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Employment Tribunals

Employment tribunals have faced an increasing caseload. Their jurisdiction has widened with the introduction of new legislation, cases have become more complex and the public's awareness of employment rights and recourse to litigation have all contributed to increased pressure on the current system. This has prompted reviews and consultations and fuelled moves toward a reform of Tribunals described by the Lord Chancellor's Department as "the greatest shake up for 40 years."

This paper covers the nature and function of employment tribunals, key issues and moves toward reform and the unification of the various different tribunal services into a single service under the Lord Chancellor's Department (now Department of Constitutional Affairs).

Vincent Keter

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Summary of main points[1]

An employment tribunal generally consists of three members. The chairman is a solicitor or barrister of at least seven years standing. Of the remaining two lay members, one is chosen from a panel of employer representatives and the other from a panel of employee representatives. The tribunal determines the case between the Applicant and Respondent after hearing evidence and submissions. The hearing is less formal than a court hearing. The chairman can deal with some matters sitting alone. Since 1997, the administration of the tribunals and their caseload has been done by the Employment Tribunals Service, an executive agency of the Department for Trade and Industry. Appeals lie to the Employment Appeals Tribunal, on a point of law, and thereafter to the Court of Appeal.

There are a variety of ways that cases can be settled before a hearing. Many of these involve the services of the Advisory Conciliation and Arbitration Service (ACAS). *The Employment Act 2002* introduced a new focus on encouraging dispute resolution in the workplace intended to reduce the burdens of litigation on tribunals, employees and industry.

Apart from the employment tribunals there are as many as 69 other administrative tribunals in England and Wales. The *Report of the Review of Tribunals* by Sir Andrew Leggatt was published in March 2001.[2] It outlined a blueprint for reform whereby all these various different tribunals would be unified into a single service. In August 2001 the Lord Chancellor's Department issued a consultation paper about the proposals.

In March 2003 the Lord Chancellor's Department announced plans to create a unified Tribunal Service. This will bring together into a single service the top 10 non-devolved tribunals including the employment tribunals. The Government expect that this will result in greater efficiency from the sharing of resources and best practice.

The Employment Tribunal System Taskforce was set up by the Government in October 2001 to make recommendations on how services could be made more efficient for users. The Taskforce report was published on 29 July 2002 and made 61 recommendations covering changes in procedures, increased access to information and increased resources. [3]

The Government endorsed the Taskforce's recommendations in November 2002. It was envisaged that further secondary legislation would be needed to carry some of these into effect.[4] In March 2003 the Secretary of State for Trade and Industry announced the Taskforce would be reconstituted to monitor progress on the implementation of its recommendations.

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1 This paper does not contain legal advice, nor is it a substitute for legal advice, which should always be taken in a particular case.

2 Sir Andrew Leggatt, *Tribunals for Users; one system, one service*, The Stationery Office, March 2001.

3 *Moving Forward: the report of the Employment Tribunal System Taskforce*, Department of Trade and Industry, July 2002.

4 On 5 December 2003 the DTI published draft regulations and a consultation document: http://www.dti.gov.uk/er/individual/etregs_condoc.pdf

CONTENTS

I The Current System

A. History

The Employment Tribunal System is made up of four distinct organisations:

- Employment Tribunals (England and Wales) and (Scotland)
- Employment Appeal Tribunal
- Employment Tribunals Service
- Advisory, Conciliation and Arbitration Service (ACAS)

The Industrial Tribunals were first established under s.12 of the *Industrial Training Act* 1964 to consider appeals by employers against training levies imposed under that Act. Since then their scope, procedures and powers have changed and expanded dramatically. Since August 1998 they have been known as employment tribunals and operate under the *Employment Tribunals Act 1996*. Their procedures and constitution are currently governed by the *Employment Tribunals (Constitution and Rules of Procedure) Regulations*.[5]

Administration of the tribunals was transferred to an executive agency of the DTI named the Employment Tribunals Service (ETS) on 1 April 1997. At that time, around 620 DTI staff provided the administrative support for the tribunal judiciary. The move was announced in a DTI Press Release P/97/18 of 8 January 1997. The ETS provides administrative support to employment tribunals and the Employment Appeal Tribunal. Its principal activities are:

- Providing information to the public on tribunal procedures
- Paperwork and correspondence in tribunal cases
- Practical arrangements for tribunal hearings, such as listing cases for hearing
- Providing support to tribunals at hearings

The ETS is independent of the employment tribunal judiciary. An annual report and accounts is published in July each year, containing useful breakdowns and statistics of hearings.

