, new provisions were introduced to discourage the inclusion of union-labour-only requirements in contracts and tenders. In the area of industrial disputes, the Act basically left alone the restrictions introduced by the 1980 Act (though with a tightening-up of the definition of 'trade dispute' on which the statutory immunities are based); however, the radical change in the 1982 Act was the removal of the union's complete immunity from suit in tort (which the unions had had, with the exception of the years of the Industrial Relations Act 1971, since the Trade Disputes Act 1906), so that now the union itself may be sued (subject to statutory maxima on the damages recoverable) if it contravenes the strengthened laws on industrial disputes.

The Trade Union Act 1984 (following the 1983 election when 'giving unions back to their members' was a prominent Conservative theme) was the third major statute passed by the previous government, but in large part marked a significant departure. While Part II can be seen as following on from the Employment Acts 1980 and 1982 by allowing an employer to sue a union (for damages or an injunction) if the union takes strike or other industrial action without the now obligatory strike ballot, Parts I and III were different in that the causes of action contained within them are vested in the union *members*. Part I obliged a union to hold secret ballots for high union offices and Part III introduced compulsory periodic reballoting on whether a union should continue to operate a political fund. This Act was therefore aimed at the *internal* affairs of a trade union particularly as the events surrounding the miners' strike and certain other major industrial disputes tended to show a greater degree of readiness on the part of union members (or of whole sections of a union) to resort to legal action in order to secure compliance with the union's rules. This process was taken a stage further by the Employment Act 1988 (following the 1987 election and the experiences of the miners' strike of 1984–85, a major event in the evolution of employment law at the time), which tightened up some of the provisions of the 1984 Act (in relation to balloting) and introduced certain new statutory rights for union members (eg rights to ballots before industrial action, to inspect union accounts, to restrain unlawful expenditure by the union and not to be unjustifiably disciplined); to assist in the enforcement of rights against a union, the Act also established the office of Commissioner for the Rights of Trade Union Members. In one respect, the Act harked back to the early legislation of that government, for it took the changes to the law on the closed shop to their logical conclusion by removing *all* legal protection from it as an institution, so that it is now no longer possible for a union to establish or maintain a legally effective, post-entry closed shop.

While the Employment Act 1989 was largely a tinkering measure, the Employment Act 1990 in several ways set the seal on a decade of change,[12] taking several themes

[12] Highly recommended reading to set this series of statutes into their political context is Auerbach *Legislating for Conflict* (1990), commented on in Foch et al 'Politics, Pragmatism and Ideology: The Wellsprings of Conservative Union Legislation' (1993) 22 ILJ 14; and Davies and Freedland *Labour Legislation and Public*

first developed in 1980 to their logical conclusions. In particular, it rendered illegal the *pre*-entry closed shop, made illegal *all* secondary action and attacked *un*official industrial action. Thus, by 1990 laws were in place which many Conservatives would have liked to have seen in 1980, had they been able to wave a magic wand. Crucially, of course, by that time there had also been a significant decrease in union membership, a radical decrease in union influence and a very noticeable move away, in many areas, from collectively negotiated terms and conditions of employment, towards more individual contracting, flexibility in employment and more use of what used to be called atypical employments. Indeed, by the early 1990s the encouragement of such moves had been adopted as government policy,[13] along with continuing deregulation.

After the fourth Conservative election victory in 1992, another Bill was expected, though possibly of a tinkering nature again, meant politically to show that the government had not run out of steam in the hitherto politically profitable area of industrial relations. However, the Trade Union Reform and Employment Rights Act 1993 turned out to be far more than that. It again addressed union elections and ballots, and the financial affairs of unions; it recast members' rights on disciplining and expulsion; further restrictions were introduced on industrial action (including strike notice and a Citizen's Charter right for individuals to challenge industrial action in the public sector). In the individual field, it altered the laws on maternity, employment particulars, redundancy consultation and transfers of undertakings in response to changes in EC law, and introduced two new heads of unfair dismissal. As a logical, but much criticized, further measure to deregulate the labour market, it finally abolished wages councils.

Outside the above mainstream legislation, the 1980s also saw very significant changes in social security laws relevant to employment law (especially payment through the employer, through statutory sick pay and statutory maternity pay), and the Wages Act 1986 introduced new laws on deductions from wages that saw quite remarkable development in the early 1990s. In the field of discrimination law there were, again, consistent developments, but this time largely through the intervention of EC law rather than changes in domestic legislation. If all of this does not provide the reader with enough excitement in life, there are always the Transfer of Undertakings Regulations …

Given this quite remarkable series of statutes (and, often, their supporting regulations and orders) we have at least been fortunate in having five major consolidations in the period 1992–96, bringing some order to the chaos. The Trade Union and Labour Relations (Consolidation) Act 1992 consolidated the morass of laws (ancient and modern) on collective labour law, replacing in particular the Trade Union and Labour Relations Act 1974 and most of the Conservative Employment Acts 1980–93. Social

Policy (1993). The political progress of the three governments of Mrs Thatcher is set out in excellent and highly readable form in Young *One of Us* (1990).

[13] Employment for the 1990s (Cm 540, 1988); People, Jobs and Opportunity (Cm 1810, 1992).

security law was consolidated into the Social Security Contributions and Benefits Act 1992 and the Social Security Administration Act 1992; it took a particularly strong river to clean out those Augean stables. The law relating to individual employment matters was finally consolidated in the Employment Rights Act 1996 which replaced the Employment Protection (Consolidation) Act 1978 (as, by then, heavily amended) and the Wages Act 1986, with the law relating to tribunals and the EAT being consolidated at the same time in the Employment Tribunals Act 1996. Outside that framework lay the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995 and the Pensions Act 1995.

(iv) NEW LABOUR: CHANGE AND CONTINUITY

The 1997 General Election saw the end of a period of 18 years of Conservative administrations and a landslide victory for New Labour. Dramatic though this political reversal of fortunes was, it was far removed from the previous return of a Labour government in 1974, when the Trade Union and Labour Relations Act 1974 (sweeping away the previous Conservative government's employment laws) was the first statute passed by that incoming government. Instead, New Labour seemed to put a relatively low priority on employment law changes (reflecting the equally low priority of the subject at the election), and it had been made clear for some time by the 'modernizers' within the party that there were to be no wholesale repeals of the reforms of the Thatcher administration.[14] Indeed, the first statute passed was the Employment Rights (Dispute Resolution) Act 1998 (reforming tribunal procedures and establishing the ACAS arbitration alternative to tribunals for unfair dismissal cases) which was inherited at Green Paper stage from the previous government. The National Minimum Wage Act 1998 enacted one of New Labour's relatively few election commitments on employment law, and the Working Time Regulations 1998 were an obligation under EC law (the previous government's challenge to the legality of the backing Directive having failed in the European Court of Justice); the Public Interest Disclosure (or 'Whistleblowers') Act 1998 was also in many ways relatively uncontroversial and commanded widespread support. It was only with the publication of the White Paper 'Fairness at Work'[15] that a clear idea could be obtained of the likely direction of the new government in this area. Again, however, in spite of some reforms important in themselves, this was hardly a major sea change, and even then the government were accused of some backsliding by the unions on the eventual form of

[14] 'The abolition of the closed shop was one of the many employment law reforms of the 1980s that were justified and will remain … Other measures which will remain include those on picketing, secondary action, ballots and notice before strikes, unofficial action, elections for certain trade union offices and rights to join the trade union of one's choice and not to be unjustifiably disciplined': Fairness at Work (Cm 3968, May 1998), p 22. For the background political changes, especially in relations with the trade unions, see McIlroy 'The Enduring Alliance? Trade Unions and the Making of New Labour 1994–1997' (1998) 36 BJIR 537.

[15] See n 14. See generally Taylor 'Annual Review Article 1997' (1998) 36 BJIR 293.

the resulting statute, the Employment Relations Act 1999, especially in relation to the union recognition procedure and the mere lifting of the limit on the unfair dismissal compensatory award (from £12,000 to £50,000), rather than its abolition as had been mooted in the White Paper. The introduction to the White Paper said that this Act was not to be seen as merely a first step in reforms, because it 'seeks to draw a line under the issue of industrial relations law' and this was largely the case in the first Labour government, at least in relation to purely domestic legislation. However, the second New Labour government (after their emphatic re-election in 2001) did see a renewed increase in the pace of domestic legislation with the enactment of the Employment Act 2002, a bad example of 'Henry VIII' drafting, ie requiring supplementation by a huge raft of statutory instruments over a prolonged period. The two main themes of this Act were the extension of family-friendly policies (a major plank of New Labour policy, covering longer maternity leave, paternity and adoption leave and the right to request flexible working) and a fairly desperate attempt to halt the inexorable rise in tribunal applications by further reforms of tribunal procedure and (more radically) new 'standard procedures' for grievances and discipline/dismissal which must be exhausted by both parties before going to a tribunal (backed by a regime of automatic unfairness, striking out of tribunal claims and significant increases or decreases in compensation).

