

## Chapter 1

# An introduction to employment law

### Learning objectives

This chapter considers the ways in which the employment relationship is regulated by both voluntary and legal measures. Having read it, you should understand:

- The nature and purpose of both voluntary and legal regulation in general
- The principles that underpin employment and discrimination law
- The relationship that can exist between voluntary and legal regulation
- The various roles of courts, tribunals and statutory agencies

### Structure of the chapter

- *Introduction*: the role of legal and voluntary regulation; economic and political perspectives
- *The nature of legal regulation and enforcement*: common law; statute law; secondary legislation; European law; the European Convention on Human Rights; tribunals and courts; the role of statutory agencies; statutory codes of practice; redress
- *Some underpinning principles*: ethics; human rights; fairness; reasonableness; equal treatment; harmonisation; natural justice; consent and freedom

## Introduction

Broadly speaking, the employment relationship is regulated by both voluntary and legal measures. Voluntary measures comprise agreements and other decisions that derive from collective bargaining, arbitration, conciliation, mediation, and grievance and discipline handling. They also include voluntarily accepted standards of good employment practice (for example, those advocated by the Chartered Institute of Personnel and Development). Legal measures are European Union (EU) treaties and directives, the European Convention on Human Rights and Fundamental Freedoms 1950, British statute law, the common law of contract and of tort, case law, statutory codes of practice and some international standards. In practice, these are not isolated sets of measures. As we shall see, voluntary and legal measures invariably interlink and influence each other.

## ► What are the purposes of voluntary and legal measures?

There are two broad purposes. First, at various points, they influence the function of management – i.e. the ways in which managers exercise power, control and organise workforces and manage conflicts of interest. This influence can be illustrated in the following way. It is widely accepted that the employment relationship is characterised by an imbalance of power in favour of the employer. Both voluntary and legal regulation can restrain the unfettered exercise of this employer power. So, for example, collective bargaining with a trade union can minimise the exploitation of individuals at work by agreements on pay and conditions, and also by helping to process grievances. Furthermore, legislation can establish minimum conditions of employment (e.g. national minimum wage), and set limits on the action that an employer might take against employees (e.g. in relation to discipline and dismissal).

The second purpose of this regulation is to assert certain principles. On the one hand, there are those principles that influence the nature and quality of decisions (e.g. fairness, equal treatment, reasonableness, etc.). In addition, there are those principles which mould the regulatory process itself. Examples of this include the fundamental importance of consent in agreeing and changing contracts of employment, and of fairness and reasonableness in disciplinary procedures.

## ► How does the law influence substantive issues?

Traditionally, it was accepted in British employment relations that, as far as terms and conditions of employment (the substantive issues) are concerned, the law may set a general framework but the details would be determined either by employers alone or after negotiation with trade unions. Indeed, in 1954, one academic lawyer was able to make the following comment: ‘There is, perhaps, no major country in the world in which the law has played a less significant role in the shaping of (industrial) relations than in Great Britain and in which the law and legal profession have less to do with labour relations’ (Kahn-Freund 1954).

This characterisation, however, soon began to change. Increasingly, over the following decades, statute law was enacted to establish both certain principles to guide employer behaviour and also the terms and conditions of employment offered to staff. So, for example, ‘fairness’ is now a basic criterion used to judge the reason for sacking an employee. ‘Reasonableness’ is widespread as a reference point for assessing health and safety standards. The prohibition of ‘less favourable treatment’ is fundamental to equality law.

There has also been a growing tendency towards more detailed prescription of certain terms and conditions of employment. This has arisen from some statute law and, in part, from case law. These more detailed requirements have an impact on all employers. For example, the outlawing of indirect sex discrimination – unless it can be justified – has created a body of case law which steers employers to scrutinise their employment practices. This law requires consideration about the legality and justification for such practices as, for example, seniority-based promotion, requirements that work should be full time, age barriers in employment, etc.

Academic commentators have pointed to growing evidence in Britain (as in other European countries) of ‘juridification’. This is defined as the tendency to which the behaviour of employers and unions is determined by reference to legal standards.

Indeed, it is suggested that, in Britain, we have moved to a ‘minimum standards’ contract of employment that has been created through the continued intervention of statute law (see Chapter 2).

### ► How does law affect procedural issues?

The procedural aspects can be subdivided into those that concern the individual employee and those which concern collective relationships.

Individual employees work under a contract of employment agreed with the employer. Consent is at the heart of contract formation and also contract variation. The courts have asserted, in numerous cases, that when an employer wishes to change terms and conditions of employment, then, procedurally, the employee must be consulted and agreement sought (see Chapter 3).

In disciplinary matters involving individuals, procedural fairness is essential. This is specified in the ACAS *Code of Practice on Disciplinary and Grievance Procedures* (2009). This has been confirmed in case law (see Chapter 8). As far as grievances are concerned, it has been established that individuals have the right, through an implied term of their contract of employment, to raise grievances through an appropriate procedure (*WA Gould (Pearmak) Ltd v McConnell and Another* [1995] IRLR 516). Also, new statutory requirements on grievance handling are explained in the ACAS code of practice. Furthermore, a worker has a statutory right to be accompanied in a grievance and a disciplinary hearing (ERA 1999, s 10).

As far as collective relations are concerned, Britain, historically, had a strong tradition of voluntarism for determining employment relations procedures. So, employers could freely decide whether or not to negotiate with trade unions and about which terms and conditions of employment. They could also determine any consultation arrangements. There is still considerable employer freedom in this area. However, European and British law have circumscribed it to some extent. The principal examples are:

- *Collective redundancies*: consultation with unions or employee representatives over specified redundancies (Trade Union and Labour Relations (Consolidation) Act 1992).
- *Transfers of undertakings*: consultation with unions or employee representatives about the transfer (Transfer of Undertakings (Protection of Employment) Regulations 2006).
- *Health and safety*: consultation with unions or employee representatives about safety standards and safety organisation in the workplace (Safety Representatives and Safety Committees Regulations 1977; Health and Safety (Consultation with Employees) Regulations 1996).
- *General workplace information disclosure and consultation*: relating to the economic circumstances of the organisation, likely changes in the labour force, and contractual changes (Information and Consultation of Employees Regulations 2004).
- *Information disclosure and consultation*: in specified multinational companies operating in the European Union (Transnational Information and Consultation of Employees Regulations 1999; and the 2010 Regulations).
- *Recognition for collective bargaining purposes*: statutory obligations to negotiate with trade unions on certain employers who meet various statutory hurdles (Trade Union and Labour Relations (Consolidation) Act 1992).

## Economic perspectives

A labour market is, arguably, defined by the limits set by law. As mentioned above, a key economic function of labour law is to determine how and when managerial authority is limited (e.g. limits to working time, minimum wages, protection against unfair dismissal). According to a leading labour law theorist, the 'main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship' (Otto Kahn-Freund in Davies and Freedland 1983). So, labour law is seen as a potential force to counteract inequality.

Labour law can provide incentives or disincentives for improving skills and productivity. The nature of labour legislation affects the efficiency of a firm in a competitive market. For some, this role of promoting economic efficiency is central. So, for example, it is argued that minimum wage laws can encourage investment in skills and technology rather than reliance on cheap labour. Labour law can also affect the movement of labour both nationally and internationally. Furthermore, such law can have, as outlined above, an important moral dimension covering such issues as slavery, child labour, unfair discrimination, privacy and bullying.

As far as disincentives of labour law are concerned, these can be found largely in the human resource management experience of employers. For example, information obligations (e.g. about the contract of employment and changes) were found to be significant (Lambourne *et al.* 2008). The Better Regulation Executive (2010: 16) reported, from a survey of 500 micro businesses (i.e. employing fewer than 10 people), that respondents stated that 'employment law does have a negative effect on business growth, and the concern about employment law is less about paperwork but probably more about cost, complexity and the perceived cost of "getting it wrong"'. In particular, as far as dismissal is concerned, 'it is believed that it is becoming increasingly hard to dismiss people and that employers have to go through an onerous process' (2010: 17).

Furthermore, globalisation, as an economic phenomenon, has led to a lively debate about the declining power of national labour laws and the need for labour regulation across national boundaries.

### ► Globalisation and the changing role of labour law

One major labour law study notes that the 'study of comparative employment law has increased in importance in recent years largely because of the growing tendency towards international economic integration and the development of transnational labour standards' (Deakin and Morris 2005: 3). Globalisation has made a significant impact on the nature and profile of labour rights arguably diminishing the efficacy of national level employment law and labour market regulation with issues of labour abuses and the degradation of workers' rights being a common theme. According to Hepple (2005: 9), the 'features of the new economy mean that labour law is now inevitably global law and not just the concern of a particular nation state'. The role of international labour regulation has acquired renewed attention and pertinence. Issues of child labour, slave labour, forced labour and a variety of other forms of economic exploitation have been prominent in debates. To these debates have also been added the issue of 'social dumping' (whereby companies seek to relocate in countries with fewer or weaker employment law

regimes), and the responsibilities of transnational companies in implementing and maintaining labour standards. The regulation of these transnational corporations poses many difficulties. Attempts have been made to introduce 'privatised' forms of regulation such as codes of conduct and social labelling systems. Transnational collective bargaining with international trade union confederations is barely formed. There are, however, examples of policy agreements. In 2010, PPR, the Paris-based multinational retail and luxury goods company (which includes Gucci and La Fnac) agreed a European charter setting out commitments on 'quality of life and work-related stress' (Carley 2010). In the developed world, collective bargaining often 'takes place under the shadow of threats to relocate or to merge with foreign corporations: domestic labour laws rarely offer rights to bargain about strategic corporate-level decisions such as these' (Hepple 2005: 10).

### ► Is there a crisis of labour law?

The consequences of 'footloose' multinational companies, of expanding globalised markets, and of migrant workers all raise serious questions about the feasibility of providing effective employment protection for working people against the exercise of employer economic power. In the United Kingdom, the cornerstone of employment protection is the contract of employment. But this is an imperfect instrument (see Chapter 2). Its defects in failing to recognise fairness and non-discriminatory treatment are gradually being rectified by statute law. However, whilst the contract of employment is effective to some degree, there are many 'atypical' (as well as some 'standard') workers who remain outside its limited protection. Some of the political wrestling involved in creating the current framework of employment law and regulation is considered in the next section.

## Political perspectives

It is important to remember that legislation arises within political arenas – both in Britain and also in the European Union. Shifts in approach to employment regulation reflect various political views which change over time. Politicians have views about the nature and extent of employment law, the range of voluntary measures and the degree to which protection should be accorded to working people. It is possible to identify three different broad models of political approach which help consider the underpinning politics of employment law (Morris, Willey and Sachdev 2002: 229):

- the free collective bargaining model;
- the free labour market model;
- the employee protection or social justice model.

Each of these models, in different ways and with different emphases, considers a range of economic, social, political and human rights issues: the management of the economy, the economic consequences of collective bargaining and employment law, the concept of social justice, entitlement to job security, anti-discrimination policies, the human rights of freedom of association and freedom of expression. The models are designed to review and analyse broad trends in the development and natures of employment law. 'None of these models exists in its pure form. Contemporary employment relations in Britain are, in fact, governed by the interpenetration of the three' (Morris *et al.* 2002: 232).