The Employment Appeal Tribunal (see section on appeals below) is composed of judges of the High Court and Court of Appeal plus lay members with special knowledge or experience of industrial relations.[6] The President of the Appeal Tribunal is nominated by the Lord Chancellor.

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5 SI 2001/1171 (SI 2001/1170 for Scotland).

6 *Employment Tribunals Act 1996* s.22

B. Functioning

1. Procedure

Claimants start proceedings by making an originating application and lodging it with the appropriate Regional Office. An application form (called IT1) and an explanatory booklet called "How to apply to an Employment Tribunal" are available from most job centres, ACAS, employment tribunal offices or online.[7] There is no legal requirement that form IT1 be used, but the complaint must be made in writing within the relevant time limit and must contain the following information:

1. The name and address of the Applicant (the person making the complaint).
2. The name and address of the Respondent (the employer or other body about whom the complaint is made).
3. The grounds and particulars upon which relief is sought. [8]

The time limit for bringing a claim should always be checked since time limits are usually strictly enforced. In certain circumstances a tribunal may grant an extension of the time limit.[9]

When the claim is received, a copy will be sent to the respondent with a notice of originating application and a blank form for the respondent to fill in and return within 21 days if they wish to defend the claim. A copy will also be sent to ACAS, who usually write to the parties offering help to resolve the dispute without litigation.

The next stage will usually be a directions hearing. Rule 4 of the *Employment Tribunals Rules of Procedure 2001* gives employment tribunals wide powers to

> give such directions on any matter arising in connection with the proceedings as appear to the tribunal to be appropriate.

Parties or the tribunal may request that the other side give more details of their case, or disclose documents or give written answers to questions. A directions hearing will be scheduled to establish the issues in the case and deal with any other matters, such as timetables, needed to administer the claim. A set of directions will be made and sent to the parties. Parties must be given at least 14 days notice of the time and place of the hearing, unless the chairman agrees a shorter time with the parties, or the case is one where the 14 day period does not apply. [10]

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7 Enquiry line: 0845 795 9775; http://www.employmenttribunals.gov.uk/england/enghomeind.html

8 Schedule 1, Rule 1, *Employment Tribunals (Constitution and Rules of Procedure) Regulations*, SI 2001/1171.

9 *Consignia plc v Sealy* [2002] EWCA Civ 878 on 19 June 2002, reported at [2002] ICR 1193 CA (also at [2002] IRLR 624.

10 For example an application for interim relief under *ERA 1996* s.128 and *TULRCA 1992*, s.161.

There are two procedures available to the tribunal to dispose of a claim without a full hearing. One is called a "preliminary hearing" and the other is called a "pre-hearing review". A preliminary hearing may be called to determine whether or not the applicant has the legal entitlement to bring the claim they have lodged. Since this may bring the claim to an end, the parties must be given a chance to be heard. A preliminary hearing might raise issues such as whether the employee had been employed for long enough to bring a claim for unfair dismissal (currently one year of continuous employment) or whether the claim was brought within a relevant time limit.

A "pre-hearing review" is different. It is designed to weed out a weak case, or part of a case, at an early stage and revolves around the merits of the case rather than a basic entitlement in law to bring the claim. A tribunal may order a party to pay a deposit of up to £500 before they are allowed to proceed to a full hearing. This will also come with a warning that if the party fights on to a full hearing and then loses, they will also face an order to pay the costs of the other side. If the deposit is not paid within the given time limit the party's case may be struck out.