At the same time as these domestic developments, EC law was becoming more active. Prior to Mr Blair's second election victory in 2001 there had been transposed one Directive in the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, and not long afterwards the transposition of a second 'atypical worker' Directive in the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations, though a third and complementary Directive on agency workers did not then find favour with member states and was rejected. Going beyond this area of mainstream employment law, EC law was also by this time powering discrimination law, leading to an upgrading of existing sex, race and disability discrimination law (in particular introducing a statutory reversal of the burden of proof and a wider definition of indirect discrimination) and the introduction of new laws to combat employment-related discrimination in the areas of sexual orientation, religion or belief, and age. The Information and Consultation Directive 2002 led to enactment of the Information and Consultation of Employees Regulations 2004 giving a legal right to require mechanisms for informing and consulting the workforce (where no such mechanism already exists) in firms of 150 or more employees by 2005, in firms of 100 or more by 2007, and finally in firms of fifty or more by 2008. The other major EC law development was the updating of the Acquired Rights Directive, leading to the renewed Transfer of Undertakings (Protection of Employment) Regulations 2006 which introduced some useful reforms but were also a disappointment in other ways, this being an area where the government could only make changes which were allowed by the Directive itself.

The domestic law agenda of this second New Labour government was unadventurous after the Employment Act 2002 (the Employment Relations Act 2004 being largely a

miscellany of technical amendments to industrial relations law), but at the 2005 election there was once again considerable emphasis by New Labour on further developments in family-friendly policies and the work–life balance. A year after Mr Blair's third election victory, this fed through into the Work and Families Act 2006 which gave extended maternity rights (including the raising of the statutory maternity pay period to nine months, as a stage towards an eventual one year) and paternity rights, and (significantly, given changes to the UK's demographic pattern) extended the right to request flexible working to those with caring responsibilities for the elderly and infirm.

The Employment Act 2008, as well as making several technical amendments (particularly to the national minimum wage legislation) addressed one major problem in employment law by that time. The 'standard procedures' for grievances and dismissal (introduced by the 2004 Act to attempt to drive down the tribunal application figures) had proved to be an inflexible, bureaucratic and (at times) counterproductive failure, to such an extent that they were even producing exasperated criticism by the judges having to try to make sense of them, in language sometimes bordering on the unjudicial. They stand as a warning of two dangers in employment law: trying to impose a one-size-fits-all solution to the myriad forms of employment and assuming that legal provisions alone can resolve an employment law problem. To avoid at least a level of facial egg, the government commissioned an independent review of them (the Gibbons Report) which grasped the nettle and recommended total repeal, a relief to all involved. This was done in the 2008 Act,[16] though (in a good example of 'legislate in haste, repeal at leisure') it has taken years to purge the system of the last cases to be governed by them. Fortunately, however, it is no longer necessary for this edition to consider them and their voluminous case law. Finally, two other legislative developments occurred towards the end of this government. First, the EU finally agreed a directive on temporary working and this was transposed into domestic law in the Agency Workers Regulations 2010. Secondly, a further major consolidation exercise resulted in all six heads of discrimination being put into one place, the Equality Act 2010; in addition to the mammoth task of consolidation, the then government introduced a limited number of substantive changes to the law in this Act, though at the time of writing several of these have either not been brought into force or are actively being considered for repeal by the successor Coalition government.

(v) THE COALITION GOVERNMENT

The 2010 election proved inconclusive in the sense that Labour lost it but the Conservatives did not win it. The result was a Conservative/Liberal Democrat Coalition, a factor that has had an effect in employment law because of the compromises that have had to be made to possible reforms in this area. It is certainly true that

[16] See Sanders 'Part I of the Employment Act 2008: "Better" Dispute Resolution? (2009) 38 ILJ 30.

the Conservative side of the Coalition have not been able to make certain changes that their backbenchers would have liked to see; on the other hand the Liberal Democrats have had to agree to other changes that in a wider sense could be seen as not exactly 'liberal' as the price of progress of some of their ideas, in particular extending even further the laws on flexible and family-friendly working.[17] Part of the Coalition agreement was a review of employment law. Possibly as a result of the novelty in this country of Coalition politics, this has not had the sort of ideological consistency of the reforms of Mrs Thatcher's governments *but* when the eventual proposed changes are taken as a whole they do amount to a relatively large scale of reform, if only of an incremental nature. At the time of writing (December 2012) the power to make many (but not all) of these changes is being established by the Enterprise and Regulatory Reform Bill but this will still leave nearly all the substantive changes to Regulations. These are likely to come into force over a considerable period in 2013 and 2014, with changes to flexible working being scheduled for 2015. They will have to be taken into consideration by the reader during the currency of this edition.

3 MACHINERY (1): PRACTICAL DISPUTE RESOLUTION

As seen above, the voluntary and non-legal nature of British industrial relations has been its dominant characteristic, and there is not an overall statutory framework for compulsory conciliation and arbitration leading to enforceable awards and agreements as may be found in certain other countries. Moreover, we do not formally distinguish between what are conceptually two different types of industrial dispute—those about the negotiation of new and improved terms of employment (disputes of interest) and those about the interpretation, application and enforcement of existing terms (disputes of right).[18] Arguably there should be separate procedures for dealing with these, particularly as the second type is inherently more amenable to legal adjudication, but in this country any such differentiation will be the exception rather than the rule, and so both kinds of dispute tend (in areas where collective bargaining is still the norm) to be subject to voluntarily negotiated procedures of varying quality (or ad hoc arrangements), leading as has been seen to non-enforceable collective agreements. However, although the law has been non-interventionist (except for the period covered by the

[17] The Prime Minister's office commissioned a report into employment law by a businessman, Adam Beecroft, which suggested extremely wide-ranging reforms, including an a element of American-style dismissal at will, or at least on the payment of a set amount of money. This report was eventually dropped, as was confirmed with some pleasure by the Liberal Democrat Secretary of State for BIS, Vince Cable, *but* one cynical interpretation is that the whole point of the Beecroft review was to spook the Liberal Democrats into agreeing to other, less radical reforms which otherwise they may have opposed.

[18] Report of the Royal Commission on Trade Unions and Employers' Associations (Cmnd 3623, 1968) para 60.

Industrial Relations Act 1971) it has not abstained totally, and has attempted in various ways at various times to provide certain residual machinery to facilitate industrial relations and minimize industrial conflict. Wages councils were historically used (prior to their abolition in 1993) to aid collective bargaining in under-unionized trades, and since the Conciliation Act 1896 there has existed machinery (in various forms, but before 1975 principally under the Department of Employment and its predecessors) for industrial conciliation. Since the Industrial Courts Act 1919[19] there has also existed machinery for industrial arbitration, previously under the Industrial Court (a tripartite arbitral body, not to be confused with the NIRC, set up by the Industrial Relations Act 1971) which was renamed the Industrial Arbitration Board between 1971 and 1974, under the 1971 Act; once again, however, the arbitration has always[20] been basically voluntary, ie by the consent of the parties. Since 1975, these conciliation and arbitration services have been largely provided by the Advisory, Conciliation and Arbitration Service (ACAS), and are considered below.

In the resolution of employment disputes by the intervention of an outside agency there is an important conceptual distinction. On the one hand there is conciliation which is where the conciliator attempts to bring the parties together in the hope that a common discussion will reveal a means of settlement acceptable to both parties; one variation of this is 'mediation' where the mediator takes a more active role in putting forward detailed solutions, though still with a view to settlement by agreement.[21] These functions are now within the jurisdiction of ACAS, which was originally established by the Employment Protection Act 1975 and is the successor to the conciliatory functions of the Department of Employment (and the Commission on Industrial Relations which functioned under the 1971 Act). On the other hand there is arbitration, which is where the arbitrator fulfils a quasi-judicial role in that the parties have agreed to submit their dispute to that person for his or her *decision* on what should be the result; he or she therefore has to look into the relevant facts and law, and it is clearly understood that the parties will abide by the decision. This function is now within the jurisdiction of both ACAS and the Central Arbitration Committee (CAC), which also was established by the Employment Protection Act 1975 and is the successor to the Industrial Court and the Industrial Arbitration Board; as we shall see, it may conduct voluntary arbitrations,

[19] Now the Trade Union and Labour Relations (Consolidation) Act 1992, ss 215–16, in relation to courts of inquiry.

[20] Except for the period 1940–59 when, initially as a result of wartime measures aimed at avoiding industrial disruptions, some arbitration was compulsory. In 1951 Order 1376 replaced Order 1305 of 1940; some 1,270 cases were heard before its revocation in 1959: see Cooper's *Outlines of Industrial Law* (6th edn, 1972) 446–51; Kahn-Freund *Labour and the Law* (1983) 151–3.

[21] Mediation may be used particularly (1) where issues cannot be presented in a sufficiently clear-cut manner for arbitration (eg major changes of work, linked to a pay settlement) or (2) where one or both of the parties is or are unwilling to submit the matter formally to arbitration (on the principle that a party who agrees to arbitration must ultimately be able to afford to lose). Either way, mediation must be properly understood by the parties—it does not result in an 'award' by the mediator, though there may be considerable moral pressure to comply with the mediator's suggestions.

but also has certain powers of unilateral arbitration under statute and has now been given important new jurisdictions in relation to the statutory recognition procedure, European Works Councils and the informing and consulting of employees.

(i) THE ADVISORY CONCILIATION AND ARBITRATION SERVICE

The composition of ACAS is governed primarily by Part VI of the Trade Union and Labour Relations (Consolidation) Act 1992. It is directed by a Council consisting of a chairman and between nine and 15 members (three or four representing employers, three or four representing unions and the rest 'independents'). ACAS itself is set up as a body independent of the government, in particular independent of the Department for Business, and appoints its own staff. It maintains a central office in London and regional offices in Scotland, and in five regions in England and Wales, and must produce an annual report for the Secretary of State for Business to lay before Parliament.

Amongst its staff, it maintains 'conciliation officers'[22] who have particular responsibility for conciliating in statutory actions brought by individual employees.

The functions of ACAS are set out in Part IV of the 1992 Act; in addition to the detailed functions considered below, there is a statement of its general duty in section 209, as follows:

It is the general duty of ACAS to promote the improvement of industrial relations.