## ► The free collective bargaining model

This reflects the traditional pattern of British industrial relations which developed, particularly, from World War One onwards. Collective bargaining was seen as the central process of employee relations, usually resulting in voluntary agreements between an employer and particular trade unions. The role of consultation was comparatively marginal. This model reflected, in part, international standards on freedom of association set in the 1940s and 1950s by the International Labour Organisation (ILO) and which British governments signed.

Philosophically, this model emphasised **voluntarism** which was broadly subscribed to by employers, unions and governments. It was characterised by the general, though not complete, ‘abstention of the law’ (Kahn-Freund 1954). The limited law enacted had two principal functions. First, it created a permissive framework in which trade unions could lawfully exist, engage in collective bargaining and call for and organise industrial action. Public policy promoted collective bargaining as an acceptable method of regulating terms and conditions of employment and of ‘institutionalising’ conflicts of interest endemic in employment relations.

Secondly, the law provided some very limited explicit protection for working people. One example was through Wages Councils (originally set up in 1909 and abolished in 1993). These councils set minimum pay for vulnerable groups of workers for whom collective bargaining was difficult to achieve. Another key example was health and safety legislation. A partial framework of such legislation owed its origins to social pioneers in the nineteenth century. It was only in 1974 that more comprehensive legislation was enacted.

Voluntarism was subject to numerous strains in the postwar years. Governments increasingly tried to balance the sectional interests and claims of unions and their members, on the one hand, and the public interest, on the other. So when, for example, the level of pay settlements achieved through free collective bargaining was perceived to be inflationary and economically damaging, governments, both Conservative and Labour, enacted voluntary and statutory incomes policies and also legislative attempts to limit trade union power. After 1979, under the Thatcher government, this free collective bargaining model became subject to a major political onslaught.

## ► The free labour market model

This was gradually introduced from 1979 to support the wider economic policies of Thatcherism. It decisively broke the prevailing consensus on industrial relations policy – which, admittedly, had been subject to considerable strains since the 1960s. The principles underlying this model were reflected in several broad policy approaches:

- Of principal importance was deregulation of the labour market. This involved the removal of certain protective measures for employees which were characterised as ‘burdens on business’. Furthermore, EU employee protection policies were challenged because they were seen as obstructing overriding free market objectives.
- The promotion of economic objectives encouraging cost-effectiveness, competitiveness and flexibility in the use of labour.
- The primary importance of individualism in the employment relationship and the marginalising of collective interests and collective representation.
- The curbing of trade union power by abolishing, rather than reforming, statutory recognition rights and by constraining unions’ ability to organise industrial action.

The policies pursued were principally driven by the economic interests of employers. Arguably, the countervailing interests of working people received much less consideration. The exceptions were in relation to discrimination law and health and safety. Here, the initiatives to improve protections largely derived from EU policies and from ruling of the European Court of Justice (ECJ).

### ► The employee protection or social justice model

This reflects the broad interventionist approach adopted by the EU – at least until the late 1990s. As articulated in EU law, the principles underpinning this model are:

- protection of employees throughout the employment relationship;
- a recognition that employees have both individual and collective interests and that these have to be accommodated in a framework of employment law;
- harmonisation of conditions of employment across member states – complementing economic convergence;
- consideration of economic issues (cost effectiveness, competitiveness and labour flexibility) in the formulation of employee protection measures;
- the promotion of consensus about employment protection measures to be adopted between the social partners (i.e. employers and their organisations and employees and their trade unions);
- an acceptance of the principle of ‘**subsidiarity**’ – that is to say that some issues are more appropriately regulated at the level of the member state rather than at the level of the EU.

Consequently, the European Union has led to the enactment of the following law which has moulded terms and conditions of employment: equal treatment on the grounds of sex, race, sexuality, age, religion or belief, disability; equal pay; protections for pregnant workers; leave entitlements for parents; the establishment of wide-ranging health and safety standards; restrictions on excessive working time; protection of part-time workers, fixed-term employees and agency workers. As far as employment procedures, it has been much less interventionist. However, as mentioned above it has developed, in a number of aspects of employment relations, the duty of employers to consult and disclose information to its employees to provide better understanding of corporate policies and, to some extent, influence their direction.

### ► The current situation

Contemporary British employment relations continue to be characterised by the interpenetration of all three models. The Labour government (1997–2010) sought to maintain the Thatcherite commitment to the free market. However, it also aimed to ameliorate the worst aspects of this for working people by enacting various social justice measures – some deriving from European law (e.g. the Working Time Regulations 1998), and some from home-grown initiatives (e.g. the National Minimum Wage Act 1998). The Conservative-Liberal Democrat coalition government formed in May 2010 committed itself to a clear set of economic and social objectives, many of which have affected the regulation of terms and conditions of working people. Its employment relations

policies are an (often uneasy) amalgam of Thatcherite objectives tinged with some commitment to social policy standards of good practice (see Exhibit 1.1).

Two key questions, as always, can be asked in judging political policies and legislation:

- in whose interests does this legislation exist and whose interests are adversely affected?
- can there be a balance of interests between those of working people and those of employers?

## EXHIBIT 1.1

### Conservative–Liberal Democrat coalition: employment relations policies

The context in which this government's employment relations policies have been formulated is one where a significant economic structural change has been initiated: substantial cutbacks in public expenditure and consequential redundancies, a two-year pay freeze for public sector workers and measures to change public sector pensions. The strands of its employment relations policies are:

- Broad commitment to the Equality Act 2010 – subject to some key changes (see Chapter 5).
- A commitment to promote the right to request flexible working for all employees – not just for employees with specified dependants (see Chapter 11).
- Abolition of the default retirement age (see Chapter 5).
- A review of and some amendments to health and safety legislation (see Chapter 12).
- Amendments to dispute resolution procedures and enforcement of statutory rights (see Chapter 8).
- Proposed restriction of the statutory right to claim unfair dismissal (see Chapter 8) (BIS, 2011).

Ideologically, these changes reflect a 'business friendly' approach and, in particular, a sympathy with the interests of small businesses. Data on the experience of micro businesses, for example, was provided by the Better Regulation Executive (2010).

Underpinning the government's policies are two specific political positions (see [www.bis.gov.uk](http://www.bis.gov.uk)):

- A concern about what is characterised as the 'gold plating' of EU directives – i.e. where provisions of legislation, when a directive is transposed into UK law, are better than in the original directive.
- The promotion of deregulation by cutting 'red tape'; and by having a 'one in one out' policy in respect of new regulations (see Chapter 13).

## The legal regulation of employment

This will be examined by looking at the following:

- **How are legal standards set?**
  - common law;
  - primary legislation: Acts of Parliament;
  - secondary legislation: regulations;
  - European law;
  - European Convention on Human Rights 1950;
  - statutory codes of practice.



- ***How do working people enforce their rights?***
  - Employment tribunals;
  - Employment Appeal Tribunal;
  - Court of Appeal;
  - Supreme Court and the former House of Lords;
  - European Court of Justice;
  - European Court of Human Rights;
  - International Labour Organisation.
- ***What is the role of statutory agencies?***
  - Advisory Conciliation and Arbitration Service;
  - Equality and Human Rights Commission;
  - Health and Safety Executive;
  - Low Pay Commission;
  - Information Commissioner;
  - Criminal Records Bureau;
  - Independent Safeguarding Authority;
  - Central Arbitration Committee.
- ***What redress is available for infringements of rights?***
  - the effectiveness of redress and remedies.
- ***What are the key underpinning principles?***
  - *substantive issues:*
    - fairness;
    - reasonableness;
    - equal treatment;
    - harmonisation;
  - *procedures:*
    - natural justice;
    - consultation;
    - consent;
    - freedom.

## ► How are legal standards set?

As indicated above, there are several sources of law affecting the employment relationship. We will look at each in turn.

### Common law

This is formulated by judges through **case law**. It has set and developed various principles (e.g. the concept of reasonableness). Various legal tests (e.g. to define an employee) have been created. **Common law** is used in interpreting statute law. Under the doctrine of **precedent** rulings of judges in the higher courts are binding on the lower courts – unless overturned by Parliament in new legislation. There are two aspects of common law:

- ***Law of contract.*** A **contract** is an agreement between two or more parties which is intended to be legally enforceable. It may be oral or in writing. These parties create their own rights and duties. So, they voluntarily decide the content of the contract. Courts may be involved in discovering the intention of the parties (i.e. what they meant by a particular provision), and whether the contract was breached. Contracts

may be ruled by the courts to be void if certain provisions are unlawful (e.g. contrary to equality law). Within employment, this branch of law has considerable significance through the contract of employment (see Chapter 2).

- *Law of tort.* A **tort** is a civil wrong other than a breach of contract. Obligations here are imposed by law. This branch of law concerns the interests of a 'person' (it can be an individual or an organisation) which may be injured by another. So, a person may be injured by another's **negligence** as a result of poor health and safety organisation, or an employer's interests may be damaged by unlawful **industrial action** organised by a trade union. (This second example can be referred to as an 'economic tort'.) A central concern for the courts in this branch of law is the issue of liability (i.e. who is liable for causing the injury). In some instances the issue of **vicarious liability** arises. This is where one person assumes liability for the actions of another. An example is where an employer is liable for all breaches of health and safety rules – even where the breach is committed by a manager or another employee. The complainant will be seeking **damages** (compensation) for the injury sustained.

### Primary legislation

This is **statute law** – **Acts of Parliament**. These may set new legal requirements and can also overturn case-law decisions of the judges; and repeal or amend existing legislation. It is the most common way through which new general rights and duties are established. Among the most notable examples in employment and discrimination law are the Employment Rights Act 1996 and the Equality Act 2010. In considering complaints that may arise under statute law, courts and tribunals will consider the following:

- Does the individual have a right, under the Act, to make a complaint (e.g. is the person an 'employee' in law with the necessary qualifying service to claim unfair dismissal)?
- Has a provision of the legislation been infringed (e.g. the right to paid annual leave)?
- Does the complainant have a remedy (e.g. compensation and possible reinstatement)?
- Has the specific legislative provision been interpreted in any previous judgments (particularly by the Court of Appeal, the Supreme Court or, if European law is involved, the European Court of Justice)?
- Does the legislation have to be interpreted in conformity with European law?
- Are there any implications arising from the Human Rights Act 1998? Is the legislation compatible? (See later section on the European Convention on Human Rights.)

### Secondary legislation

This subordinate legislation, made by way of **statutory instruments**, is often referred to as 'regulations'. They are laid before Parliament for approval in a simpler process than passing an Act. They are made under particular statute law (e.g. the European Communities Act 1972 or the Health and Safety at Work Act 1974). As with Acts of Parliament, regulations must be compatible with the European Convention on Human Rights (see below). Increasingly, employment law is enacted this way. The regulations include rights and entitlements which are enforceable in the courts in the same way as those under Acts of Parliament. Examples of some common secondary legislation in employment are:

- Employment Relations Act 1999 (Blacklists) Regulations 2010;
- Transfer of Undertakings (Protection of Employment) Regulations 2006;

- Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000;
- Management of Health and Safety at Work Regulations 1999;
- Working Time Regulations 1998.