The government is proposing further new employment tribunal regulations, which were published for consultation in July 2003.[11] These are designed to take into account the proposed overhaul of dispute resolution procedures under the *Employment Act 2002* and other proposed improvements.[12]

2. The Hearing

a. What to expect

The hearing in an employment tribunal is less formal than in a court, but nevertheless has some of the procedural qualities of a court hearing, such as the giving of sworn evidence and a clear order of play. The employment tribunal website gives useful advice on what parties should expect at the full hearing of the merits of the claim:[13]

> What will happen at the main or full merits hearing?
>
> Normally there are three members of the tribunal, i.e. a Chairman and two members. However, in some cases a Chairman may sit without lay members, e.g. often in claims for unlawful deduction from wages and breach of contract cases. The party who gives evidence and calls witnesses first, usually sums up last.
>
> There is no absolute rule as to which side starts. In unfair dismissal cases where the respondent admits the dismissal, the respondent usually goes first. If the

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11 http://www.dti.gov.uk/er/individual/DRcondoc.pdf
12 DTI Press Release P/2003/393 of 9 July 2003.
13 http://www.employmenttribunals.gov.uk/england/enghomeind.html

respondent does not admit that he or she dismissed the applicant, the applicant usually goes first. In discrimination cases the applicant usually goes first. In cases which involve more than one complaint, or even in some cases with a single complaint, the Chairman may seek the views of the parties or their representatives before the tribunal decides how the hearing should proceed.

Witnesses on each side are usually allowed to sit in the hearing before they give their evidence, but occasionally witnesses may be required to wait outside the hearing until they are called to give evidence.

A party or witness is usually required to give evidence on oath or affirmation. To lie having sworn an oath or affirmation could result in criminal conviction for perjury. That person then gives his or her evidence to the tribunal. This may be by reading a pre-prepared written statement. The tribunal may instead read the statement itself, or in some longer cases, may have read the statement prior to the hearing.

The other party or that party's representative can then ask the witness questions ('cross-examination').

The witness can give further evidence to clarify matters which came up when being asked questions by the other party ('re-examination'). Finally, the tribunal members and Chairman may ask some questions.

The same procedure is then usually followed in respect of the other witnesses and parties to the proceedings.

When all witnesses have given their evidence, both parties are requested to sum up, explaining why the tribunal should decide in their favour. These are called 'submissions'. Then, either the parties leave the tribunal room or the tribunal members leave the tribunal room. The tribunal then comes to a decision in private.

Finally, the tribunal, through the Chairman, announces its decision and reasons to the parties in their presence. Occasionally the tribunal 'reserves' its decision. This means that the parties are not told the decision until they receive it in writing from the tribunal. This may happen in complex cases or where there is not enough time on the day of the hearing to come to and announce the decision.

The tribunal will normally expect to deal with both the merits and any questions of remedy i.e. reinstatement, re-engagement or compensation in the one main hearing. The time allocation given prior to the hearing will usually include time for both the merits and the remedy. The Chairman should indicate at the beginning of the hearing whether the tribunal wants to hear evidence about remedy at the same time that it hears evidence about the merits, or whether it will deal with remedy as a separate issue once it has decided whether or not the claim succeeds or fails. If in doubt at the beginning of the hearing, ask the Chairman what he or she intends to do.

> The procedure during the hearing is controlled by the Chairman. Whilst the Chairman will ensure that parties take the above steps in a calm and measured way, he or she may have to be firm in moving the case on to ensure that it proceeds at a pace which enables it to be dealt with within the time allocated. In particular, the Chairman may have to be strict in respect of ensuring that questions to witnesses keep to the issues which the tribunal has to determine. The Chairman may also put reasonable time limits on submissions.

b. Legal rules governing the full hearing

The general rule is that the full hearing of the application must be heard by a tribunal, consisting of the chairman with two other members (or one other member if the parties consent).[14] However, *Employment Tribunals Act 1996* section 4(3) sets out a list of instances where the matter shall be heard by the chairman alone, for example when the matter is left uncontested by the respondent. Section 4(5) nevertheless allows the chairman to convene a full tribunal if that seems more appropriate.

Under the Constitution and Rules of Procedure the three members of the tribunal are drawn from three different panels set out in regulation 5(1)(a) to (c).[15] The chairman is drawn from a panel of individuals appointed by the Lord Chancellor who have certain minimum legal qualifications. The remaining two panels, from which the lay members are drawn, are appointed by the Secretary of State after consultation with organisations representative of employees and employers respectively. The intention is to provide a balance of perspectives within a tribunal and to further the tribunal's appearance of impartiality.