This apparently simple formulation has in fact gone through three phases, with considerable symbolic significance (if little practical effect). From 1975 to 1993 the section continued 'and in particular to encourage the extension of collective bargaining and the development and, where necessary, reform of collective bargaining machinery'. That may well have been the ethos of the 1970s, but after a decade in the 1980s of overt government hostility to any such aims it was hardly surprising that the previous government took the opportunity in the Trade Union Reform and Employment Rights Act 1993 to repeal that wording. They substituted 'in particular by exercising its functions in relation to the settlement of trade disputes under sections 210 and 212 [ie by conciliation and arbitration]'. ACAS had certainly proved useful to the previous Conservative government in certain disputes (a measure of that use being that they were never seriously threatened with abolition, unlike most tripartite bodies of the 1970s), and this formulation reflected that. However, it arguably placed too much emphasis on reactive, problem-solving work ('fire fighting' in IR jargon), and too little on long-term advice work ('fire prevention') which ACAS wanted to enhance. With the change of government in 1997, an increased emphasis on fire prevention could be seen to be consistent with the present government's 'partnership' ideas in the White Paper 'Fairness at Work'. As a result, the Employment Relations Act 1999 removed the

[22] Trade Union and Labour Relations (Consolidation) Act 1992, s 211; they are known as Conciliation Officers Tribunals (COTs) to distinguish them from those specializing in collective conciliation.

1993 wording and left ACAS with the widest possible general duty as set out above. Of course, the cynic could argue that the extent to which ACAS can increase their proactive work will depend not on a change to their statutory remit but on the resources they are to be given; over the past decade there has also been some controversy, with those resources first being depleted significantly but then largely restored when the previous government realized they needed ACAS to dig them out of the hole caused by the failure of their system of 'standard procedures' for grievance and dismissal.

The specific statutory functions[23] of ACAS are as follows.

(a) Collective conciliation

Where a trade dispute[24] exists or seems imminent ACAS may, at the request of one or more of the parties or on its own initiative, offer its assistance for the purposes of conciliation or mediation. In doing so, it may also refer the parties to a third person for conciliation, and it must where possible encourage the parties to use any existing negotiation or disputes procedures.[25] The traditional form of conciliation is carried out by an individual ACAS officer working directly with the parties, but in recent years there has been an increase in the use of a hybrid form, referred to as 'advisory mediation', aimed at encouraging a cooperative and problem-solving approach by the parties themselves, possibly on a longer term basis; this tends to be done by the setting up of a joint workshop or joint working party chaired by the ACAS officer, and may be particularly appropriate for resolving disputes over matters such as handling organizational change.[26] In addition to these forms of voluntary conciliation, ACAS also has statutory conciliation functions at certain stages in union claims for disclosure of bargaining information or under the statutory recognition procedure, both of which are considered in Chapter 9.

One area of potential difficulty for ACAS in the context of collective conciliation may arise if it transpires in a particular dispute that the employer is seeking to bring a legal action against the union, initially for an injunction to restrain the industrial action or threat of it and then possibly in a suit for damages. In such a case, any ACAS

[23] These services always were in the past free to the parties, but s 251A of the 1992 Act (inserted by the Trade Union Reform and Employment Rights Act 1993) gave a power to charge fees *and* a power for the Secretary of State to require the charging of fees for some or all services. This change was not wanted by ACAS itself.

[24] The wide definition as originally contained in the Trade Union and Labour Relations Act 1974, s 29 (and now in the Trade Union and Labour Relations (Consolidation) Act 1992, s 218) continues to apply for this purpose; the narrowed definition for the purpose of immunity from tort action in industrial disputes enacted by the Employment Act 1982 and now in the 1992 Act, s 244 does not apply here. Perhaps an example of governmental propensity to have cake and consume same.

[25] Trade Union and Labour Relations (Consolidation) Act 1992, s 210. In 2011/12, 972 collective conciliation cases were received and 754 completed. Of these cases, 46% concerned pay or other terms of employment, 12% recognition, 10% redundancy, 10% other union issues, 10% dismissal/discipline and 10% changes in working practices: *ACAS Annual Report 2011/12*. Independent research carried out in 1985 and published in 1988 showed a high level of satisfaction with the service provided, by both unions and employers: *ACAS Annual Report 1987* p 26.

[26] See Kessler and Purcell 'Joint Problem Solving' (ACAS Occasional Paper No 55).

intervention would have to be more circumspect. However, there is another side to it, since such ACAS intervention might in practice be more likely to resolve an impasse than legal proceedings, and at one stage the suggestion was made tentatively that the law should be amended to include provision for a judge to stay proceedings in any action arising from an industrial dispute in order for ACAS to attempt conciliation[27] which, if successful, might well make considerable savings in cost, time, acrimony and accusations against the courts of partiality in industrial disputes; however, this interesting suggestion has never been taken up. It can be further noted that where the parties engage lawyers the lines of communication may be lengthened and the process of conciliation made more difficult.

(b) Individual conciliation

ACAS, through its conciliation officers, has a statutory duty to attempt to conciliate in cases brought before tribunals by individuals claiming unfair dismissal or denial of employment protection rights; this also applies to cases of all the heads of modern discrimination law and to the various rights enacted by the legislation for the protection of trade union members, including the statutory redundancy handling procedures.[28] The ACAS regional offices receive copies of originating applications to the tribunals and a conciliation officer must attempt to settle a case without reference to a tribunal if requested to do so by the parties or if, in the absence of a request, he thinks there may be a reasonable prospect of success.[29] In all cases, the conciliation officer must consider encouraging the use of established grievance procedures within the firm. In unfair dismissal cases, the officer must in theory seek to promote a settlement primarily by way of reinstatement or re-engagement, and only attempt a monetary settlement if that is impracticable, or not wanted by the ex-employee.[30] The conciliation process is confidential, in that anything said to the officer during it is not admissible evidence

[27] *ACAS Annual Report 1983* para 1.16.

[28] Employment Tribunals Act 1996, s 18. See ACAS *Individual Employment Rights—ACAS Conciliation between Individuals and Employers*.

[29] For many years the total number of such (ET1) cases received by ACAS was stable at about 35,000 pa. However, they started to climb alarmingly in the 1990s, reaching 79,332 cases received in 1994. This was at a time of some decrease in numbers of staff and placed a severe strain on other ACAS functions. The figures took another lurch upwards in 1995 to 91,568, topped 100,000 in 1996 and stood at 165,093 in 2001–02. This was the background to attempts by successive governments to lessen reliance on the tribunal system, first in the Employment Rights (Dispute Resolution) Act 1998 and then in the Employment Act 2002. At first this seemed to be working, with a decrease to 81,833 in 2004–05, but there was a further lurch upwards in 2005–06 to 109,712. In 2011/12 that figure stood at 72,075, but when pre-claim cases (below) are added the total figure was 94,090. Of the cases received in 2011/12, 56% were primarily for unfair dismissal, 27% for working time issues, 14% for redundancy and 28% for discrimination; one odd figure is that 70% of cases included an element of unpaid wages or other benefits (taking the figures well over 100%) but this is because such claims are frequently added to other primary claims. Of the cases completed in the year, 43% were settled, 24% were withdrawn and only 21% proceeded to a tribunal hearing: *ACAS Annual Report 2011/12*.

[30] Employment Tribunals Act 1996, s 18(4). This is wholly ineffective in practice, as can be seen from the consistently low rate of re-employment (whether by order or by agreement): see Ch 7, heading 6; Williams and Lewis *The Aftermath of Tribunal Reinstatement and Re-engagement* (DE Research Paper No 23) pp 31 and 39.

in subsequent tribunal proceedings without the consent of the person who said it.[31] It must be emphasized that if the conciliation is successful in leading to an agreed settlement as a consequence of action taken by a conciliation officer under his statutory duties, that will bar any future tribunal proceedings in the matter,[32] so that the claimant should be certain that he or she is happy with the terms of the proposed settlement before irrevocably agreeing with it. For this reason alone, it is vital that ACAS should behave, and be seen to behave, entirely impartially as between the claimant and the employer when conducting negotiations.

In this respect, a serious problem arose for ACAS through the rise throughout the 1980s of the number of cases submitted to them *without* any formal application having been made to a tribunal. In these cases (referred to as 'non-ET 1' cases in the jargon) the employer would often be wanting ACAS to record an agreement already reached, in order to achieve legal finality, but doubts could arise as to whether the employee had really understood the terms of the agreement. A conflict arose between law and practice. Legally, it was clear from the cases that there was no statutory obligation on an ACAS officer to ensure that it was a *fair* settlement and so an employee could not later challenge the binding nature of the settlement on the grounds that ACAS had not explained his rights to him properly or given him independent advice.[33] On the other hand, it was the established ACAS view that their officers should not simply act as rubber stamps for possibly inequitable settlements and should at least enquire whether the employee understood his position and his rights.[34] Eventually, however, the considerable rise in non-ET 1 cases placed such a strain on resources that ACAS had to reconsider its policy. This was done in 1990 and the current position is that: (1) officers will only act in non-ET 1 cases where the employee claims infringement of specified employment rights; (2) they will decline to conciliate where any qualifying period is clearly not satisfied; (3) they will not become involved where employment ended voluntarily or where a redundancy occurred under fairly applied customary arrangements or agreed procedures; and (4) (most importantly) they will not have any

[31] Further, anything communicated to the ACAS officer in this process is covered by the defence of absolute privilege in the law of defamation: *Freer v Glover* [2006] IRLR 521, QBD.