## European Union law

In employment regulation, there are three principal and relevant aspects of European law: Treaties of the European Union; **directives**; and rulings of the European Court of Justice.

- **Treaties**

The original Treaty of Rome 1957, founding the then European Economic Community, has been amended on several occasions since – by the Single European Act 1986, the Treaty on European Union 1992 (the Maastricht Treaty), the Treaty of Amsterdam 1997, the Treaty of Nice 2000 and the Treaty of Lisbon 2008. As a consequence of the Lisbon Treaty which came into force in December 2009, two treaties govern the European Union:

- **The Treaty on European Union (TEU):** This outlines the aims of the Union and its institutions.
- **The Treaty on the Functioning of the European Union (TFEU):** This replaced the original Treaty of Rome and came into force in December 2009. It includes articles of relevance to employment law (e.g. Article 157 on equal pay).

A treaty article can be enforced as a direct right in the courts of member states where it is ‘sufficiently clear, precise and unconditional as to require no further interpretation’. Such a treaty article can have ‘direct effect’ both ‘vertically’ and ‘horizontally’. This means that, in the first situation, the article confers rights for the citizen against the state. In the second situation, it confers rights for the citizen to exercise against another (e.g. an employer). A clear example of such ‘**direct effect**’ is the principle of equal pay for equal work between men and women. This was in the original Treaty of Rome and has subsequently been enacted as Article 157 in the current treaty (the TFEU).

In addition to the Treaties, there are three sets of EU secondary legislation: regulations, directives and decisions. Directives are the principal means for establishing employment rights within the European Union (see Table 1.1).

- **Directives**

These are adopted through a legislative process known previously as ‘co-decision’ and, under the TFEU (art. 251), as the ‘ordinary legislative procedure’. This involves the European Council (which comprises the heads of government of all member states) and the European Parliament (comprising elected MEPs from each member state). After many ministerial meetings and discussions in the European Parliament, ultimately they can be agreed and adopted. Originally, agreement had to be unanimous. However, in 1987 amendments were made to permit the adoption by ‘**qualified majority vote**’ (QMV) of certain directives (those defined as health and safety measures).

It is also possible, under procedures adopted in the Maastricht Treaty, for the ‘**social partners**’ to negotiate a ‘**framework agreement**’ on a particular policy proposed by the Commission. These ‘social partners’ are BUSINESSEUROPE (formerly UNICE), the European private-sector employers’ confederation; CEEP, the public-sector equivalent; UEAPME (representing small and medium-sized enterprises); and the ETUC, the

**Table 1.1** Some key European directives on employment policy

1989	Safety and health of workers	1999	Fixed-term work
1990	Display screen equipment	2000	Racial discrimination
1991	Contract of employment information	2000	Equal treatment in employment
1992	Pregnant workers	2001	Transfers of undertakings
1994	European Works Councils	2002	Information and consultation
1994	Protection of young people at work	2003	Working time
1995	Data protection	2006	Equal treatment: men and women
1996	Posted workers	2008	Temporary agency work
1997	Part-time workers	2008	Insolvency
1998	Collective redundancies	2010	Parental leave

European Confederation of Trade Unions. Framework agreements may then be adopted by the Council of the European Union as the basis of a new directive. Three significant examples are the 2010 Directive on Parental Leave, the 1997 Directive on Part-time Workers and the 1999 Directive on Fixed-term Work.

The main advantage of such framework agreements is the ability to take into account, at the drafting stage, the practical implications (reflecting the experiences of employers and unions) of such policies proposed by the Commission. It may be that rather than provide detailed provisions, general principles are agreed which can guide employment practice in individual workplaces. This is particularly so with the 1997 Part-time Workers Framework Agreement and Directive (see Chapter 2).

Generally, directives are enforceable against member states. Each country is obliged to transpose a directive into national law within a specified number of years. In Britain, this is achieved by passing an Act of Parliament or laying regulations before Parliament (under the European Communities Act 1972) for approval. So, for example, the original Working Time Directive 1993 was enacted through the Working Time Regulations 1998.

The enforcement of directives has a particular significance for those employed in the public sector (and in certain private-sector companies which carry out public functions under law). These employees may use a directive in a national court without it having been transposed into national law. This arises because they work for the state (the civil service) or 'an emanation of the state' (e.g. a local authority, an NHS trust or an agency created as a result of the reorganisation of central government). The directive is said to have 'direct effect'. However, a directive must be 'sufficiently precise and unconditional' to be enforced without the need for domestic legislation. In practical terms, this means that a person employed in any public-sector body can complain that a specific right has been infringed from the date of adoption of the directive by the Council of the European Union – even if there is no British legislation. Unlike a treaty article, a directive can only have '**vertical direct effect**' – i.e. enforceability against the state or an emanation of the state.

Some employees who work in certain parts of the private sector may be able to use this route to enforce rights. The concept of ‘emanation of the state’ has been interpreted by the courts to embrace certain privatised corporations (notably British Gas and water companies). Three tests have been developed to help establish whether an organisation can be so defined:

- Is there a public service provision?
- Is there control by the state?
- Does the organisation have special powers?

It was ruled in a judgment of the European Court of Justice that ‘A state body is a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state, and which has, for that purpose, special powers beyond those which result from the normal rules applicable in relations between individuals’ (*Foster v British Gas plc* [1990] IRLR 353).

- ***Rulings of the European Court of Justice***

The Court is responsible for determining the application and interpretation of European law (see Table 1.2). Together with Treaty articles and directives, its rulings have been the other most significant European influence on the development of employment regulation within Britain. These rulings are binding on all member states, irrespective of the country of origin of a particular case. The Lisbon Treaty 2008 provided for the EU’s accession to the European Convention on Human Rights 1950 (see below) so that ECJ rulings must be compatible with the Convention.

Among the key rulings to affect British employment relations are the following:

- *Deciding whether an EU member state has failed to fulfil a treaty obligation.* For example, the ECJ decided that because of the failure of the Italian government to implement the 1980 Insolvency Directive by the due date in 1983, citizens could sue their government for the loss they had sustained, provided that there was a clear link between a government failure and the damage suffered by an individual (*Francovich and Bonifaci v the Republic of Italy* [1992] IRLR 84). The consequence of this case is that ‘*Francovich claims*’ can now be made in the British courts, subject to certain conditions.
- *Dealing with infraction proceedings.* For example, the United Kingdom’s failure to provide for full consultation rights in respect of redundancies and business transfers was referred by the Commission to the Court for a ruling (*EC Commission v United Kingdom* (C-383/92) [1994] IRLR 412). Ultimately, this case resulted in the adoption of new consultation regulations in Britain that were compliant with EU law.
- *Reviewing the legality of decisions of the Council of the European Union and the Commission.* For example, the court determined, following a complaint by the British Conservative government, that the Working Time Directive 1993 was properly made as a health and safety measure under the treaty procedures (*United Kingdom v European Council* (C-84/94) [1997] IRLR 30).
- *Reviewing the failure to act of the European Council and the Commission where the treaty obliges them to act.*

**Table 1.2** The impact of European law: some key cases

<b>Non-discriminatory retirement ages between men and women</b>	House of Lords judgment resulted in amendments to British law in the Sex Discrimination Act 1986 ( <i>Marshall v Southampton &amp; SW Hampshire Area Health Authority</i> [1986] IRLR 140)
<b>Discrimination on the grounds of pregnancy a 'direct discrimination'</b>	This arose from an ECJ ruling which elaborated equal treatment law ( <i>Dekker v Stichting Vormingscentrum</i> [1991] IRLR 27). The concept was also incorporated in the Pregnant Workers' Directive
<b>Pensions being defined a 'pay'</b>	The Court of Appeal ruled that superannuation payments were subject to European equal pay provisions ( <i>Barber v Guardian Royal Exchange</i> [1990] IRLR 240)
<b>Part-time workers' access to statutory rights</b>	The House of Lords ruled that, in interpreting European equal treatment law, it was indirect discrimination against women to have an hours qualification for access to redundancy pay and unfair dismissal compensation ( <i>R v Secretary of State for Employment ex parte Equal Opportunities Commission</i> [1994] IRLR 176). New regulations were introduced which provided a one-year qualification period for all employees (full time or part time)
<b>Removal of ceiling on compensation in sex discrimination cases</b>	A ceiling on compensation payments was ruled as limiting the effective implementation of the principle of equal treatment ( <i>Marshall v Southampton &amp; SW Hampshire Area Health Authority (No. 2)</i> [1993] IRLR 455). As a consequence, the ceilings on compensation were removed in successful sex and race discrimination cases (SI 1993/2798; SI 1994/1748). In the long term, no ceilings were imposed in other strands of discrimination law
<b>Discrimination on the grounds of trans-sexual status ruled contrary to equal treatment law</b>	This was determined by the ECJ in <i>P v S and Cornwall County Council</i> [1996] IRLR 347. In 1999 the Sex Discrimination (Gender Reassignment) Regulations amended the Sex Discrimination Act 1975
<b>Defining 'working time' when 'on call'</b>	The Working Time Directive 1993 was interpreted in <i>SIMAP v Conselleria de Sanidad y Consumo de la Generalidad Valenciana</i> [2000] IRLR 845; and <i>Landeshauptstadt Kiel v Jaeger</i> [2003] IRLR 804
<b>Dismissal of woman undergoing IVF treatment can be discriminatory</b>	<i>Mayr v Backerei und Konditorei Gerhard Flockner OHG</i> [2008]
<b>Calculating length of service and age discrimination</b>	Excluding service before age 25 in calculating length of service was contrary to the Employment Directive 2000 ( <i>Kücükdeveci v Swedex GmbH &amp; Co</i> [2010] IRLR 346)

- Giving preliminary rulings on points of European law at the request of a national court.
- To hear complaints on the application and interpretation of European law.
- To determine the wider application of European law. For example, in 1990, the court ruled that national courts are obliged to interpret that country's domestic legislation in the light of European directives regardless of whether the domestic legislation pre-dates or post-dates the directives. This wide view of interpretation also concerns law enacted in the member states prior to that country's entry into the EU (*Marleasing SA v La Comercial Internacional de Alimentacion* (C-106/89)).

In interpreting the law, the ECJ adopts a 'purposive' (as opposed to 'literal') approach to interpretation. So, it will consider the intention of the legislators and the 'spirit' of the

legislation rather than the strict 'letter'. This is compatible with the character of much law in the original EU member states which is in the form of broad statements of overriding aims and principles. The House of Lords has accepted that such an approach might be accepted in the British courts for complying with European law (Lord Justice Templeman in *Pickstone v Freemans plc* [1988] IRLR 357).

## ► European Convention on Human Rights 1950

From 2 October 2000, this Convention was incorporated into law in the United Kingdom through the Human Rights Act 1998. The Convention was drafted under the auspices of the Council of Europe – an intergovernmental body, founded in 1949, primarily to promote democracy, human rights and the rule of law throughout Europe. It is separate from the European Union, although member states of the EU are also members of the Council and the EU accepts and expects compliance with the Convention.