The detailed provisions relating to the hearing are contained in Schedule 1, Rule 10 of the regulations. These provide that the hearing must be in public. Rule 10(3) sets out instances where the hearing may be in private when hearing evidence from a person which is likely to consist of:

> (a) information which he could not disclose without contravening a prohibition imposed by or by virtue of any enactment, or
> (b) information which has been communicated to him in confidence, or which he has otherwise obtained in consequence of the confidence reposed in him by another person, or
> (c) information, the disclosure of which would, for reasons other than its effect on negotiations with respect to any of the matters mentioned in section 178(2) of the 1992 Act, cause substantial injury to any undertaking of his or any undertaking in which he works.[16]

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[14] *Employment Tribunals Act 1996* s.4

[15] *Employment Tribunals (Constitution and Rules of Procedure) Regulations*, SI 2001/1171.

[16] The "1992 Act" refers to the *Trade Union and Labour Relations (Consolidation) Act* 1992. Section 178(2) refers to collective agreements or collective bargaining between trade unions and employers.

In any case involving an allegation of sexual misconduct and in *Disability Discrimination Act* cases involving evidence of a personal nature, the tribunal may make a "restricted reporting order". The order will state those who may not be identified in any reporting of the case. The media will still be free to report the case but the identities of those involved must be protected. A deliberate breach of the order will be a criminal offence, punishable by a fine. An order should not be granted simply because either or both of the parties have made a request.

If the case engages any issue of national security a government minister may direct a tribunal to sit in private for crown employment proceedings. The tribunal may also take this step on its own initiative. This might extend to excluding the applicant or the applicant's representative from a part of the hearing, or from seeing certain documentation. The tribunal may also withhold the reasons for its decision.

c. Representation

There is no restriction on rights of audience in tribunals and parties may choose whomever they want to represent them or they can represent themselves. Lay consultants often appear as representatives and the tribunal service publishes guidelines for lay representatives on how to conduct themselves at hearings. Bar school students are also encouraged to take on cases through the Free Representation Unit as a way of gaining advocacy experience.[17] The position of non-legally qualified advisers giving legal advice generally, particularly in relation to employment law matters, was considered in the Blackwell Report.[18] The report, commissioned by the Lord Chancellor in 1999, concluded that restricting representation was not advisable but did suggest that the trade unions should publish a code of practice for lay advisers and take a more proactive role in representation of their own members.

Employment tribunals are intended to be accessible to those who are representing themselves so the basic rule is that public funding will not be available except for appeals. However, legal help is sometimes available in appropriate cases from a variety of sources. This may or may not include representation at a contested hearing. On 1 April 2000 legal aid was replaced by "legal help" which covers advice and "help at court" covering representation in court. This would cover appeals to the EAT and cases involving an employment contract claim pursued through the courts instead of the tribunal system. As in the past with legal aid, these are means tested services and are now administered by the Legal Services Commission which replaced the Legal Aid Board.[19] The service is known as the "Community Legal Service".[20]

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17 FRU website: http://www.fru.org.uk/

18 Dept. for Constitutional Affairs: http://www.dca.gov.uk/civil/blackwell/reportfr.htm

19 Qualification levels were changed on 7 April 2003 - see LCD Press Release 107/03 of 11th March 2003 and the *Community Legal Service (Financial) (Amendment) Regulations 2003 SI 2003/650*

20 Useful website: http://www.justask.org.uk

The Legal Service Commission does not provide financial help for representation before employment tribunals. However, solicitors can give limited free advice under what was formerly know as the "Green Form" scheme. This is available to those with low disposable income and low savings or capital and generally covers drafting and correspondence in relation to the claim, but not representation in the hearing. In discrimination cases the various equality commissions can provide financial assistance for representation at tribunals. The relevant bodies are:

- Equal Opportunities Commission (http://www.eoc.org.uk/)
- Commission for Racial Equality (http://www.cre.gov.uk/)
- Disability Rights Commission (http://www.drc-gb.org/)

Hearings in tribunals can involve complex legal issues and might require detailed preparation and effective presentation for a case to have any hope of success. Accordingly, the lack of availability of funded legal assistance has led to arguments that this could amount to non-compliance with Article 6(1) of the *European Convention on Human Rights* (right to fair trial). In Scotland only, this has led to an extension of legal aid, since 15 January 2001, to cover complex employment tribunal cases.