[32] ERA 1996, s 203(2); there are equivalent provisions in the discrimination legislation and the other provisions where ACAS conciliation appears. Because of the form on which they are recorded, these are known as 'COT3 settlements'.

[33] In *Moore v Duport Furniture Products Ltd* [1982] ICR 84, [1982] IRLR 31, HL, it was held (1) that the action of the conciliation officer in recording an agreement to accept compensation of £300 on the standard form COT3 was sufficient to bar further proceedings, and (2) that where an officer is presented with such an agreement already worked out by the parties, his duty is only to verify the fact of agreement and record it—he is not under a further duty to enquire into the 'fairness' of the agreement or to give the applicant any further advice. Likewise, an ACAS official is under no legal duty to explain the law to the applicant and is not bound to adopt any particular formula or approach: *Slack v Greenham (Plant Hire) Ltd* [1983] ICR 617, [1983] IRLR 271. This approach was strongly reaffirmed in *Clarke v Redcar & Cleveland BC* [2006] IRLR 324 where equal pay claimants were trying to evade a COT3 settlement after receiving further legal advice that they had settled for too little, arguing unsuccessfully that the ACAS officer should have told them that it was too little.

[34] *ACAS Annual Report 1984* p 63.

role to play in *any* case (whether or not a non-ET 1 case) where a firm agreement has already been reached independently, *unless* the terms of the agreement are capable of being changed as a result of conciliation.[35] One result of this, to provide a mechanism for dealing with non-ET 1 cases, was the introduction of the concept of the 'compromise agreement' which allows the parties themselves to reach a binding agreement which rules out a tribunal application, providing the statutory criteria are satisfied, the most important being that the individual has received advice from an independent adviser as to the effect of the proposed agreement.[36] There are now therefore two forms of legally binding settlements, the longstanding ACAS COT3 settlement and the compromise agreement. At the time of writing, the Coalition government intend to raise the profile of compromise agreements (in order to increase even further the level of settlement on which the whole system depends), including by renaming them 'settlement agreements'.

One very important development in individual conciliation arose from the repeal of the 'standard procedures' for grievance and dismissal, which were abolished in April 2009. Welcome though that was, it was only the start for ACAS because the Gibbons Report which had recommended abolition envisaged as part of a replacement system (along with a revised ACAS code of practice and a greater emphasis on 'mediation') more active intervention by ACAS *before* disputes get to the issuing of tribunal proceedings. To this end, ACAS have established a system of 'pre-claim conciliation' (PCC), ie intervention *before* an ET1 tribunal claim form has been issued, which in most cases is bound to harden attitudes. In a sense, it is a very *old* idea (in traditional ACAS parlance, fire prevention rather than firefighting), but there are two potential problems—(1) the rise in the number of tribunal applications may jeopardize it, because ACAS have a statutory *duty* to conciliate in those cases which may soak up resources meant for PCC;[37] (2) all parties concerned (employer, trade union, advice workers, ACAS) still have to operate this system against the background of very tight timetables because one thing that the government would *not* consider as part of the abolition of the standard procedures was any relaxation of the inflexible three-month time limit for most employment claims. The Coalition government intend, at the time of writing, to address both of these issues in the Enterprise and Regulatory Reform Bill. If these fundamental proposals proceed, the whole system will change, in that PCC will become ACAS's primary *duty*, relegating the traditional ET1 cases to a mere power (with the availability of conciliation dependent on resources). The emphasis will therefore be on early attempts at resolution. On the question of timing, this is to be dealt with by providing that when

[35] *ACAS Annual Report 1991* p 45. As a result of this change, the non-ET 1 caseload declined from 17,724 in 1989 to only 2,431 in 1992.

[36] Employment Rights Act 1996, s 203(3)–(4) provides the template for the rules on compromise agreements in all the relevant legislation.

[37] In spite of this, the early experience of PCC has been encouraging and in 2011/12 ACAS received 23,777 requests for PCC; the resolution figure was 55%: *ACAS Annual Report 2011/12*.

a case goes to PCC the clock of the time limit in question will stop (the proposal being for up to one month). The intention is to bring in these radical changes in 2014.

(c) Arranging arbitration

Under section 212 of the Trade Union and Labour Relations (Consolidation) Act 1992, ACAS may arrange arbitration for an actual or anticipated trade dispute if one or more of the parties request it *and* all parties consent to it.[38] This is clearly voluntary arbitration, and the resulting decision will not be legally enforceable per se,[39] though in practice the arbitrator's decision is invariably complied with. ACAS does not automatically have to arrange arbitration; as well as being satisfied that all parties consent, it must also consider whether conciliation might be successful instead, and should not arrange arbitration unless satisfied that existing negotiation and disputes procedures have been exhausted (unless there are special reasons why arbitration should be used *instead* of such procedures). The conciliation stage is important—if successful it removes the need for an arbitration; if unsuccessful the ACAS conciliation officer then has the task of determining with the parties the precise terms of reference for the arbitrator, for it is important in an arbitration that the terms are not themselves a subject for dispute; in fact, the terms of reference are usually kept as simple as possible and, further, nothing of what has happened or been said at the conciliation stage is made known to the arbitrator, who approaches the issue afresh. The usual practice is for ACAS to appoint one person to conduct the arbitration (from the panel of approximately 80 appropriate people whom they use), though occasionally a board of arbitration may be convened; officials and employees of ACAS are *not* used, though ACAS do of course provide the necessary secretarial and administrative services.[40] It is also possible for a voluntary arbitration to be referred to the CAC, though this option has effectively now fallen into disuse. Legal representation at an arbitration is unusual (and indeed usually discouraged if suggested) and although the proceedings may be conducted in a relatively structured manner (aimed at giving both sides a full opportunity to expand upon their written submissions and to query the other side's case), matters of procedure are largely for the arbitrator to determine and will not normally include legalistic forms, such as prolonged cross-examination.

Certain particular aspects in arbitration might be noted here briefly. First, references may come from *standing* arbitration agreements, usually taking the form of a clause in the disputes procedure section of a collective bargain stating that in the absence

[38] Mumford 'Arbitration and ACAS in Britain: A Historical Perspective' (1996) 34 BJIR 287.

[39] Pt I of the Arbitration Act 1996 does not apply to this form of arbitration: s 212(5). One rare example of binding arbitration on terms and conditions of employment was contained in the Pilotage Act 1987, s 5 and the Terms of Employment of Pilots (Arbitration) Regulations 1988, SI 1988/1089, but it was meant to be a temporary expedient; see Smith 'The Pilots' Compensation Scheme: A Study in Arbitration, Interpretation and Causation' (1994) 32 BJIR 379.

[40] In 2011/12 there were only 21 references to arbitration: *ACAS Annual Report 2011/12*. On the use of third-party intervention, see Millward et al *Workplace Industrial Relations in Transition* (1992) 194–6 and 208–11.

of agreement on a disputed point through internal procedures, the matter shall be referred to ACAS for conciliation and/or arbitration. This may be a general reference, or the clause itself may cover the procedure that is to be adopted. Second, it is possible for parties to a dispute to approach ACAS to ask them simply to *nominate* an arbitrator to conduct an arbitration which has already been agreed upon, without going through the normal conciliation procedures; such arbitrations do not figure in the annual ACAS statistics.[41] Third, at times there has been considerable interest in and publicity about the form of arbitration variously known as 'pendulum', 'flip-flop', 'straight choice' or 'final offer', where the arbitrator is constrained to choose between acceptance in full of one side's case or that of the other.[42] The aim of this is said to be to narrow the field of dispute and ensure that each side puts forward a realistic (rather than a bargaining) case, capable of being accepted in full. While this may be a natural form of adjudication in disputes of right, ACAS is by no means convinced that it is a panacea in disputes of interest such as pay determinations where flexibility in the arbitration may be just as important. Although ACAS will arrange such an arbitration if the parties desire it, it does *not* adopt it as its policy, preferring to encourage responsible bargaining in other ways and pointing out consistently that the fact that an arbitrator is normally given full discretion in coming to his award does *not* mean in practice that all he or she does is to split the disputed area down the middle, with half a baby to each.

(d) Arbitration in unfair dismissal and flexible working cases

Although voluntary arbitration has always been available to the parties to a dismissal dispute, it has in the past worked on an informal basis (with a disappointed complainant employee still able to go to a tribunal for a further hearing), and in recent years has declined in numbers along with arbitration generally. Faced with the steep rise in tribunal applications, the previous government explored the possibility of a revamped ACAS-run arbitration scheme to act as an *alternative* to tribunal proceedings.[43] This idea was taken up by the previous government, and made possible by the Employment Rights (Dispute Resolution) Act 1998, section 7 (inserting the Trade Union and Labour Relations (Consolidation) Act 1992, section 212A) which gives ACAS the power to produce a scheme for promulgation by the Secretary of State by order. Although this power has existed since August 1998, the finalized scheme did not

[41] This, however, can lead to a problem: the resulting arbitration is *not* an ACAS arbitration within the Act and so the exclusion of the Arbitration Act 1996 by s 212(5) (n 39) does not apply. Thus the 1996 Act could be applicable (if the agreement to arbitrate is in writing) and so the resulting decision could be legally binding (and any recourse to the courts excluded) under that Act, possibly without the parties realizing it at the time.

[42] See the *CAC Annual Report 1984* ch 3 for a discussion of this development. The aim is to avoid the damage arbitration is said to do to conciliation. Parties in negotiation anticipating arbitration tend to 'stand off' leaving a wide band of discretion for the arbitrator. Final offer arbitration encourages them to adopt a more realistic position, even perhaps to reach agreement. While this is a natural process in disputes of right, where the arbitrator has usually two positions to choose from, it is less certain in its application to disputes of interest. There is considerable North American experience in public sector arbitration.