The Convention was ratified by the UK in 1951. Until 2000, those alleging that their human rights had been infringed needed to embark on a lengthy process to the European Court of Human Rights in Strasbourg. Following the implementation of the Human Rights Act 1998, the Convention is gradually woven into the fabric of law in the UK and complainants have easier access to possible redress in the domestic courts.

Exhibit 1.2 sets out the key Convention rights. The Human Rights Act 1998 has three fundamental effects which in varying ways can have an effect on law relating to employment:

- **Common law.** This must be developed compatibly with Convention rights. This means that previous judgments can be questioned. In relation to employment, this is likely, over time, to affect the common law of contract.
- **Legislation.** All legislation (Acts of Parliament, regulations and orders) must be interpreted and implemented in compliance with the Convention 'so far as it is possible to do so' (HRA 1998, s 3(1)). Where there are two possible interpretations of a statutory provision (i.e. one compatible with the Convention and one not), that which is compatible must be adopted. Previous interpretations, under case law from courts in the United Kingdom, may no longer be relied upon. Where it is not possible to interpret particular legislation compatibly, a court (in England and Wales, the High Court and above; and in Scotland, the Court of Session and the High Court of Justiciary) may:
  - Quash or disapply secondary legislation (regulations and orders).
  - Issue a 'declaration of incompatibility' (HRA 1998, s 4) for primary legislation (an Act of Parliament). This will not rescind the legislation. It will remain in force. However, the declaration will draw the issue to the government's attention and enable the appropriate minister to invoke the 'fast track' procedure to amend the legislation in Parliament by a remedial order.
  - Require UK courts and tribunals to take account of case law from the European Court of Human Rights in Strasbourg but not necessarily be bound by it.
- **Activities of public authorities.** It is unlawful for a public authority to act incompatibly with Convention rights. The Human Rights Act covers all activities of a public authority, for example: policy-making, rules and regulations, personnel issues, administrative procedures, decision-making. There are three broad categories of public authorities:
  - *'Obvious' or 'pure' public authorities.* This describes, for example, a government department or statutory agency, a Minister of the Crown, local authorities, NHS

## EXHIBIT 1.2

## Key rights, European Convention on Human Rights 1950

The detailed provisions of these rights are in Schedule 1 to the Human Rights Act 1998.

### Absolute rights

These have no restrictions or limitations:

*Article 7: protection from retrospective criminal penalties*

*Article 3: protection from torture, inhuman and degrading treatment and punishment*

*Article 4: prohibition of slavery and enforced labour*

### Limited rights

These can be limited in specific circumstances defined in the Convention:

*Article 5: The right to liberty and security*

A person may be detained if the detention is lawful. It covers, for example, arrest by the police and imprisonment following conviction by a court.

### Qualified rights

Many rights with a bearing on employment relations are in this category:

*Article 8: right to respect for private and family life*

*Article 9: freedom of thought, conscience and religion*

*Article 10: freedom of expression*

*Article 11: freedom of assembly and association*

It is permissible to interfere with these qualified rights in the following circumstances:

- If the interference is provided for in law.
- If the interference is necessary in a democratic society. It must fulfil a pressing social need; pursue a legitimate aim; be proportionate to the aims being pursued; and be related to a permissible aim set out in the relevant Article (e.g. the prevention of crime or the protection of public order).

### Other rights

*Article 6: right to a fair trial*

*Article 14: prohibition of discrimination (in the exercising of Convention rights)*

trusts, education authorities, fire and civil defence authorities, the armed forces, the police and the immigration service, and the prison service. Everything done by these is covered by the Human Rights Act – whether in their public functions or in their private functions (e.g. offering an employment contract).

- *Courts and tribunals.* Their responsibility for interpreting and implementing the law is outlined above. In the employment context, neither employment tribunals nor the Employment Appeal Tribunal have power to quash or disapply secondary legislation not to issue declarations of incompatibility. If this were done in an



employment case, it would be at the appeal stages in the Court of Appeal or the Supreme Court. Nevertheless, employment tribunals and the EAT must interpret the law compatibly with the Convention.

- *'Hybrid' or quasi-public bodies.* These are bodies which carry out some public functions. They are not a public authority for all their activities. Examples include the privatised utilities (gas, electricity and water companies).
- **Remedial action.** The Human Rights Act 1998 creates two effects:
  - 1 *A direct effect.* This is where a person (i.e. a victim) can enforce Convention rights directly in court through starting legal proceedings (s 7). Such action can only be taken against a 'public authority'. A victim may be a company or other organisation as well as a private individual. The complaint has, normally, to be made within one year of the act complained of. If a court finds that a public authority has breached a person's Convention rights, it can award whatever remedy is available to it within its existing powers and is just and equitable (s 8(1)). This may include the award of damages; quashing an unlawful decision; ordering the public authority not to take the proposed action.
  - 2 *An indirect effect.* There is no means of enforcing Convention rights directly against private individuals (including private companies or quasi-public bodies when they are carrying out their private functions). In these cases, where a private individual or organisation is involved, there is an indirect effect. This means that the law (statute and common law and secondary legislation) in cases involving such private 'individuals' must be applied and interpreted compatibly with the Convention.

Complaints under the Human Rights Act may be initiated in a number of courts or tribunals, depending on which is appropriate. If the claim is based on a contract or in tort (e.g. a claim for personal injury), action should start in the High Court or the county court (or, in Scotland, in the Sheriff Court or Court of Session). Where the case relates to the decision of a public body, the appropriate action will usually be judicial review in the High Court. It is still possible for a complaint to be made, ultimately, to the ECHR (see Exhibit 1.3).

## ► Human rights and employment law

The *explicit* significance for employment law cases of the Human Rights Act 1998 and the European Convention has been slow and gradual. In two areas Convention rights have been explicitly referred to by the Courts in their judgments:

- legal representation in internal disciplinary procedures where a person's prospect of future employment is jeopardised (see *R (on the application of G) v Governors of X School and Y City Council [2011]* IRLR 222 in Chapter 8); and
- the determination of whether a particular 'belief' is protected under equality law (see *Grainger plc v Nicolson [2011]* IRLR 4, EAT in Chapter 5, Exhibit 5.19).

## ► Statutory codes of practice

In hearing complaints, tribunals and courts may be required to take account of statutory codes of practice. These have to be approved by Parliament. The main ones currently in force which are relevant for individual employment rights are:

## EXHIBIT 1.3

## Union expulsion of a British National Party member

### *Associated Society of Locomotive Engineers and Firemen (ASLEF) v United Kingdom [2007] IRLR 361*

**Facts.** Lee was a train driver and a member of ASLEF, the train drivers' union. In 2002, it was reported to the union's general secretary that Lee was a well-known British National Party activist who had stood as a candidate in elections. He was said to have written and distributed racist material and harassed Anti-Nazi League protestors and been reported to the police.

The union's executive committee took the view that Lee's activities with the BNP were likely to bring the union into disrepute. A resolution to expel him was passed unanimously. Under its rules, ASLEF states that it aims to promote and enact equal treatment policies and is committed to campaigning vigorously to expose 'the obnoxious policies of political parties such as the National Front'.

Lee complained, in the first instance, that he had been unlawfully excluded from ASLEF membership (contrary to TULRCA 1992, s 174(3)). The employment tribunal upheld Lee's complaint. ASLEF appealed to the Employment Appeal Tribunal which upheld the union's claim about the law. The matter was referred back to a further ET hearing; and again Lee was successful in his application. ASLEF then made an application to the European Court of Human Rights in Strasbourg. Its complaint was that it was prevented from expelling a member because of his membership of a political party that advocated views contrary to its own policies, and that this was an infringement of its right to freedom of association (under Article 11 of the ECHR).

**Law.** Article 11 of the Convention: freedom of assembly and association:

- 1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
- 2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.

The UK law which was considered as, arguably, incompatible with this Convention article was the Trade Union and Labour Relations (Consolidation) Act 1992, s 174.

**ECHR judgment.** The court's view was that Lee's expulsion did not impinge on his freedom of expression (Article 10). It noted that he had suffered no particular detriment apart from loss of union membership. Even in workplace employment relations, ASLEF was the bargaining agent for the terms and conditions of all train drivers, irrespective of whether they were members or not.

The court gave more weight to ASLEF's right to choose its members. It acknowledged that the union had its own clear political views. It noted that there was no suggestion that in the internal union procedures that ASLEF had erred in its finding that Lee's views and those of the union's clashed. In the absence of any identifiable hardship suffered by Lee or any abusive or unreasonable conduct by ASLEF, the court concluded that the balance between the competing Convention rights had not been properly struck.

**Consequences:**

- TULRCA 1992, s 174 was amended in 2004 to allow a union to exclude an individual from membership on the grounds of his or her activities as member of a political party.
- Membership of a specified political party, in itself, remained as an unlawful ground for expulsion. However, the Employment Act 2008 amends the law in this respect.

- *Advisory Conciliation and Arbitration Service:*
  - Disciplinary and Grievance Procedures (2009).
  - Disclosure of Information to Trade Unions for Collective Bargaining Purposes (1998).
  - Time Off for Trade Union Duties and Activities (2010).
- *Health and Safety Executive:*
  - Code of Practice on Safety Representatives and Safety Committees (1978).
  - Code of Practice on Time Off for the Training of Safety Representatives (1978).
- *Equality and Human Rights Commission:*
  - Code of Practice on Employment (2011).
  - Code of Practice on Equal Pay (2011).
  - Guidance on matters to be taken into account in determining questions relating to the definition of disability.
- *Border and Immigration Agency:*
  - Avoidance of Unlawful Discrimination in Employment Practice While Seeking to Prevent Illegal Working (2008).
- *Information Commissioner:*
  - Employment Practices Data Protection Code (2005). (N.B. this code is not required to be laid before Parliament.)

**The status of statutory codes** (as, for example, those published by ACAS) is as follows:

- Failure of a person to observe any provision of a code ‘shall not of itself render him liable to any proceedings’;
- However, in any proceedings before an employment tribunal, any appropriate code of practice ‘shall be admissible in evidence’, and ‘if any provision of such a code appears to the tribunal to be relevant to any question arising in the proceedings it shall be taken into account in determining that question’ (TULRCA 1992, s 207).

### ► How do working people enforce their rights?

Normally, complaints about individual employment rights are made to an employment tribunal. It is possible for a complainant (the employee or worker) or a respondent employer to appeal, on a point of law, to the Employment Appeal Tribunal (EAT); and, then, usually with permission, to the Court of Appeal (or Court of Session in Scotland); and, then, to the Supreme Court (until October 2009, the House of Lords). If the complaint involves European law (for example, on equality, working time or transfers of undertakings), an ultimate appeal, with the permission of either the Court of Appeal or Supreme Court, would be to the European Court of Justice in Luxembourg. Alternatively, the British courts might refer a particular matter to the ECJ for a ruling on its interpretation. In 2011, for example, the Court of Appeal asked the ECJ to rule on when an employer’s duty to consult workers’ representatives over collective redundancies is triggered – when a strategic decision has been made or at an earlier stage when the employer is contemplating redundancies (*United States of America v Nolan* [2011] IRLR 40, CA see Chapter 3) (for more detail on these bodies see below).