There are a number of organisations which provide free legal advice and representation in employment tribunals. Details of these can be found in Appendix 3. Access to these services tends to be concentrated in London, although there are law centres and citizens advice bureaux all over the country.

Another way in which parties can access legal services for tribunal proceedings is through conditional fee agreements.[21] This allows lawyers to operate on a "no win no fee" or other arrangement. The client may be required to pay a sum up front to cover a costs insurance premium. The most common type of agreement is a hybrid agreement whereby the client pays fees up to an agreed maximum, thereafter a conditional fee agreement is engaged.

d. Trade Unions

Many applications in employment tribunals are taken with representation or advice from the employee's union. In 2001/2002 (year ending October) there were 4,419 new trade union applications.[22] The most common claim was for unfair dismissal. In the same period the TUC reported that 95% of cases they took on were won or settled favourably to their members. In cases which went to a final hearing they reported that 80% of cases were won.[23] This should be seen in the context of the Employment Tribunal Service figures for unfair dismissal cases in roughly the same period which show that 56% of cases were

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21 See *Conditional Fee Agreements Order 2000, SI 2000/823*

22 TUC survey "Focus on Employment Tribunals-trade unions trends survey 03/03" May 2003

23 Ibid.

dismissed and 44% upheld at final hearing.[24] This would suggest that the unions who took part in the survey are generally careful about which cases they take on. Three quarters of the unions said that they only submitted cases or appeals on a lawyer's recommendation. There was also a 32% reduction in cases being taken to tribunal by a trade union in the period 2000 to 2002. The TUC survey puts this down to the effectiveness of collective bargaining in reducing the need for litigation.

e. The Decision

The decision of the tribunal must be recorded in writing and signed by the chairman. The decision and reasons for the decision may be given at the end of the hearing, but sometimes the tribunal will reserve its decision. It can sometimes take up to six months for the decision to be promulgated, although the target for dissemination is usually four weeks from the date of the hearing. The reasons for the decision can come in summary or extended form. If a party wishes to appeal, extended reasons should be obtained, since only the full reasons for the decision will be acceptable when lodging the appeal at the Employment Appeals Tribunal.

Prior to an appeal being lodged, a tribunal can review its own decision of its own motion or on the application of a party, on the grounds that:

(a) the decision was wrongly made as a result of an error on the part of the tribunal staff
(b) a party did not receive notice of the proceedings
(c) the decision was made in the absence of a party
(d) new evidence has become available which could not have been reasonably known of or foreseen at the time of the hearing
(e) the interests of justice require a review[25]

After review, a tribunal may confirm, vary or revoke its decision and order the case to be reheard by the same or a different tribunal. In the meantime the time limits for lodging an appeal are not suspended but continue to run.

3. Appeals

The Employment Appeals Tribunal's (EAT) jurisdiction is derived from section 21 *Employment Tribunals Act 1996*. The procedure for hearing appeals is governed by the *Employment Appeal Tribunal Rules 1993, SI 1993/2854 (as amended)*. In addition, there is a 2002 practice direction issued by the EAT.[26] The EAT can hear appeals from employment tribunals on questions of law only.[27] There is no appeal on a question of fact,

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[24] ETS Annual Report and Accounts 2002-2003
[25] *Employment Tribunals (Constitution and Rules of Procedure) Regulations*, SI 2001/1171, Sch 1, 13(1)
[26] 9 December 2002: Reported at [2003] ICR 122 and [2003] IRLR 65
[27] *Employment Tribunals Act 1996 s.21*

unless the tribunal's finding was one which no reasonable tribunal could have come to, on the evidence (in other words the decision falls within the legal definition of "perversity"). An appeal brought on the ground of perversity will only succeed if an overwhelming case is made out.[28]

After the employment tribunal has made its decision, an appeal to the EAT must be lodged within 42 days of the day on which extended written reasons for the decision or order were sent to the party wishing to appeal. If no extended reasons are given then time runs from the date of the order or decision. The limit also applies even where the tribunal has decided liability and adjourned the assessment of compensation. Appeals are initially vetted by the Registrar of the Appeal Tribunal to ensure that they come within the EAT's jurisdiction.[29] The Registrar will make a preliminary decision on whether an appeal is really on a point of law or is in reality on a point of fact. The EAT might take a different view of the facts but this alone does not give it jurisdiction to hear the appeal. Occasionally the question of jurisdiction and the fact/law distinction is only resolved after a full hearing.