[43] Resolving Employment Rights Disputes: Options for Reform (Cm 2707, 1994).

come into force until 2001.[44] It is based on a high level of agreement between the parties and has to be entered through a COT3 agreement or compromise agreement making it clear that the parties (particularly the claimant) understand that they are giving up completely their right to go to a tribunal. ACAS then organize an individual arbitrator to hear the case; the hearing is deliberately informal (with legal representation discouraged), the arbitrator has the powers of award of a tribunal *but* there is no appeal from the arbitrator's decision. In a sense, this system was an attempt to turn the clock back to a time where disputes were always supposed to be settled internally (going to a tribunal being a sign of failure), but it was always debatable whether this was possible now. The scheme faced considerable hostility from employment lawyers (the lack of an appeal being a particular bugbear) and, from a very slow start, things only went downhill[45] and so the present position is that in practice this is no real alternative to a tribunal for an unfair dismissal claim. In spite of this, the scheme was extended in 2003 when the new right came into force to request flexible working and not be unreasonably refused.[46] In theory this ought to be particularly appropriate for an arbitral approach but to date there has been little or no experience of it.

(e) Advice

The statutory power to give advice, contained in the Trade Union and Labour Relations (Consolidation) Act 1992, section 213, was altered by the Trade Union Reform and Employment Rights Act 1993. It used to contain eleven particular categories of relevant areas, including matters affecting collective bargaining, worker organization and recognition of unions. It now reads more simply:

> ACAS may, on request or otherwise, give employers, employers' associations, workers and trade unions such advice as it thinks appropriate on matters concerned with or affecting or likely to affect industrial relations.

As with the change at that time (considered above) to the general duty of ACAS, this alteration was likely to have little practical effect, but could be seen (in its removal of express references to collective means of resolving employment problems) to be symbolic. Again, references to such matters have not been reinstated by the present government.

The power to advise remains wide and will doubtless continue to be heavily used.[47] It covers general advice, specific replies to queries (for example on the meaning of modern employment laws), in-depth surveys and projects, giving conferences or

[44] It is now contained in the ACAS Arbitration Scheme (Great Britain) Order 2004, SI 2004/753, *Harvey* R [1977].

[45] From its inception in 2001 until 2009 only 61 cases were lodged: *ACAS Annual Report 2008–09*.

[46] See the ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004/2333, *Harvey* R [2149].

[47] This advice function has always been of great importance in practice: Armstrong 'Evaluating the Work of ACAS' [1985] Employment Gazette 143 and 'Asking ACAS' (ACAS Occasional Paper No 56; Dix, Hawes and Pinkstone).

seminars and the publishing of advisory booklets.[48] Diagnostic work within a company on a longer term basis may in fact be the result of one particular problem which arose and was settled through ACAS conciliation—the approach may have been made for the ACAS officer to attempt to find a settlement for the immediate problem on the understanding that the whole area in dispute would be looked at, either by the officer himself or, increasingly, by the setting up of a joint working party or workshop under the aegis of ACAS. This latter approach (more recently known as 'advisory mediation', see above) has expanded and largely replaced the older ideas of externally conducted 'IR audits' for two reasons—(1) it fits the current employment relations realities better, reflecting their more diverse nature with less chance of one desirable model being appropriate, but (2) at the same time it enables ACAS still to make a distinctive contribution towards ideas of *joint* resolution of problems and employee involvement, even in areas where formal bargaining with unions is no longer the norm.[49]

The ACAS Helpline came to renewed prominence with the repeal of the standard procedures for grievance and dismissal in 2009. As part of the government's replacement system (aimed at returning to a more voluntaristic and less prescriptive way of resolving individual disputes), the Helpline was expanded by about 50% in order to undertake a subtly different function – previously its function had been largely to give factual information (eg as to a dismissed employee's legal rights) but the idea now is that it should operate more proactively to steer enquiries into the available choices for resolving the possible dispute behind the enquiry (eg pre-claim conciliation, see above) *instead* of issuing tribunal proceedings.[50]

(f) Powers of inquiry

ACAS may on its own initiative hold an inquiry into aspects of industrial relations generally or in any particular industry or firm.[51] It may add its advice to its eventual findings, and is empowered to publish both if it thinks publication desirable (after hearing any representations on the question by those involved). In cases of greater public interest, however, the Secretary of State may decide to appoint a Court of Inquiry under the Trade Union and Labour Relations (Consolidation) Act 1992, section 215 (originally the Industrial Courts Act 1919). This is a more formal procedure than that adopted by ACAS and results in the laying before Parliament and publication of a formal report.[52] In appointing such a court, the Secretary of State lays down rules regulating its procedure, which may include powers to compel witnesses to provide information or give evidence on oath.

[48] For the current list of publications, set <http://www.acas.org.uk> under 'our publications'. The website also gives details of the e-learning packages for use in advice and training.

[49] Kessler and Purcell 'Joint Problem Solving—Does it Work? An Evaluation of ACAS In-depth Advisory Mediation' (ACAS Occasional Paper No 55).

[50] In 2011/12 the Helpline received 924,787 enquiries.

[51] Trade Union and Labour Relations (Consolidation) Act 1992, s 214.

[52] Use of this device is rare; a notable example was the Report of the Court of Inquiry under Scarman LJ into the dispute between Grunwick Processing Laboratories Ltd and APEX (Cmnd 6922, 1977).

(g) Codes of practice

Pursuant to its powers of inquiry and advice, ACAS is empowered by the Trade Union and Labour Relations (Consolidation) Act 1992, section 199 to issue codes of practice. The procedure is that a draft code will be drawn up with a view to comment by interested parties. The final draft is then submitted to the Secretary of State, who, if he approves, may lay it before Parliament. If no objection is taken to it, the Secretary of State may then bring it into force by order. Codes of practice are of increasing importance in modern employment law, to attempt to fill out the bare bones of the legislation and give practical advice on how to put that legislation (often of considerable legal complexity) into effect. A code of practice is not law in itself, so a person will not be liable for its breach; like the Highway Code in motoring cases, however, breach of its terms may be used as evidence against an employer in any proceedings before a tribunal or the CAC.[53] The first three codes of practice issued by ACAS covered disciplinary practices and procedures in employment, disclosure of bargaining information and time off work for trade union duties and activities. Arguably the COP No 1 on discipline and dismissal has been one of the most important documents in modern employment law, laying down many of the most fundamental principles for unfair dismissal law, and being the basis (or even model) for most of the internal procedures adopted by employers.

The original three codes of practice were reissued in 1998, but only in order to bring them up to date with current legislation, and not to make any substantive changes. The Code of Practice No 1 on discipline and dismissal was then reissued in 2000, in an expanded form also covering grievance procedures and the statutory right to be accompanied at a disciplinary or grievance hearing, and again in 2004 to take into account the new standard disciplinary and grievance procedures. It then, of course, had to be reissued yet again in 2009 when those procedures were repealed(!). At that stage, it constituted an important part of the government's policy for a replacement for the failed procedures. The idea is that the code will resume the primacy it always had in *practical* dispute resolution. To that end, the new code is actually shorter than its predecessor (to be more user-friendly to non-lawyers), though backed by the much longer 'Discipline and grievances at work: the ACAS guide' which, though not having the formal status of a code of practice, is likely to be of great practical significance in fleshing out the principles set out in the new code. All of this may appear to be essentially an exercise in returning to the past *but* there is one innovation. Wanting to 'beef up' the code (as a replacement for the failed procedures) the government have provided in the Employment Act 2008, section 3 (adding a new section 207A to the Trade Union and Labour Relations (Consolidation) Act 1992) that if a tribunal finds that a party before

[53] Trade Union and Labour Relations (Consolidation) Act 1992, s 207(2). Under s 203 the Secretary of State for Employment may himself issue codes of practice (after consultation with ACAS) and any such COP may replace part or all of one already issued by ACAS. This power has been used to issue the COPs in the politically contentious areas of picketing, the closed shop and union ballots and elections.

it has unreasonably failed to comply with a code of practice, it may increase or decrease any award or compensation by up to 25%. The novelty of this is that the ACAS Code No 1 (for all its immense practical effect) has *never* previously had any element of legal enforceability, being meant to operate purely in the context of 'best practice'. How (and on what principles) this new discretion will be operated by the tribunals remains to be seen at the date of writing. It is to be hoped that it will not increase the 'legalism' of tribunal hearings even more.

(ii) THE CENTRAL ARBITRATION COMMITTEE

The CAC, successor to the Industrial Court and the Industrial Arbitration Board, was established by the Employment Protection Act 1975 and its procedure is now governed by Part VI of the Trade Union and Labour Relations (Consolidation) Act 1992. It is a permanent arbitration body, independent of both ACAS and the sponsoring department and sitting centrally in London and elsewhere as the need arises. It consists of a chairman and deputy chairmen and a panel of persons appointed from both sides of industry. It will normally sit with a chairman or deputy chairman and two 'wingmen', though if it cannot reach a unanimous decision, the power of decision lies with the chairman or deputy chairman, acting as an umpire. It may sit in public or in private, and its decisions made in the exercise of its statutory functions (but not its consensual arbitrations) must be published; these decisions are given in the form of arbitral awards, with the emphasis upon a statement of 'general consideration' and then the terms of the award, rather than in the form of a closely reasoned legal judgment. If a question arises as to the interpretation of one of its awards, any party to it may refer the matter back to the CAC for decision. The functions of the CAC were progressively lessened by the previous Conservative government (which had a general distaste for third party intervention in industrial disputes) and were restricted to the following:

(1) To arbitrate on matters voluntarily submitted to it by the parties through ACAS;[54] the CAC may thus be an alternative to the (more usual) single arbitrator and such a reference may be ad hoc or may be because reference to the CAC is formally built into the relevant procedure agreement between employer and union;
(2) To enforce the disclosure of certain bargaining information.