In addition, various statutory agencies have responsibility for assisting in the enforcement of employment law. They provide advice and information and most have some

enforcement powers. The most notable are the Advisory Conciliation and Arbitration Service, the Health and Safety Executive, the Equality and Human Rights Commission, the Low Pay Commission (for more detail on these bodies see below).

## Employment tribunals

Originally set up in 1964 as industrial tribunals to deal with training levy complaints, their jurisdiction was extended to unfair dismissal in 1972. They now cover a very wide range of employment rights (e.g. all strands of equality law, equal pay, maternity and parental rights, rights of trade union membership, unlawful pay deductions) ([www.justice.gov.uk](http://www.justice.gov.uk)). In 1998, they were renamed 'employment tribunals'. They now operate under the Employment Tribunals Act 1996 and the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (as amended). A full tribunal comprises three people. It is chaired by an employment judge, a legally qualified person. He or she may sit alone or may be assisted by two lay people who have experience of employment relations and are drawn from an employer list (including managers and HR practitioners); and from an employee list (including people with trade union experience). The President of the Employment Tribunals has powers to issue practice directions to promote consistency of case management. For example, in 2010, he issued guidance on the reading out loud of some witness statements in tribunal hearings which he described as achieving 'nothing of value' and 'wast[ing] the time of the tribunal and the parties'.

The use of tribunals to deal with employment rights complaints was supposed to be beneficial in offering informality and speed. This, however, has not proved to be so (see later section on redress). Exhibit 1.4 outlines, as an illustration, the employment tribunal process for an unfair dismissal complaint. The role and operation of employment tribunals was considered in a consultation paper, *Resolving workplace disputes: a consultation*, published by the Conservative-Liberal Democrat Government in January 2011 ([www.bis.gov.uk](http://www.bis.gov.uk)).

### EXHIBIT 1.4

## Employment tribunals: dealing with unfair dismissal complaint

### Scenario

Hannah has been employed for just over two years as an administrator in a facilities management company, World Class Facilities plc (WCF). Her performance has been reasonably satisfactory – although she was taken through the company's capability procedure six months ago when she was performing some new tasks unsatisfactorily. In the past couple of months she has been late for work on three or four occasions and has, generally, not been working to an acceptable standard. Her manager, in consultation with the human resources department, has decided to start disciplinary action. (She is given the statutory right to be accompanied which she declines.) The hearing results in her dismissal with one month's pay in lieu of notice. During the disciplinary appeal hearing she informed the company that she was pregnant. She says that she is going to complain to an employment tribunal of unfair dismissal. She discusses the situation with Sunita, a friend who works in human resource management in another company.

## Time limits

Hannah has three months from the date of her dismissal to submit a claim to an employment tribunal. Late applications can be accepted only where the tribunal thinks it is 'just and equitable' to do so.

Hannah needs to consider whether she qualifies to make a claim. She may, also, within this three-month period, use the ACAS pre-claim conciliation service ([www.acas.org.uk](http://www.acas.org.uk)).

## Assistance

Hannah will not receive any financial assistance towards her tribunal claim. If she was a member of a trade union she could receive some help making and presenting her claim. In her case, however, she has to bear any costs herself and rely on the voluntary support of a friend, Sunita. She might obtain some advice on her complaint from Citizens Advice ([www.citizensadvice.org.uk](http://www.citizensadvice.org.uk)). (After the employment tribunal hearing, she can claim some specified expenses – travel and accommodation.)

## Does the complainant qualify?

- **'Employee' status:** The tribunal must be satisfied that the complainant is an 'employee' and not a 'worker on some other contract'. In some cases, an employer will state that the claimant is not an 'employee' and it is then a matter for the tribunal to determine his or her employment status (see Chapter 2). In Hannah's case she has a contract of employment – the essentials of which are set out in a written *Statement of Initial Employment Particulars* (Employment Rights Act 1996, s 1).
- **Length of continuous service with the employer:** The complainant must have the appropriate continuous service with the employer. If, however, the dismissal relates to a 'protected characteristic' under the Equality Act 2010, then, he or she does not require a qualifying period. In Hannah's case, she is claiming that her dismissal is because of her pregnancy. She is also eligible to claim 'ordinary' unfair dismissal (see Chapters 5, 8 and 11).
- **Dismissal:** An employment tribunal needs to be satisfied that the complainant was dismissed. Hannah was given a letter terminating her employment.

## ACAS pre-claim conciliation

ACAS ([www.acas.org.uk](http://www.acas.org.uk)) has a statutory duty (Employment Tribunal Act 1996, s 18) to try, through its conciliation officers, to promote a settlement in employment tribunal complaints – but *not* to advise the parties. In 2009, it expanded this free service. This involves conciliation officers assisting the parties to discuss the complaint. The aim is to find a solution acceptable to both parties and which avoids the costs, stress and time associated with a tribunal hearing. The ex-employer may offer a sum of money to settle the claim. In Hannah's case either she or the company could ask for pre-claim conciliation. It is, of course, for the parties to see if an agreement is possible. The conciliation officer cannot impose one. If none is reached, a complaint may be submitted to the tribunal.

## More information

Hannah may use the statutory questionnaire available under the Equality Act. This asks the ex-employer to respond to a number of specific questions to help her support her claim of discriminatory treatment ([www.equalities.gov.uk/news/equality\\_act\\_2010\\_forms\\_for\\_ob\\_aspx](http://www.equalities.gov.uk/news/equality_act_2010_forms_for_ob_aspx)) (see also Chapter 5).

## Filling in the forms

**ET1:** An ex-employee making a complaint must complete the necessary form (see the Ministry of Justice website: [www.justice.gov.uk](http://www.justice.gov.uk)).\* It should be completed electronically within three months from the

\* Some different arrangements for dealing with the forms apply in Scotland.



date of the dismissal. Among the information required is the nature of the complaint. In Hannah's case, she would say she was unfairly dismissed because the reason for her dismissal was her pregnancy and not her overall performance. She might also say that, if there were performance issues, these were related to pregnancy. So, she would include two grounds for complaint. If it is claimed that there is more than one reason for a dismissal, it is for the tribunal to determine the *principal* reason. A complainant is asked to indicate on the ET1 the remedy that he or she is seeking. In dismissal cases, this will be compensation and, possibly, re-engagement or reinstatement. Hannah could claim these.

**ET3:** The employer receives a copy of the ET1 form from the tribunal office and should complete an ET3 form, responding to the claims made by the ex-employee ([www.justice.gov.uk](http://www.justice.gov.uk)). In Hannah's case, the employer might deny that the reason for dismissal was pregnancy. It would refer to her poor performance record and state that the decision to dismiss was as result of a fair disciplinary procedure. It might point out that it only became aware of her pregnancy when the decision to dismiss for capability had already been taken. The forms provide an outline of the issues in dispute. If the tribunal accepts the complaint, then these issues will be dealt with in more detail at a full hearing.

The government are proposing fees to be introduced from April 2013 for complainants to pay 'up front'.

### Pre-hearing review

This can be ordered by the tribunal or at the request of either the respondent employer or the complainant. It is held, in advance of a full hearing, by an employment judge (usually sitting alone) to decide preliminary matters – e.g. deciding whether, on the face of it, a complaint looks weak; has no reasonable prospect of success; or is vexatious. If a tribunal decides there is no reasonable prospect of success, the complainant is allowed to continue only if he or she deposits a sum of money ordered by the tribunal. Such decisions can, sometimes, be successfully challenged (*A v B [2010]* EWCA Civ 1378).

### Who are the 'representatives'?

Both the complainant and the respondent employer will need to decide who is to represent them at the tribunal hearing. Complainants may represent themselves or, alternatively, may use a trade union official, a solicitor or a 'friend' (someone who may not be legally qualified who will assist in preparing and discussing the case). An employer usually uses a solicitor or a senior manager supported by staff from the HR department (see later section in this chapter). In Hannah's case, she is being assisted by a friend. WCF plc is represented by its HR Manager.

### Claim 'activated'

If the claim is not settled in the ACAS pre-claim conciliation process, and the employment tribunal has formally accepted it for a full hearing, then various steps take place. The hearing may not be scheduled for several months from the ET1 being submitted.

**Further opportunity for ACAS conciliation** right up to the date of the hearing. An agreement would be legally binding and made through ACAS on form COT3. Tribunal proceedings would be withdrawn.

**Case management.** Various steps are ordered by the tribunal office to ensure that documentation is available and, as appropriate, exchanged between the parties. This includes papers that each party is relying on to support their case. Hannah's ex-employer is likely to provide all the paperwork relating to her performance and the relevant minutes of disciplinary hearings. Hannah herself may produce documentary evidence to show when she told her employer of her pregnancy; and also any evidence she has about how her pregnancy may have affected her performance.

**Witnesses.** Each party will have to indicate who they will bring as witnesses. (It is possible for a tribunal to order a witness to attend to give evidence or produce documents or information.) Witness statements should be prepared and exchanged in advance of the tribunal hearing. These may be read or, in

some cases, 'taken as read'. Hannah may be the only witness for her complaint. WCF plc, on the other hand, may have various witnesses: her supervisor, her line manager, the senior manager who heard the appeal and, possibly, relevant HR staff.

**Preparation.** Hannah should meet her 'friend', Sunita, well in advance to prepare the presentation of her case; to try and anticipate the issues likely to be raised by WCF plc; and to prepare questions that she might ask the company's witnesses.

## The full tribunal hearing

The tribunal comprises a legally-qualified employment judge who chairs and two lay members. Proceedings are, normally, public. In unfair dismissal cases, the complainant presents his or her case first. Hannah will read her witness statement and Sunita may then ask her to elaborate, orally, on some aspects. Then, Hannah can be cross-examined by the representative of WCF plc, the HR Manager. Sunita may re-examine particular points, if necessary, and the tribunal may also ask questions to clarify or elaborate particular issues. This process is repeated with all witnesses. So, Sunita may cross-examine WCF plc witnesses on Hannah's behalf. She may consult with Hannah, during the proceedings, on particular issues and questions that need to be asked.

## Tribunal decision

This will involve consideration of both fact and law. In Hannah's case the tribunal will, having heard all the evidence, decide on the principal reason for her dismissal. Was it the 'fair' reason of 'capability' (under the Employment Rights Act 1996, s 98); or was it the automatically unfair reason of 'pregnancy and maternity' (under the Equality Act 2010, s 39)? If it is for 'capability', then the issue would be whether it was 'reasonable in the circumstances' for the employer to dismiss Hannah for that reason; and whether WCF plc used a fair procedure (in accordance with the ACAS *Code of Practice on Disciplinary Procedures* 2009) ([www.acas.org.uk](http://www.acas.org.uk)). If it is found to be a dismissal because of the 'protected characteristic' of 'pregnancy and maternity', the tribunal would rule it to be an unfair dismissal. The Court of Appeal has reaffirmed an established view that, in unfair dismissal claims, the role of the tribunal is to review the fairness of the employer's decision and **not** to substitute its own view ([London Ambulance Service NHS Trust v Small \[2009\]](#) IRLR 563).