Once the appeal has been accepted by the registrar, it will be listed for a brief preliminary hearing (up to half an hour) to decide if it should be allowed to proceed to a full hearing. This hearing is called a Preliminary Hearing for Directions. The appellant must demonstrate that it is "reasonably arguable that the employment tribunal made an error of law in their decision". After this hurdle has been passed it can take up to 18 months before the final hearing takes place.

The EAT has the same powers as the High Court in relation to

> (a) the attendance and examination of witnesses,
> (b) the production and inspection of documents and
> (c) all other matters incidental to its jurisdiction.[30]

4. Enforcement of Awards

The current position is that the tribunal has no power to enforce its awards. These are enforceable through the county court as if they were county court judgments.[31] An application must be made in the respondent's local county court, supported by a copy of the tribunal's decision and an affidavit verifying the amount. This stage will not usually require a hearing and the application can be made without notice to the respondent. The county court will then enter judgement for the amount of the tribunal's award. This allows a variety of enforcement proceedings to be taken:

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28 *British Telecommunications plc v Sheridan* [1990] IRLR 27 and *Yeboah v Crofton* 2002 EWCA Civ 794
29 Challenges to a decision of the Registrar should be made by referral to an EAT Judge.
30 *ETA 1996*, s.29(2)
31 Section 15 *Employment Tribunals Act 1996*

- Execution against goods (bailiff seizes goods to pay the debt)
- Charging order on land or shares (property or shares are subject to a charge)
- Bankruptcy of individual or firm or winding-up of company
- Garnishee proceedings (bank account or other debtor of the respondent)
- Administration order (against company)
- Attachment of earnings (order to employer to pay from wages due respondent)
- Order to obtain information (court attendance and examination on oath)

This may present problems to a person who has obtained an award with representation by a lay advocate, since the lay representative will not have rights of audience in the county court. Legal representation and the costs that this entails may be necessary. Occasionally, the cost of pursuing the award can outweigh the value of the award. The Employment Tribunal Taskforce (see below) recommended that the tribunals be given enforcement powers, although they acknowledged the far reaching nature of their conclusion and recommended research be done on current enforcement methods. This would involve huge changes in the way the tribunal service operates, since any enforcement regime would presumably require all the same resources, infrastructure and expertise as exists in county courts (eg bailiffs, oral examination). It might require tribunal chairmen to have all the expertise in this area currently required of District Judges.

If the employer is insolvent then the award may never be paid. There is a scheme under the *Employment Rights Act 1996* whereby the DTI pay certain debts of insolvent employers. This includes unpaid redundancy entitlements or awards (including protected awards), unpaid wages or statutory entitlements to notice or holiday pay. Basic awards in unfair dismissal cases are also covered.[32]

C. Settlement and Resolution of Cases

1. ACAS

The Advisory, Conciliation and Arbitration Service (ACAS) came into being in 1974. *The Employment Protection Act 1975* gave it statutory recognition.[33] ACAS works very closely with the employment tribunal service and plays the largest role in resolving employment disputes. ACAS frequently settles tribunal cases, avoiding the need to go to a full hearing when a complaint has already been made. This is much needed since the process of pursuing litigation to final outcome is very frequently stressful and time consuming. Litigation almost always takes much longer than parties expect and even if a successful outcome is reached after the main hearing, there may be many more stages (and further delays) if the decision is appealed or needs to be enforced through

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[32] See DTI PL718 http://www.dti.gov.uk/er/redundancy/insolvency-pl718.htm#intro

[33] The main statutory provisions relating to ACAS are now contained in the *Trade Union & Labour Relations (Consolidation) Act 1992* ("TULRCA") which repealed most of the *Employment Protection Act 1975.*

subsequent applications in the county court. There is a strong focus in the ACAS approach on preventative measures, such as advising on how to avoid disputes through good practice.