The workload of the CAC was therefore drastically reduced from its high point as a major player in employment relations under the Labour governments of the 1970s.

The CAC has, however, seen a revival in its use under the present government, being involved in three major developments. The first, and most high profile, is the new statutory recognition procedure under the Employment Relations Act 1999 (see Chapter 9); jurisdiction to adjudicate on disputes arising from this procedure is given

[54] Trade Union and Labour Relations (Consolidation) Act 1992, s 212(1)(b).

to the CAC.[55] The second development was the transposition of the European Works Councils Directive 94/45/EC. More significantly, however, the CAC was given important functions under the Information and Consultation of Employees Regulations 2004, in relation to questions both of interpretation and enforcement.[56] These important new functions are likely to be sensitive and contentious, as can be seen from three further factors. The first is that when the CAC is operating the recognition procedure, it now has separate procedural requirements as to appointment, composition and decision taking,[57] aimed at increasing openness and minimizing challenges to its decisions. The second is that its decisions in relation to disputes over European works councils or the information and consultation of employees are subject to appeal on a point of law to the EAT.[58] The third is that, in expanding its membership to cope with the likely increase in its case law, the government were keen to stress (again) openness and adhesion to the 'Nolan principles' on open competition for public appointments. Moreover, the possible legal complexity of these new jurisdictions was reflected in the choice as Chairman (to replace the long-serving previous Chairman, Professor Sir John Wood, the original co-author of this work, on his retirement) of not just another eminent employment lawyer, but a High Court judge, Burton J.

(iii) THE CERTIFICATION OFFICER

In addition to ACAS and the CAC the other principal institution which the reader is likely to encounter in the areas of industrial relations and trade union law is the Certification Officer (CO). The office was established by the Employment Protection Act 1975 and is now governed by Part VI of the Trade Union and Labour Relations (Consolidation) Act 1992, though with major changes made by the Employment Relations Act 1999. It takes its name from the major function at that time of certifying trade unions as 'independent', such certification being the key to enjoyment of the new statutory rights given to unions and their members by that Act; the procedure of certification is considered in Chapter 9. However, it becomes immediately obvious that in fact this official is, if not misnamed, at least inadequately named, since his functions now extend far beyond certification (which is now of course quantitatively far less important). In fact, he resembles more the old institution of the Registrar of Trade Unions, with a wide supervisory jurisdiction which may be generally split

[55] In exercising these functions, the CAC 'must have regard to the object of encouraging and promoting fair and efficient practices and arrangements in the workplace': Trade Union and Labour Relations (Consolidation) Act 1992, Sch A1, para 171.

[56] In 2011/12 the CAC received 52 applications; 43 concerned trade non-recognition, 4 disclosure of information, 1 European consultation and 4 information and consultation of employees: *CAC Annual Report 2011/12*.

[57] Trade Union and Labour Relations (Consolidation) Act 1992, s 263A. In particular, there *must* be a side member for each side of industry; where there is a split of opinion, but a majority have the same opinion, that is to be the decision (and so the chairman only has the power of umpire to decide the case if there is no majority opinion).

[58] Transnational Information and Consultation of Employees Regulations 1999, SI 1999/3323, reg 38(8); Information and Consultation of Employees Regulations 2004, SI 2004/3426, reg 35(6).

into two functions—administrative and judicial. The administrative functions include the listing of trade unions, dealing with the mechanics of union amalgamations, and receiving the audited annual returns and actuarial reports on members' superannuation schemes that are required of trade unions under the Trade Union and Labour Relations (Consolidation) Act 1992. In addition, however, the CO has judicial functions, in that he has the power to adjudicate on complaints brought by individuals of infringements of the laws relating to (1) political expenditure by a union, the running of a political fund and the necessary balloting thereon; (2) the balloting required for a union amalgamation; and (3) the balloting required for the appointment of union officers. Although the CO is funded and provided with staff through ACAS, he operates independently of it (and of the Department for Business, Innovation and Skills). He is expressly empowered to regulate his own procedure on any application or complaint to him, and he produces an annual report on his activities, which is an important source of up-to-date information and statistics on trade unions and their operations. At the time of writing, the Coalition government have proposed merging the office of the CO with the CAC.

4 MACHINERY (2): JUDICIAL DISPUTE RESOLUTION

The large majority of all employment and employment relations litigation is handled by employment tribunals, which from inauspicious beginnings under the Industrial Training Act 1964 have expanded to assume wide new jurisdictions under the modern employment legislation and now have common law jurisdiction over breach of contract claims, at least on termination of employment.[59] They started life as 'industrial tribunals' but were renamed 'employment tribunals' in 1998,[60] for no apparently compelling reason. As 'industrial juries' they were originally designed to provide a means of speedy resolution of employment cases which will often turn very heavily upon their particular facts, and the Donovan Report in 1968[61] referred to their potential advantages as being ease of access, informality, speed and inexpensiveness. Rules of procedure (including pre-trial procedures, such as the simplified pleadings)

[59] Employment Tribunals (Extension of Jurisdiction) Order 1994 SI 1994/1623 (in Scotland SI 1994/1624); see *Harvey* Division R [778], [788]. One serious limitation in high value claims is that the maximum awardable is £25,000, a figure that has not been raised since 1994. Moreover, a claimant in such a claim cannot claim the *first* £25,000 in a tribunal (in which, for example he or she is claiming unfair dismissal) and then claim the rest in a court because the tribunal decision establishes an estoppel: *Fraser v HLMAD Ltd* [2006] ICR 1395, [2006] IRLR 687, CA.

[60] Employment Rights (Dispute Resolution) Act 1998, s 1. The Industrial Tribunals Act 1996 was renamed the Employment Tribunals Act 1996. All references to these bodies pre-1998 (in cases and legislation) will of course be to 'industrial tribunals'.

[61] Royal Commission on Trade Unions and Employers Associations (Cmnd 3623, 1968).

are drafted with this aim in mind, and the tribunals have wide powers to decide most cases in a common-sense way, having regard to 'good industrial practice'. The paradox here, however, is that while the tribunals' procedure may be simplified, the law which they have to apply is often of great complexity and there has in the past been major controversy over how 'legalistic' the proceedings and decisions of tribunals should be. Simple, common-sense access to quick justice may be a worthy aim, but there is still a lot of hard law which must be complied with in most of the statutory actions.

The original idea of quick and informal justice in a tribunal was consistent with another theme in this area, namely the undesirability of appeals to complicate the matter. Tribunals have always been given primacy on questions of fact, and so one important feature of this whole system is that an appeal from a tribunal decision lies to the EAT only on a question of *law*.[62] As seen below, this rule is applied rigorously and indeed may well affect the ultimate disposal of an appeal because, even if it is successful, a common order will be for the matter to be remitted to the tribunal for final decision on the facts, ie the EAT will not normally *decide* the case for itself.

(i) EMPLOYMENT TRIBUNALS

Tribunals sit in most local centres of population, under the auspices in England and Wales of 21 local offices, all under the control of the Head Office in London, and in Scotland four local offices under the control of the Head Office in Glasgow. Under the original model, a tribunal consists of three people, a legally qualified chairman (now known as an employment judge) and two lay members, one from a panel kept by the Secretary of State representing employers' interests and one from a panel kept representing employees' interests. The theory is that, although expressly appointed from each side of industry, the lay members are to act as independent members of the bench, not in a partisan manner, and so they are full members of the tribunal which decides its cases if necessary by a majority (even in the unusual case of the judge being in the minority). One of the principal functions of the side members is to use their employment experience to help the tribunal to come to a sensible and practicable decision; however, this approach must not be taken too far, and the Court of Appeal has warned that knowledge of the employment background and industrial common sense (though of great importance in many cases) may *not* be used to take a decision directly against the plain meaning of a statutory provision, even if the side members consider the end result of applying that plain meaning to be unfair or ridiculous.[63]

This original model has, however, been under attack for some years. This started when the Trade Union Reform and Employment Rights Act 1993 amended these provisions as to the composition of a tribunal by establishing a class of case to be heard by a chairman *alone*; this was partly to deal with withdrawn or non-contested cases, but

[62] Employment Tribunals Act 1996, s 21.
[63] *British Coal Corpn v Cheesbrough* [1988] ICR 769, [1988] IRLR 351, CA.

it also covered Wages Act cases, applications for interim relief and the common law proceedings that may now be heard by a tribunal, *unless* they raise matters of fact or law such that they should be heard by a full tribunal. This process was taken further by the Employment Rights (Dispute Resolution) Act 1998 which extended the categories of chairman-alone hearings (covering, for example, guarantee payments and redundancy payments and cases involving union subscriptions) against the background of a significant increase in tribunal applications.[64] However, arguably the most significant change came in 2012 when the Coalition government added to the list of judge-alone jurisdictions cases of unfair dismissal, for many lawyers the prime area for the use of side members with their industrial expertise. There is still a power to sit with side members[65] but the legislation now makes judge-alone very much the normal default setting in these cases.