## Remedy hearing

A complainant indicates on the ET1 form the remedies he or she is seeking. A tribunal will hold a remedy hearing to hear evidence of the loss sustained by the complainant. The respondent employer is able to challenge this evidence. A dismissed complainant must show evidence of attempting to 'mitigate their loss' (e.g. by applying for or obtaining other employment). If Hannah is successful in her discrimination claim, she is likely to seek compensation and an award for injury to feelings (see Chapters 5 and 8).

## Compensation

The compensation awarded by tribunals is, invariably, well below the maximum sums available. The maximum compensatory award for unfair dismissal complaints is £68,400 (February 2011). Compensation is unlimited in discrimination claims. The **median** compensation for unfair dismissal is £4,591; and for sex discrimination (which at the time covered pregnancy complaints), £6,078 (Employment Tribunal and EAT statistics 2010–2011, [www.justice.gov.uk](http://www.justice.gov.uk)).

## Appeal

It is possible for either party to appeal against an employment tribunal decision to the Employment Appeal Tribunal. However, the appeal must relate to a 'point of law', e.g. alleging that the employment tribunal misconstrued the law. Rarely are such appeals made.

## ► Employment Appeal Tribunal

This was established in 1976 as a superior court of record to hear appeals on points of law from the (then) industrial tribunals. Each bench comprises a judge (drawn from the High Court and Court of Appeal) and two lay members from people who have experience of employment relations. In various areas of employment law, it has provided guidance for tribunals on particular issues (website: [www.justice.gov.uk](http://www.justice.gov.uk)). In 2010–11, the EAT received 2048 appeals from employment tribunals (Employment Tribunal and EAT statistics, [www.justice.gov.uk](http://www.justice.gov.uk)).

## Court of Appeal

The jurisdiction of the Court of Appeal covers England and Wales. (In Scotland the equivalent appeal court is the Court of Session). Created in the late nineteenth century, it comprises two divisions: the Civil Division (presided over by the Master of Rolls) and the Criminal Division (presided over by the Lord Chief Justice). Under employment law, appeals against rulings of the EAT are heard in the Civil Division. Further appeals can be made to the Supreme Court – with the ‘leave’ (permission) of either the Court of Appeal or of the Supreme Court itself ([www.justice.gov.uk](http://www.justice.gov.uk)).

## Supreme Court (formerly the House of Lords)

The Supreme Court was established in October 2009, under the Constitutional Reform Act 2005, replacing the judicial committee of the House of Lords. It ‘hears appeals on arguable points of law of the greatest public importance’ (see website). It is the final court of appeal for civil and criminal cases from the Court of Appeal in England and Wales, for civil cases from the Court of Session in Scotland, and for civil and criminal cases from the Court of Appeal in Northern Ireland. Decisions of the Supreme Court bind all lower courts.

If the law derives from the European Union, there can be a further appeal stage to the European Court of Justice. If there is some uncertainty about the application or meaning of a provision of European law, the Supreme Court may refer this to the ECJ for authoritative guidance.

There are 12 Justices of the Supreme Court, who are appointed by the monarch on the advice of the Prime Minister, from senior appeal court judges from each part of the UK. The first female Law Lord – now a Justice – Lady Justice Hale was appointed in 2004. The Justices of the Supreme Court are debarred from sitting in the House of Lords (as a legislative chamber in Parliament) whilst holding that office. Usually, these Justices sit as a panel of five. The number of appeals dealt with each year varies – tending to be between 80 and 100. A few concern employment-related issues. For example, in 2011, it heard appeals from Court of Appeal rulings in relation to *Parkwood Leisure Ltd v Alemo-Herron and Others* [2010] IRLR 298 (see Chapter 3 on Transfers of Undertakings); and *R (on application of G) v Governors of X School* (see Chapter 8 on disciplinary action) ([www.supremecourt.gov.uk](http://www.supremecourt.gov.uk)).



## European Court of Justice

Based in Luxembourg, this is the principal judicial body of the European Union. It is officially known as the Court of Justice of the European Communities. It has jurisdiction in Britain under the European Communities Act 1972 in relation to European competition and company law; and also employment and equality law (see earlier section in this chapter on European Union law).

The ECJ comprises 27 judges and eight Advocates-General who assist the court. Judges are nominated by member states for a six-year term. The ECJ makes final rulings on the application of European law (see Table 1.2). The role of Advocates-General has no equivalent in the English and Scottish legal systems. They provide a reasoned submission (an Opinion) in open court. This is a preliminary opinion on points of law in a specific case. An Advocate-General will refer to other relevant rulings and recommend a judgment. Some months later, the court will pronounce its ruling. It is usual for the Court to accept an Advocate-General's view. In its Annual Report 2009, the Court noted that there is an increase (from 41 per cent in 2008 to 52 per cent in 2009) in the determination of cases *without* an Advocate-General's Opinion where a case raised no new point of law ([www.europa.eu](http://www.europa.eu)).

## European Court of Human Rights

Based in Strasbourg, this court operates under the Council of Europe and is separate from the European Union. Its responsibility is to adjudicate on alleged violations of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms to which Britain is a signatory. This Convention is now incorporated into UK law through the Human Rights Act 1998. Although it is still possible for a complainant to appeal to the ECHR, initially, he or she should apply through the domestic courts ([www.echr.coe.int](http://www.echr.coe.int)).

## International Labour Organisation

The ILO was established in 1919. Now an agency of the United Nations, it is charged with setting universal labour standards. It is a tripartite body comprising representatives of government, employers and workers. De-colonisation has meant that its membership has grown from 52 states in 1946 to 177 in 2003. The 1944 Declaration of Philadelphia redefined the ILO's objectives and reaffirmed the key principles on which the ILO is based:

- Labour is not a commodity.
- Freedom of expression and association are essential to sustained progress.
- Poverty anywhere constitutes a danger to prosperity everywhere.

ILO standards are set by the International Labour Conference in the form of Conventions and Recommendations. If a state ratifies a convention, it undertakes to ensure that its domestic law conforms to the convention's standards. Recommendations do not create legal obligations. Any dispute relating to ratified conventions can be referred to the International Court of Justice in the Hague.

The effectiveness of the ILO and of labour standards has been widely criticised (Hepple 2005: 66). In particular, it lacks effective sanctions against states which argue that down-scaling labour standards is necessary to remain competitive and attract investment. The implementation of ratified standards is also decidedly uneven. In response to this, the ILO has, since 1997, focused on 'core' standards: those relating to freedom of association and collective bargaining; forced labour; non-discrimination; child labour and minimum age in employment. However, difficulties remain in translating these principles into practice.

In 2011, for example, it published a proposed Convention concerning decent work for domestic workers. It noted that these are mostly female and continue to be 'undervalued and invisible'. They tend to be 'vulnerable to discrimination in respect of conditions of employment and of work and to other abuses of human rights'. Certainly, in the United Kingdom, they frequently fall 'below the radar' of employment protection because they work in private residences. However, the Department for Business, Innovation and Skills was reported as saying that 'it would not be ratifying the convention to bind the UK by its rules "for the foreseeable future", so felt it would be wrong to vote for it at all' and so would abstain (*Guardian*, 16 June 2011) ([www.ilo.org/global](http://www.ilo.org/global)).

## What is the role of statutory agencies?

### ▶ Advisory Conciliation and Arbitration Service

Established initially in 1974, ACAS became a statutory body in 1975. It is an independent service, charged with the general duty 'to promote the improvement of industrial relations, in particular, by exercising its functions in relation to the settlement of **trade disputes**' (TULRCA 1992, ss 209–14). It is governed by a Council, comprising a full-time chairperson; and 11 members appointed after consultation with the Confederation of British Industry (CBI) and other specified employers' organisation; and the Trades Union Congress and other specified employees' organisations. Three members are appointed by the Secretary of State for Business. It is required to publish an annual report (TULRCA, ss 247–53).

Among its functions are the following:

- *Individual conciliation*: to offer conciliation in disputes over individual statutory employment rights (e.g. in unfair dismissal, discrimination claims, etc.) between individual employees and their employers or ex-employers. (See Exhibit 1.4 and Chapter 8 for a detailed outline of the role of ACAS in unfair dismissal cases.)
- *Collective conciliation*: to offer and provide this in industrial disputes.
- *Arbitration*: to provide facilities for **arbitration** in industrial disputes; and to provide a scheme for arbitration in relation to individual unfair dismissal claims (as an alternative to an employment tribunal hearing).
- *Statutory codes of practice*: to draft **codes of practice** to be approved by Parliament (see earlier). (See Chapter 8 for discussion about the *Code of Practice on Disciplinary and Grievance Procedures*) ([www.acas.org.uk](http://www.acas.org.uk)).

### ▶ Health and Safety Executive

This was established in 2008 arising from a merger of the former Health and Safety Commission and former Health and Safety Executive. It is responsible for taking appropriate

steps to secure the health, safety and welfare of people at work and to protect the public generally against dangers to health and safety arising from work activities. It is headed by a governing board of up to 11 members and a chairperson. In formulating its policy it consults on all aspects of health and safety. It publishes an annual report. Its health and safety inspectors advise on health and safety legislation and have powers of enforcement (see Chapter 12) ([www.hse.gov.uk](http://www.hse.gov.uk)).

### ► Equality and Human Rights Commission

Established in 2007, the Commission took over the work of the Equal Opportunities Commission, the Commission for Racial Equality, and the Disability Rights Commission. Its principal functions are:

- to take legal action: this can be taken on behalf of individuals where legal requirements need to be clarified;
- to initiate formal inquiries into employing organisations;
- to make representations to government on the implementation of discrimination and human rights law;
- to provide advice and information on discrimination and human rights law; and to provide some financial support to external organisations;
- to promote good practice in relation to equal opportunities ([www.equalityhumanrights.com](http://www.equalityhumanrights.com)).

### ► Low Pay Commission

Established initially in 1997 as a non-statutory body to report on the introduction of a national minimum wage, the following year it was made a statutory body under the National Minimum Wage Act 1998. It comprises a chairperson and eight other members. These generally consist of nominees from employer bodies, trade unions and academics with low pay expertise. Its role is to carry out tasks specified by the Secretary of State for Business. Before making recommendations it is required to consult employers' and workers' organisations. It is also obliged to have regard to 'the effect of this Act on the economy of the United Kingdom as a whole and on competitiveness' (NMWA 1998, s 7) ([www.lowpay.gov.uk](http://www.lowpay.gov.uk)).

### ► Information Commissioner

Initially known as the Data Protection Commissioner, the name was changed in 2000. The Commissioner has several principal functions:

- He or she is empowered to take enforcement action against 'data controllers' (i.e. companies and other organisations) which are in breach of the 'data protection principles' (Data Protection Act 1998, Sch 1).
- A 'data subject' (in the employment context, usually a 'worker') may complain to the Commissioner that the 'principles' are not being complied with in a particular case. The Commissioner may investigate by initiating an assessment (DPA 1998, s 42).
- He or she is under a statutory duty (DPA 1998, s 51) to promote and disseminate good practice – which includes the preparation of codes of practice.