The ACAS website describes their services as follows:

- *Providing impartial information and help*
- *Preventing and resolving problems between employers and their workforces*
- *Settling complaints about employees' rights*
- *Encouraging people to work together effectively*

ACAS have a network of telephone help lines giving free help and information about any work problem. In negotiation and dispute resolution, the focus is on achieving a long term effective solution and wider issues such as communication. There is a general commitment to problem solving at an early stage. In tribunal cases, on average 71 per cent of cases are resolved at the ACAS stage. When the case is one of straightforward unfair dismissal and a way forward cannot be found, ACAS have a scheme giving people the choice of confidential arbitration instead of a tribunal. The organisation also runs many workshops and seminars throughout England, Scotland and Wales.

2. Compromise Agreements

Most of the employment statutes contain a provision making any agreement not to pursue a claim at a tribunal void and unenforceable as an attempt to contract out of statutory rights. Thus section 203 (1) of the ERA, which, amongst other rights, contains the right not to be unfairly dismissed, provides:

> (1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports-
> (a) to exclude or limit the operation of any provision of this Act, or
> (b) to preclude a person from bringing any proceedings under this Act before an industrial tribunal.

However, the legislation also provides two main exceptions to this general rule:

- Agreements reached with the aid of ACAS conciliation, called COT3 agreements
- Compromise agreements

Compromise agreements must comply with stringent statutory conditions. As far as unfair dismissal is concerned, the conditions are contained in section 203 (3) of the *Employment Rights Act 1996*, as amended by the *Employment Rights (Dispute Resolution) Act 1998* which state that

(a) the agreement must be in writing;
(b) the agreement must relate to the particular proceedings;

(c) the employee or worker must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an industrial tribunal;
(d) there must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a profession or professional body covering the risk of a claim by the employee or worker in respect of loss arising in consequence of the advice;
(e) the agreement must identify the adviser;
(f) the agreement must state that the conditions regulating compromise agreements under this Act are satisfied.

Compromise agreements were first introduced by the *Trade Union and Employment Rights Act 1993* but they are now widely used by employers (and employees) who want to avoid the trouble, expense and uncertainty of tribunal proceedings. However, the provision in subsection (3)(b) that such agreements must relate to "particular proceedings" has led to some uncertainty about how far they can prevent all claims and potential claims to tribunals.[34]

Clause 39 of the *Employment Bill 2001/02* (subsequently the *Employment Act 2002*) proposed to amend all those Acts which allow for compromise agreements, to remove the requirement that they must relate to a particular complaint. However, this was not carried forward into the final enactment.

3. Arbitration

In December 1994, a Green Paper was published, *Resolving Employment Rights Disputes: Options for Reform*.[35] This referred to "unreasonably long delays in many locations and the seemingly inexorable growth of 'legalism' in [tribunal] proceedings".[36] The Green Paper proposals, with some modifications, eventually became law in the *Employment Rights (Dispute Resolution) Act 1998*, the statutory basis for the ACAS arbitration scheme.[37] One proposal dropped by the last Conservative government was the imposition of a statutory requirement on employees to try to resolve disputes through internal procedures before taking them to tribunals.[38] Measures introduced by this Act included:

- providing an alternative means of resolving disputes about unfair dismissal by voluntary referral to arbitration under a scheme to be drawn up by the Advisory, Conciliation and Arbitration Service (ACAS)

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34 See, eg, "Shoddy compromises", *People Management*, 17 June 1999
35 Cm 2707
36 Cm 2707, para 1.2
37 For a fuller account of the background, see Library Research Paper 98/13, 16 January 1998, *Employment Rights (Dispute Resolution) Bill [HL] 1997/98*
38 HC Deb 20 November 1995, c 20W

- encouraging the use of in-house appeal procedures by allowing a reduction in compensation awards for a failure to make use of available procedures
- permitting tribunals to determine cases without a hearing or full hearing in certain circumstances
- extending the jurisdictions in which a chairman may sit alone
- making provision for hearings by the chairman and one other member
- enabling 'legal officers' to be appointed to the tribunals to relieve chairmen of some of their more straightforward duties.