The tribunal is administered by a clerk who is a permanent official. The claimant may conduct his case before the tribunal in person or be represented by any other person (sometimes a lawyer, sometimes a trade union official, and the respondent employer may often be represented by a member of the firm's personnel or legal staff);[66] there is no legal aid for representation, though a dismissed employee may be eligible to obtain free preliminary advice from a solicitor, and may also be able to turn to his or her trade union or to the CAB.

Costs are not usually awarded; this has generally been thought to be a fundamental and desirable element of the tribunal system. However, there is always some pressure politically to curb what are seen as unworthy or time-wasting applications (at the very least adding a significant 'nuisance value' to applications, leading—so the argument goes—to too many undeserving cases being bought off by employers, regardless of their merits). In recent years, this has coincided with the desire of successive governments to curb the major increase in the number of tribunal applications. There has always been a residual power to award costs. Originally this only covered frivolous or

[64] Applications rose sharply from 34,697 in 1990–91 to 71,821 in 1992–93; they peaked at 130,408 in 2000–01. In 2004–05 they fell to 86,181 which seemed to give some credence to the government's dispute resolution reforms in the Employment Act 2002, *but* any hopes of a permanent decrease were then dashed when they increased again to 115,039 in 2005–06. In 2007–08 they reached 189,303 (artificially swelled by large, multiple equal pay cases in the public sector). In 2011/12 the figure was 186,300, without that artificial swelling.

[65] As the President of the Scottish EAT Lady Smith pointed out forcefully in *McCafferty v Royal Mail Group* UKEATS/0002/12.

[66] Dickens et al *Dismissed: a Study of Unfair Dismissal and the Industrial Tribunal System* (1985) found that 23% of applicants had legal representation, 22% had trade union representation and 9% had some other form of representation; 41% of employers had legal representation, 52% had internal company representation and 5% were represented by an employers' association. The Genn Report (*The Effectiveness of Representation at Tribunals*; Report to the Lord Chancellor, 1989) found broadly the same, with 28% of applicants having legal representation, 16% trade union representation and 18% some other form of representation; 42% of employers had legal representation, 49% internal company representation and 8% employers' association representation. The report has a wealth of information on the effects of representation; see Mullen (1990) 53 MLR 230 and Genn 'Tribunals and Informal Justice' (1993) 56 MLR 393. See also Banerji, Smart and Stevens 'Unfair Dismissal Cases in 1985–86—Impact on Parties' [1990] Employment Gazette 547; Tremlett and Banerji *1992 Survey of Industrial Tribunal Applications* (1994).

vexatious conduct by a party; in 1980 this was widened to cover cases brought 'otherwise unreasonably' and in 2001 the current rule was introduced under which costs may be awarded where the party or their representative acted 'vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived'.[67] The significance of the 'misconceived' heading was that for the first time a costs application could be made based on the weak *merits* of the case, not just the way it was handled. Even this change was not thought enough by the then government when drafting the Employment Act 2002. At original Bill stage, this contained the remarkably radical proposal to introduce an ordinary costs rule (loser pays) into the tribunals, as a major assault on increasing applications. This, however, proved to be too controversial and was withdrawn. However, the Act did lead to two other significant changes in the Rules of Procedure. The first was to allow an employer to claim costs based not on its legal expenditure, but on its own in-house costs in dealing with the case. The second was to allow the making of what elsewhere are called wasted costs orders against paid representatives whose conduct has needlessly wasted tribunal time. Costs have thus become a live issue again, with these wider powers. On the other hand, employment judges remain generally wary of introducing wider costs rules into their jurisdiction and, in spite of these changes, actual orders for costs remain relatively rare.[68]

Apart from specific rules, such as that on costs, the tribunals have wide powers to determine their own procedure by virtue of the Rules of Procedure.[69] In recent years, there has been much emphasis on case management in tribunals with the judge expected to play an active part at this preliminary stage. Successive governments have wanted to increase the use of strike-out powers in the case of weak claims, if only to reduce the running costs of the tribunal system but this aspect above all others has led to what could be seen as a conflict between executive and judiciary because to a significant extent tribunal judges have been loath to comply and the higher courts have always stressed the unusual and draconian nature of a strike-out, particularly in the light of the right to a fair hearing in Article 6 of the European Convention on Human Rights.[70]

At the time of writing, we are expecting new Rules of Procedure to come into force in 2013 as a result of a comprehensive review undertaken by a previous President of the EAT, Underhill J; these are aimed at reducing technicality and making the rules easier to understand, especially for litigants in person. In addition to this, two other major

[67] Rule 40(3).

[68] Even by 2011/12 the proportion of cases where costs were awarded was still only 0.5%; the mean award was £1,730.

[69] Details of the ET procedure rules lie outside this work; for comprehensive coverage, see *Harvey* Division PI.

[70] The leading EAT authority is *Balls v Downham Market High School* [2011] IRLR 217 and in *Tayside Public Transport Co v Reilly* [2012] IRLR 755 the Inner House of the Court of Session reaffirmed that normally there should be no strike-out if any facts remain in contention.

changes in the pipeline (also scheduled for 2013) are (i) a new scheme enacted for the levying of fees to bring a tribunal claim (to be recouped from the respondent if successful but forfeited if unsuccessful) and (ii) the levying of what will in effect be a fine (payable to the state, again to help finance the tribunal system) on a losing employer if there are 'aggravating factors' to the case.[71]

One final point concerns the aggregate effect of all of these changes. If one adds together the demise of side members in so many cases, the consequent emphasis on the position of the judge alone (no longer simply the tribunal 'chairman'), the attempts to extend the costs regime, the charging of fees and the inexorable lengthening of hearings with arguably a significant decrease over the years of the original inquisitorial nature of tribunals,[72] the question might well be asked—are these really still tribunals as originally understood, or simply courts by another name?

(ii) THE EMPLOYMENT APPEAL TRIBUNAL

Appeal from a tribunal decision lies to the EAT, a body set up under the Employment Protection Act 1975.[73] The EAT, a superior court of record, consists of a High Court or circuit judge and either two or, more unusually, four lay members, once again giving equal representation to both sides of industry, though once again the members should not act in a partisan manner and the decision of the EAT is by simple majority, if necessary.[74] Where a tribunal has consisted of an employment judge sitting alone, an appeal may be heard by the judge alone. The constitution of the EAT is laid down in the Employment Tribunals Act 1996, which expressly gives it the powers of the High Court *and* those of the employment tribunals.[75] Its procedure is contained in the EAT Rules laid down in Regulations.[76] As in the case of tribunal proceedings, the parties may be represented by anyone and costs are not normally awarded, unless the EAT considers that the appeal 'was unnecessary, improper, vexatious or misconceived' or there was 'unreasonable delay or other unreasonable conduct in bringing or conducting the proceedings'.[77]

[71] This would be 50% of the amount awarded to the successful claimant, subject to a maximum of £5,000. Although 'aggravating factors' are not defined, this fine would probably be particularly appropriate if the employer has ridden roughshod over internal procedures.

[72] In *Arnold Clark Autos Ltd v Middleton* UKEATS/0011/12 Lady Smith in the Scottish EAT struck down a decision by a tribunal to call witnesses itself when dissatisfied with the parties' evidence and in doing so went as far as to suggest that an inquisitorial approach is now never appropriate—'Employment tribunals are not investigative bodies. It is not for them to decide what issues are to be looked into'.

[73] Now the Employment Tribunals Act 1996, Pt II.

[74] This has caused some debate, particularly after the case of *Nethermere (St Neots) Ltd v Gardiner* [1983] ICR 319, [1983] IRLR 103 (extending rights to homeworkers), the argument being that if appeal to the EAT is so stringently confined to a point of law, then should there be two non-lawyers with the power to outvote a High Court judge?

[75] Sections 28, 33.

[76] SI 1993/2854, *Harvey* R [714]. These rules are supplemented by the EAT *Practice Direction* reissued in May 2008 and set out at *Harvey* PI [1761].

[77] Rule 34A; r 34C allows a wasted costs order against a paid representative personally.

The most important point about the appeal to the EAT is that it is an appeal on a point of law *only*;[78] this is a deliberate policy to minimize appeals. The practical significance of this is that the parties must ensure that they argue the facts properly and fully before the tribunal, for if they do not and they lose on the facts (for example, by not calling all the relevant evidence or by not presenting it sufficiently persuasively) they may not take the matter to the EAT for a second chance. To appeal to the EAT, the party must be able to show that the tribunal was wrong in law. It has been authoritatively stated in *British Telecommunications plc v Sheridan*[79] by the Court of Appeal that this means one of two things—either (1) an ex facie error of law or (2) that the tribunal's decision was perverse. There had been said to be a third category, ie where the tribunal misunderstood or misapplied the facts,[80] but that was specifically disapproved in *Sheridan*, since it would have permitted the EAT to allow an appeal simply by taking a different view of the facts.[81] The judicial approach to perversity has undergone considerable changes over time, against the background of the obvious point that this is the only way that an appellant can legitimately convert fact into law. In the early years of the tribunals' expanded jurisdiction after the inception of unfair dismissal law in 1971, the appellate courts tended to take a wider, more interventionist approach that if (particularly) the industrial members of the bench agreed that they would not have decided the case that way, the decision was perverse. At a time when the new law was bedding in and basic ground rules were being established, this approach could be seen as natural, but by the mid-1980s a large element of revisionism (based on the idea that the system was becoming too legalistic) led to a review of this crucial element of perversity appeals. It was now that the current narrow approach to perversity came in (with the corresponding warnings to the EAT not to reverse a tribunal decision merely because they think it wrong on the facts). In *RSPB v Croucher*[82] Waite P went as far as to call cases of perversity 'exceptional' and said:

> We have to remind ourselves of our duty and our functions as an appellate tribunal. We have to remember that it is our duty loyally to follow findings of fact by an industrial tribunal which has enjoyed the advantages, which can never be ours, of having seen witnesses, sensed the atmosphere prevailing in a particular work-place, gauged the qualities of the different personalities, weighed the impact of their effect each upon the other; and that cases must be

[78] The EAT will not hear appeals where the dispute has in fact been resolved, even if one or both of the parties wish to have a particular point resolved as a matter of principle: *IMI Yorkshire Imperial Ltd v Olender* [1982] ICR 69. Likewise, if there is no real dispute between the parties, who want a ruling for some extraneous purpose: *Baker v Superite Tools Ltd* [1986] ICR 189.