- He or she must maintain a register of 'data controllers' who are required to notify their data processing.
- He or she may serve an *Enforcement Notice* on a 'data controller' (e.g. an employer). This requires the data controller to stop processing any personal data or any specified personal data, or processing it in a specified manner.
- He or she may serve an *Information Notice* on a 'data controller' specifying information required in a given time period to respond to a request for an assessment, or to decide whether the data protection principles have been complied with. Appeal can be made to the Information Tribunal on both Information and Enforcement Notices (DPA 1998, s 48). Further appeal is possible to the High Court in England and Wales, the Court of Session in Scotland, and the High Court in Northern Ireland ([www.ico.gov.uk](http://www.ico.gov.uk)).

### ► Criminal Records Bureau

This is an executive agency of the Home Office established in 2002 (under the Police Act 1997). It provides a disclosure service for organisations in the private, public and voluntary service to inquire about the criminal records of specific applicants for employment; and those in employment. There are two checks available in England and Wales:

- *Standard disclosure*: This shows current and spent convictions, cautions, reprimands and warnings held on the Police National Computer. It also shows whether a person is on a government department list as unsuitable to work with children or vulnerable adults.
- *Enhanced disclosure*: This is the highest level of check and contains the same information as standard disclosures; but also includes other relevant information held by local police forces. This level of disclosure is primarily for positions involving regular caring for, training, supervising or being in sole charge of children or vulnerable adults.

In Scotland, there is also a *basic disclosure*. This is issued to individual applicants and provides details of convictions at national level that are not spent under the Rehabilitation of Offenders Act 1974.

Both the standard and enhanced disclosures are issued to the individual and to a registered employer. Organisations wishing to use the CRB checks must comply with its code of practice. The aim of the code is to ensure that the disclosed information is used fairly and that sensitive personal information is handled and stored appropriately and is kept for only as long as necessary. To assist employers, the CRB has also developed a sample policy statement on the recruitment of ex-offenders ([www.crb.gov.uk](http://www.crb.gov.uk)).

### ► Independent Safeguarding Authority

This authority began work in 2009. It vets those who apply to work with children or vulnerable adults. It does this by:

- working with the CRB, which will gather information on those who want to work with vulnerable groups;
- using that information to decide on a case-by-case basis who poses a risk of harm to vulnerable groups;
- storing information about an individual's ISA status for employers and voluntary organisations.

In 2010, the Conservative-Liberal Democrat Government began a review of the criminal records and vetting and barring regime. In February 2011 it was announced that, among other measures, the Criminal Records Bureau and the ISA would be merged. (This is a provision in the Protection of Freedoms Bill.)

### ▶ Central Arbitration Committee

Set up in the 1970s, it is an independent tribunal with statutory powers to adjudicate in various employment disputes. Its key functions are:

- to receive applications from trade unions for recognition rights with an employer;
- as appropriate, make a declaration granting recognition;
- receiving employers' applications for derecognition of a trade union;
- receiving complaints about the disclosure of information for collective bargaining;
- to help resolve disputes under the Information and Consultation Regulations 2004;
- dealing with claims and complaints regarding the establishment and operation of European Works Councils ([www.cac.gov.uk](http://www.cac.gov.uk)).

## What redress is available for infringements of rights?

It is, of course, pointless enacting employment rights without ensuring adequate redress. In this section we will look at the effectiveness of existing processes.

### ▶ The effectiveness of redress and remedies

The effectiveness of redress for individuals depends upon the effectiveness of complaints procedures and on ease of access for complainants. There are two relevant sets of procedure:

- in-house dispute resolution: i.e. internal grievance, harassment, whistleblowing, capability and disciplinary procedures;
- external complaints procedures: especially through employment tribunals.

Considerable attention by governments has focused on these procedures as a way of promoting better, speedier dispute resolution; improving the quality of workplace relations; and reducing public expenditure on tribunals.

### ▶ In-house procedures

Detailed consideration of these is provided later in the textbook (see Chapter 8). Guidance is provided in the *ACAS Code of Practice on Disciplinary and Grievance Procedures* (2009). ACAS also advises on mediation as a contribution to workplace dispute resolution ([www.acas.org.uk](http://www.acas.org.uk)).

### ▶ Employment tribunals

An illustration of the steps in an employment tribunal claim are outlined in Exhibit 1.4.

Originally, tribunals as institutions were commended in comparison with the ordinary courts because they were said to offer 'cheapness, accessibility, freedom from

technicality, expert knowledge of a particular subject' (Franks 1957). Employment tribunals, when allocated jurisdiction for individual employment rights complaints in 1972, were expected to have these characteristics. However, over the past 40 years, these characteristics have been increasingly questioned in various academic studies (Dickens *et al.* 1985; Leonard 1987; Lewis and Clark 1993; Hepple *et al.* 2000). A contemporary evaluation of the tribunal process in providing adequate redress can be considered under the following headings:

- **Access of complainants.** This may be limited formally in legislation depending on employment status (i.e. whether the person is, in law, an 'employee'), on length of service with the employer; and on the implementation of 'up front' fees.
- **Duration of procedure.** This may be slow; 75 per cent of hearings of single cases before an employment tribunal should be held in 26 weeks. This target was achieved in 2007–08 and 2008–09. However, the figure for 2009–10 was 65 per cent (Tribunals Service Annual Statistics 2009–10, [www.justice.gov.uk](http://www.justice.gov.uk)). The median number of days spent on a case that involved a tribunal decision was one (Peters *et al.* 2010).
- **Resources.** There are several categories of resources necessary for complainants and respondents: professional advice, financial resources and time.

*Professional advice:* Case law under the Convention on Human Rights saw the development of the concept of 'equality of arms' ([Neumeister v Austria \[1968\]](#) 1 EHRR 91). Essentially, this refers to the balance of resources between each side in a dispute or court case. In a subsequent case before the European Court of Human Rights, the concept was described as follows: '... as regards [civil] litigation involving opposing private interests, "equality of arms" implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent' ([Dombo Beheer BV v Netherlands \[1993\]](#) 18 EHRR 213).

Resources available to complainants and to respondent employers in employment tribunal cases differ widely. Data on this is available in the 2003 and 2008 surveys of employment tribunal applications (Hayward *et al.* 2004; and Peters *et al.* 2010). For example, 32 per cent of claimants nominated a professional representative on the ET1 form, compared with 54 per cent of employers on the ET3. Particularly for claimants, this represents 'a large decrease' from 2003 when the respective figures were 40 per cent and 55 per cent (Peters *et al.* 2010). 'The proportion of claimants who received no representation or advice [40 per cent] has risen compared with 2003' when it was 34 per cent (*ibid.*). At the full tribunal hearing, as in the 2003 survey, 'employers were much more likely than claimants to be represented (73 per cent versus 34 per cent)' (*ibid.* 48).

*Financial resources:* 55 per cent of claimants incurred personal financial costs as a result of the case (*ibid.*: 91). The median amounts for legal and professional fees were £2,000 for claimants and £2,500 for employers. As in 2003, discrimination claims were the most expensive for both parties. The most expensive cases for complainants were those concerning wage deductions (£5,502); and for employers, redundancy payments (£7,050) (*ibid.* 55).

*Time:* The median number of days a complainant spent on a case was seven (compared with four in 2003). Cases where a discrimination claim was the primary jurisdiction involved more time – the median was 14 days (*ibid.*: 92–3). As far as

respondent employers were concerned, the mean number of days spent on a case was 13 and the median was 5. For discrimination cases the figure was 9 days (*ibid.*: 95).

- **Technicality.** Increasingly, this has become the hallmark of the tribunal process. The presence of lawyers has encouraged tribunals to appear more like courts. Indeed, by the mid-1980s, they were described as ‘quasi-courts’ (Dickens *et al.* 1985). Also, some bodies of employment law together with associated **case law** (e.g., equal pay and transfers of undertakings legislation) are particularly complex for lay complainants. Reliance on the expertise of lawyers is almost inevitable in these complaints.
- **Stamina.** Complainants need stamina and resources to enter and remain in the tribunal process: 36 per cent said that they had experienced stress and depression as a result of their complaint. As in the 1998 and 2003 surveys, ‘these were the most common non-financial negative effects mentioned by claimants’ (Peters *et al.* 2010: 96). Complainants bringing unfair dismissal or discrimination cases were most likely to report stress and greater incidence of loss of confidence/self-esteem (Peters *et al.* 2010: 96; Hayward *et al.* 2004: 162–3).
- **Remedies.** Where complainants are successful, the remedies can frequently be small. In successful unfair dismissal the remedies are limited compensation (capped at £68,400 in February 2011); and possible reinstatement or re-engagement. The *median* award in unfair dismissal cases was £4,591. Under equality law the remedies are unlimited compensation; an award for injury to feelings; a declaration; and a recommendation. An ‘appropriate recommendation’ (Equality Act 2010, s 124) to deal with discrimination in relation to the complainant or other staff can be made by the tribunal. In most discrimination cases *median* compensation was around £6000 (Employment Tribunal and EAT statistics 2010–11, [www.justice.gov.uk](http://www.justice.gov.uk)).

## ► Employment consequences

By the time of the survey interview, 73 per cent of claimants were in new work and 8 per cent were still working for the employer against whom they had made the complaint. ‘Where claimants had moved into new work, the average time it had taken to find this work was 15 weeks, whilst the median was 8 weeks’ (*ibid.*); 41 per cent said that their pay was less than that in their previous job; and the same proportion said that it paid better (Peters *et al.* 2010: 99). Forty-one per cent said that their new job was at a higher level or about the same when compared to their previous job; 32 per cent saw their new employment as ‘something to do until something better comes along’ (*ibid.*).

## What are the key principles underpinning employment law?

In the previous sections, we have referred to various principles which infuse employment law. Here, we consider them more fully and indicate their relationship to human resource management and employment relations. These underpinning principles can be divided into those that concern the substantive issues of employment relations (i.e. the outcomes – the terms and conditions of employment and other decisions); and those that affect the processes by which decisions on terms and conditions and other employment relations matters are made.

- **Substantive issues:**
  - Fairness
  - Reasonableness
  - Equal treatment
  - Harmonisation.
- **Procedural issues:**
  - Natural justice
  - Consultation
  - Consent
  - Freedom.

## Substantive issues

In recent years, two overarching and interconnected policy perspectives have become increasingly influential: *ethical standards* and *human rights*. These encompass, in varying ways, the concepts of fairness, reasonableness, equal treatment and harmonisation. They are used as benchmarks to assess the treatment of employees and behaviour in society at large. So, for example, equality law (relating to both employment and the provision of goods, services and facilities) provides a clear standard of acceptable treatment. The promotion of ethical standards and the commitment to human rights also concerns business employment practices beyond Britain. They are a means of evaluating corporate behaviour in international supply chains which may be founded, in part, on child labour and exploitative conditions. Third World charities have expressed strong concern about this; and, indeed, Oxfam has published a code of practice to encourage employers to address the issue and take steps to establish a more ethical supply chain.

### ► Fairness

In defining fairness, people are invariably subjective (considering the concept in relation to their own personal values). They tend to define it relatively or comparatively (e.g. this is fair and that is not). When asked why they say something is fair or unfair, the tendency is quickly to move away from the abstract and explore details and practical elements of what constitutes fairness.

For example, at the heart of the debate on a statutory minimum wage is the notion of a fair wage. The idea of such a wage is long-standing. The Catholic Church has, historically, referred to a 'just' wage; and the Council of Europe defines and quantifies a 'decency threshold' – an acceptable level of pay. It is the latter that provides a clue to the practical ways in which the concept of fairness is defined. There are social expectations that pay should be sufficient, as a minimum, to enable a person to buy food and provide adequate shelter and appropriate care for both himself or herself and any dependants. Indeed, there are campaigns in Britain for a 'living wage'. It is claimed that the statutory national minimum wage is insufficient (see Chapter 9). Fair treatment, then, is determined against reference points. These are likely to change over time – particularly as social expectations and values shift.



## Reasonableness

Reasonableness is, likewise, an undefined term. It is a long-established concept in law generally. For example, in criminal law there are the concepts of 'reasonable force' in relation to self-defence; and the 'reasonable chastisement' of children. In civil proceedings, the 'reasonable man' test can be used to make value judgements about a person's conduct. The fundamental difficulty with such a test and with the concept of reasonableness is that it is invariably measured against shifting criteria. As social attitudes change, even within 20 or 30 years, the socially accepted notion of reasonable behaviour changes. Also, at any one time, there will probably be differences in attitude between men and women, between older and younger people, and between people from different social and ethnic backgrounds on the standards that they have in mind when assessing reasonableness.

In the employment arena, reasonableness is of particular significance in cases involving unfair dismissal, disability discrimination, and health and safety. In the former, tribunals have to satisfy themselves of the reasonableness of an employer's conduct in dismissing an employee for a particular fair reason. (See *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 in Chapter 8 for more detailed discussion.) In legislation on disability discrimination, employers are required to make reasonable adjustments. Under health and safety legislation, the general duties imposed on an employer must be complied with 'so far as is reasonably practicable' (see, respectively, Chapters 5 and 12 for more details). Implied in the legislative provision of 'reasonableness' is the idea of a balance being struck between various factors: for example, cost, time and trouble involved in aiming to comply with the law.

## Equal treatment

Equal treatment as a concept has developed in British employment relations as a result of a number of parallel influences: social movements originating in the United States of America and policy initiatives from the European Union. In the 1960s, in the USA, the women's movement critically questioned the role and status of women in society and the opportunities available. Simultaneously, also in the USA, the civil rights movement challenged endemic racism and asserted social, voting and employment rights. The significance of these movements was felt in Britain and energised groups who sought changes here.

Within the European Community (as the Union was then called), commitment to equal treatment has had an uneven history. The founding Treaty of Rome 1957 refers only to equal pay between men and women – and that as a result of a political compromise. No specific social provisions were included because, initially, the community was conceived primarily as a free-trade area or 'common market'. Pragmatically, a Social Action Programme in the 1970s promoted equal treatment on the grounds of sex and equal pay. By 1989, under the Community Charter of Fundamental Social Rights of Workers, a clear shift had taken place in the importance of social policy. The preamble states that 'the same importance must be attached to the social aspects as to the economic aspects and . . . therefore, they must be developed in a balanced manner'. The social policy objectives of the European Union have, as a consequence, moulded much UK legislation on equal treatment.

There are two aspects to equal treatment law. First, 'like must be treated alike'. A basis of comparison is, then, established. The objective legal test has been defined in a House of Lords judgment on direct sex discrimination in this way: 'would the

complainant have received the same treatment but for his/her sex?' (*James v Eastleigh Borough Council* [1990] IRLR 288). This is known in shorthand as the 'but for' test (see Chapter 5). The second aspect concerns policies and practices which appear neutral in effect but should be scrutinised to see if they create some institutionalised disadvantage for a person with particular characteristics (e.g. sex, race, disability, age) – i.e. indirect discrimination.

### ► Harmonisation

As an issue in British employment relations, this has developed from the early 1970s in a pragmatic and voluntary way primarily as a result of management–union negotiations. It is an aspect of equal treatment and concerns the establishment of 'single-status' terms and conditions of employment and the removal of the differential status and treatment of manual and non-manual workers (i.e. blue-collar and white-collar) workers. In particular, it resulted in common holidays and working hours and common access to sick pay and pensions. Traditionally, status distinctions had been the norm – with manual workers granted shorter holidays, working longer hours and, invariably, having no access to sick pay or pension schemes.

Under employment law, there has been no explicit differentiation between blue- and white-collar workers. The principal limitations on access have related to the number of hours worked each week and continuity of service with an employer. Although length of service remains for entitlement to some employment rights, the 'hours' threshold has been ruled to be unlawful (*R v Secretary of State for Employment ex parte Equal Opportunities Commission* [1994] IRLR 176). So, part-time workers have entitlements and, under the Part-time Workers Directive 1997, are eligible for *pro rata* treatment with full-time workers.

## Procedural issues

There are four key underpinning principles evident within employment relations processes:

### ► Natural justice

This is a long-standing legal concept. There are two key rules:

- that no person may be a judge in their own cause;
- that a person must be given a fair opportunity to know the allegation against them, to state their case and to answer the person making the allegation.

In employment relations, these rules have particular importance in disciplinary and dismissal cases. Procedural fairness is as important a consideration for employment tribunals as the other tests (viz. whether the dismissal is for a fair reason and whether the employer behaved reasonably in all the circumstances). The ACAS *Code on Practice on Disciplinary and Grievance Procedures* embodies the principles of natural justice (see Chapter 8).

### ► Consultation

Within employment relations, conflicts of interest are endemic. Employers and their workforces will have different views and expectations about pay levels, job security

arrangements, other terms and conditions of employment. Two processes can contribute to resolving workplace differences: collective bargaining and consultation. The former involves negotiations with recognised trade unions and results in ‘joint regulation’ (i.e. terms and conditions agreed between the employer and the recognised union).

Consultation is a weaker form of employee participation in management decision-making. Nevertheless, it is significant because it can arise in any workplace – unionised or not. Also, legislation (for example, the Information and Consultation with Employees Regulations 2004) and case law (for example, *R v British Coal Corporation and the Secretary of State for Trade and Industry ex parte Price* [1994] IRLR 72) have to some degree, over the past 30 years, enhanced its role. Its growth is, in part, a result of the promotion by the European Union of ‘social partnership’ and the way this concept has been woven into the fabric of employment relations.

In academic literature, distinctions are drawn between ‘pseudo consultation’ (Pateman 1970) and ‘genuine consultation’. The former is essentially information giving by management. There is little, if any, expectation that a management decision or proposal will change as a result of discussion. This form of consultation maintains the ‘right to manage’. ‘Genuine consultation’ can be assessed by various benchmarks. Examples of these can be seen in European law on, for example, collective redundancies and transfers of undertakings. In particular, the indicators of such consultation include:

- the extent to which appropriate information for discussion is disclosed by management;
- the extent to which management representatives listen actively to the views of the workforce and its representatives;
- the depth to which managers genuinely engage in discussion;
- the extent to which managers respond to the comments, views and ideas of the workforce; and
- the willingness of management to amend a policy proposal or change a decision.

It is possible for this form of consultation to develop into what is sometimes characterised as ‘integrative consultation’. This can focus on problem-solving or the implementation of substantial changes to the organisation of work and the deployment of staff. Necessarily, it involves detailed discussions about interrelated issues.

## ► Consent

Following from the principle of ‘consultation’, ‘consent’ or agreement is an important element in employment procedures. It is central to the law on contract formulation, contract variation and to terms and conditions negotiated with trade unions or other worker representatives (see Chapter 2). It is also important to note that ‘managing by consent’ is good employment practice because of its contribution to minimising workplace conflict.

## ► Freedom

Traditionally, within employment relations, employers have asserted their commitment to managerial freedom. This has often been encapsulated in the term ‘the right to manage’. As such, this ‘right’ has no legal standing. It is, arguably, a moral right deriving from economic ownership. It is an assertion that management should have unfettered freedom and discretion to take whatever decisions are appropriate for the prosperity of

the business. Frequently, it is strongly associated with operational issues – particularly the deployment and organisation of resources (including employees). It embraces, for example, a ‘right to hire and fire’, rights to determine promotion, staffing levels, disciplinary matters, production control, technological change and quality issues.

There are, however, circumstances in which managements have been, and continue to be, willing to limit their freedom to act. In determining pay and conditions, some employers have felt that their interests could be met by agreeing to negotiate with unions. Although such a concession would reduce management’s freedom of action, it would be compensated for by the creation of a more orderly system of employment relations based on workforce consent.

The traditional management ‘ideology’ described here has been substantially challenged and changed in the past 50 years or more. The right to manage has been constrained by various frameworks of legal regulations (particularly those on discrimination and dismissal). Where **collective bargaining** continues to exist, its complete ‘freedom’ is open to question. Provisions of collective agreements are not isolated from the specifications of employment law. So, no collective agreement can infringe discrimination law. The terms of collective agreements (as well as the terms of contracts of employment) must not provide for terms that are inferior to those prescribed in law.

The extent to which employers have freedom and discretion is variable. It is dependent upon the combined extent to which employment law intervenes and the employer has conceded collective bargaining rights to unions. Storey (1980: 45) describes the right to manage as ‘the residue of discretionary powers of decision left to management when the regulative impacts of law and collective agreements have been subtracted’.

## Conclusion

The interlocking of legal and voluntary measures remains an important feature of employment regulation. The balance has decisively swung towards significant juridification over the past 30 years or more. Managers are much less likely to determine policies, employment practices and terms and conditions of employment without reference to legal standards. Nevertheless, there are still areas for management to exercise discretion and to determine some of their own standards above the statutory minima. It is unlikely that there will be a return to the high level of ‘voluntarism’ that existed in Britain until the 1960s. Indeed, evidence of future legislative developments suggests that voluntarism within a legal framework will continue to be the norm.

## Further reading

Access relevant websites for recent annual reports of:

- Advisory Conciliation and Arbitration Service
- Equality and Human Rights Commission
- Health and Safety Executive
- Employment Tribunals and Employment Appeal Tribunal
- Low Pay Commission.

Key websites for developments in employment and discrimination law:

- Department for Business, Innovation and Skills: [www.bis.gov.uk](http://www.bis.gov.uk)
- Department for Work and Pensions: [www.dwp.gov.uk](http://www.dwp.gov.uk)
- Employment Tribunals and Employment Appeal Tribunal: [www.justice.gov.uk](http://www.justice.gov.uk)
- Equality and Human Rights Commission: [www.equalityhumanrights.com](http://www.equalityhumanrights.com)
- European Union: [www.europa.eu](http://www.europa.eu)
- Advisory Conciliation and Arbitration Service: [www.acas.org.uk](http://www.acas.org.uk)
- Chartered Institute of Personnel and Development: [www.cipd.co.uk](http://www.cipd.co.uk)
- Confederation of British Industry: [www.cbi.org.uk](http://www.cbi.org.uk)
- Trades Union Congress: [www.tuc.org.uk](http://www.tuc.org.uk)

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