[79] [1990] IRLR 27, CA.

[80] *Watling v William Bird & Son Contractors Ltd* (1976) 11 ITR 70, per Philips J.

[81] If there can be said to be *no* evidence to support a particular finding of fact, that is an error of law under head (1). Note, however, that delay by a tribunal, even if extreme, is not a separate head of appeal even when allied to human rights arguments: *Bangs v Connex South Eastern Ltd* [2005] IRLR 389, CA.

[82] [1984] ICR 604, [1984] IRLR 425; the passage cited is at 609 and 428, respectively. Note, however, that on its facts this case was later restrictively construed in *John Lewis plc v Coyne* [2001] IRLR 139.

> very rare indeed where we take upon ourselves to reach the conclusion that a tribunal has arrived at a result not tenable by any reasonable tribunal properly directed in law.

This narrow approach to perversity was approved by the Court of Appeal in *Neale v Hereford and Worcester County Council*[83] where May LJ said that an appellate court should only reverse a tribunal's decision if it could be said 'My goodness, that must be wrong'.[84] Indeed, even this well-known explanation was thought possibly too liberal in *Piggott Bros & Co Ltd v Jackson*[85] by Lord Donaldson MR who thought that it might tempt an interventionist EAT into the forbidden land of fact. However, his preferred solution (that perversity could normally only be shown by an error of law or a *total* lack of evidence) was arguably capable of removing perversity as a separate heading. Subsequently, Wood P in the EAT in *East Berkshire Health Authority v Matadeen*[86] complained that *Piggott* was causing difficulties in appeals, and sought to lean back towards the *Neale* approach, stating that the EAT could interfere if the members[87] were satisfied that the tribunal decision was not a permissible option, or was one which offended reason, or was one which no reasonable tribunal could have reached, or was so clearly wrong that it could not stand. This formulation would leave perversity as a freestanding ground, which seems now to have been accepted at Court of Appeal level, though with the clear warnings that any perversity challenge must be fully particularized, and should only be upheld by the appellate body if an 'overwhelming case' has been made out.[88]

In addition to such policy considerations, perversity appeals also face another problem; it is now well established that a tribunal must not simply substitute its own view of what would have been reasonable in the circumstances for that of the employer, but must consider (in an unfair dismissal case) whether dismissal was an option which *a* reasonable employer might have chosen, even if others might not (the 'range of reasonable responses' test, see p 505 below). Thus, if a tribunal's decision on reasonableness is to be challenged as perverse the appellant has, in effect, a double hurdle—he must show that *no* reasonable tribunal could possibly have come to the conclusion that *a* reasonable employer could have decided to dismiss (where the appellant is the employee) or that *no* reasonable employer could have decided to dismiss (where the appellant is the employer).

[83] [1986] ICR 471, [1986] IRLR 168, CA; moreover it was held in *Campion v Hamworthy Engineering Ltd* [1987] ICR 966, CA that if a case goes to the Court of Appeal on perversity, that court's function is to apply the *Neale* test to the tribunal's decision, *not* to consider whether the EAT's decision on the point was correct.

[84] This is known in some quarters as the 'Biggles test' (see (1987) 16 ILJ 213) due to a flippant remark in the *Harvey* bulletin that although this statement is entirely consistent with the modern approach, its phraseology may appear over-reliant on the writings of Captain W E Johns ('Gosh' said Biggles as a shell ripped off his right leg).

[85] [1992] ICR 85, [1991] IRLR 309, CA.

[86] [1992] ICR 723, [1992] IRLR 336.

[87] One strong argument by Wood P is that the lay members are there to contribute their industrial expertise, and are capable of applying such tests of perversity 'when viewed against appropriate industrial experience and practice', ie at least a nodding recognition of the earliest approach.

[88] *Yeboah v Crofton* [2002] IRLR 634, CA; this case is now frequently cited in this context.

Appeal on a point of law is thus tightly circumscribed and the point has been made repeatedly that the EAT must exercise considerable self-restraint in cases where it disagrees profoundly with the decision of the tribunal on the facts but where there is no definable error of law; in such a case it must not interfere.[89] Likewise, there have been repeated warnings by the Court of Appeal to appellants and, more particularly, their legal advisers that points of fact are not to be dressed up in the garb of points of law in order to bring an appeal.[90] Moreover, this is backed by an important procedural device. Starting originally with perversity appeals but now applying to all appeals, a notice of appeal is subject to a 'sift' by a judge or the Registrar which is partly to decide (as a matter of case management) which of several procedural routes should be adopted, but which can also be used to ensure that there is a proper point of law at issue; if not, the appeal may be struck out at that stage (subject to a right to have this decision reconsidered at a short oral hearing).[91]

Three further points about the EAT are worth noting. The first is that it will be most reluctant to admit fresh evidence unless, exceptionally, the existence of the fresh evidence could not have been reasonably known of or foreseen (akin to the 'reasonable diligence' test applied generally by the Court of Appeal);[92] this rule is not to be circumvented by remitting the case to the tribunal for a rehearing including the otherwise inadmissible evidence.[93] This reinforces the point made above that it is essential that all relevant evidence is placed before the tribunal at the hearing. The second point is that, although the EAT is empowered on appeal to substitute its own decision for that of the tribunal if it allows the appeal,[94] if the decision on appeal entails the finding of further facts or the reconsideration of certain existing facts the proper course will normally be to remit the case to the tribunal for further consideration in the

[89] *Retarded Children's Aid Society Ltd v Day* [1978] ICR 437, [1978] IRLR 128, CA; *Martin v Glynwed Distribution Ltd* [1983] ICR 511, [1983] IRLR 198, CA; *O'Kelly v Trusthouse Forte plc* [1983] ICR 728, [1983] IRLR 369, CA; *Spook Erection v Thackray* [1984] IRLR 116, Ct of Sess. The decision of the EAT in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, [1981] IRLR 347 (upheld on appeal: [1982] ICR 693, [1982] IRLR 413, CA) is a good example of the necessary self-denial; see also the judgment of Mummery P in *Stewart v Cleveland Guest (Engineering) Ltd* [1996] ICR 535, [1994] IRLR 440. This will be particularly so in matters of procedure which fall primarily within the discretion of the tribunal chairman: *Dietmann v London Borough of Brent* [1987] IRLR 146, CA.

[90] See, eg, *Hollister v NFU* [1979] ICR 542, [1979] IRLR 238, CA; *Thomas and Betts Manufacturing Ltd v Harding* [1980] IRLR 255, CA.

[91] EAT Practice Direction, paras 9.5, 9.6. The institution of this process is explained in detail by Burton P in 'The Employment Appeal Tribunal: October 2002–July 2005' (2005) 34 ILJ 273. *Star Wars* fans may think of this as the Revenge of the Sift.

[92] *Borden (UK) Ltd v Potter* [1986] ICR 647 (overruling the previous 'reasonable explanation' test in *Bagga v Heavy Electricals (India) Ltd* [1972] ICR 118); for an example of the application of this test (and the further requirement that the new evidence would have an important influence on the outcome of the case) see *Wileman v Minilec Engineering Ltd* [1988] ICR 318, [1988] IRLR 144. Similarly, the EAT will not normally allow a party to argue a point of law not taken at the tribunal, unless it is a point that the tribunal should have considered on its own motion: *Langston v Cranfield University* [1998] IRLR 172.

[93] *Kingston v British Railways Board* [1984] ICR 781, [1984] IRLR 146, CA.

[94] Employment Tribunals Act 1996, s 33.

light of the EAT's decision.[95] The third point is that as a matter of precedent the EAT is not bound by a previous decision of its own.[96] Thus, there have been many instances, in cases raising bona fide matters of law, of a later EAT decision altering the direction of an area of law away from previous authorities. There is thus a difficult balance to maintain between certainty and legal development, and the student of employment law must realize that in practice the doctrine of precedent is not as strong here and so, for example, it cannot always be assumed beyond doubt that an ageing EAT decision will always be applied without question.

Finally it should be noted that at the time of writing the Enterprise and Regulatory Reform Bill proposes to alter the constitution of the EAT by providing that normally it is to sit judge-alone. This is consistent with the approach of the present government to tribunals, considered above, and marks another stage in the process of the demise of lay participation in adjudication on employment disputes.

[95] *O'Kelly v Trusthouse Forte plc* [1983] ICR 728, [1983] IRLR 369, CA. A hybrid is that it is now accepted that the EAT may adjourn its hearing and remit the case to the tribunal to amplify its reasons, if that will help the EAT to come to a final decision: *Burns v Consignia plc (No 2)* [2004] IRLR 425, approved by the Court of Appeal in *Barke v SEETEC Business Technology Centre Ltd* [2005] IRLR 633, CA.

[96] *Secretary of State for Trade and Industry v Cook* [1997] ICR 288, [1997] IRLR 150.