The ACAS scheme did not come into operation until 21 May 2001.[39] At that time it applied only to unfair dismissal cases and required both parties to agree to be bound by the arbitrator's decision and to waive their right to take a case to an employment tribunal. The scheme has since been extended to cover voluntary resolution of disputes in relation to the statutory right to request flexible working with effect from 6 April 2003. Details of how the scheme works are contained in the Schedule to the *ACAS Arbitration Scheme (England and Wales) Order 2001*, SI 2001/1185. The introduction says:

> Resolution of disputes under the Scheme is intended to be confidential, informal, relatively fast and cost efficient. Procedures under the Scheme are non-legalistic, and far more flexible than the traditional model of the employment tribunal and the courts. For example (as explained in more detail below), the Scheme avoids the use of formal pleadings and formal witness and documentary procedures. Strict rules of evidence will not apply, and, as far as possible, instead of applying strict law or legal precedent, general principles of fairness and good conduct will be taken into account (including, for example, principles referred to in any relevant ACAS "Disciplinary and Grievance Procedures" Code of Practice or "Discipline at Work" Handbook). Arbitral decisions ("awards") will be final, with very limited opportunities for parties to appeal or otherwise challenge the result.

The number of arbitrations under the scheme has been low. There were only 13 cases between the start of the scheme in May 2001 and 31 March 2002. In the year to 31 March 2003 there were 23 arbitrations, which given the overall number of tribunal applications in that year (98,617) is still vanishingly low.[40]

4. Disciplinary and Grievance Procedures

Many cases would not come to litigation if they found an internal resolution through an employer's disciplinary or grievance procedures. *The Employment Act 2002* sets out statutory disciplinary and grievance procedures due to come into force in October 2004.[41]

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39 *ACAS Arbitration Scheme (England and Wales) Order 2001*, SI 2001/1185

40 ACAS Annual Report 2002/2003 p.22

41 *The Employment Act 2002 ss.29 to 40 and Schedule 2*.

This followed a consultation starting with the paper *Routes to resolution: improving dispute resolution in Britain*, published in July 2001.[42]

a. Current Provisions

At present there is no statutory requirement for employers to establish their own internal grievance and disciplinary procedures, although around 90% of larger employers do have procedures in place.

In 2000, ACAS issued a statutory *Code of Practice on Disciplinary and Grievance Procedures* under section 199 of the *Trade Union and Labour Relations (Consolidation) Act 1992*. The code came into effect on 4 September 2000 and incorporates guidance on the new right to be accompanied in grievance and disciplinary hearings introduced by the *Employment Relations Act 1999*.[43] A failure to observe the Code of Practice does not of itself render anyone liable to proceedings, but it can be taken into account by a tribunal.

Section 3 of the *Employment Rights Act 1996* (ERA) requires employers with 20 or more employees to include a note specifying any disciplinary rules they may have with the statement of employment particulars which must be issued within two months of the start of employment.

Section 127A of the ERA (which was added by the *Employment Rights (Dispute Resolution) Act 1998*) gave tribunals the power to increase awards in unfair dismissal cases by up to two weeks' pay if an employer has prevented an employee from using internal procedures. Conversely, awards could be reduced by the same amount if an employee failed to make use of any internal procedures. This will be superseded by the new provisions when they come into force in October 2004 (see below).

b. Proposals

Many respondents to the *Routes to Resolution* consultation paper argued that the number of cases going to employment tribunals could be reduced if more emphasis was placed on attempting to resolve disputes in the workplace. The TUC, for example, said:

> 1.5 … The TUC believes that a principal reason for cases going to litigation is the continuing failure of significant numbers of employers to abide by or to have in place proper internal dispute resolution procedures. Many of these claims

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42 See DTI website: http://www.dti.gov.uk/er/individual/etresponse3.htm
pdf file: http://www.dti.gov.uk/er/individual/resolution.pdf

43 The Code can be seen on ACAS' website, http://www.acas.org.uk/publications/pdf/cop.pdf

> emanate from the small business sector where, as the consultation paper notes, there are most likely to be no proper internal procedures.[44]

The CBI, in a submission to the Government in May 2000, said:

> Responsibility for limiting the potential for litigation lies, primarily, with employers themselves. Fostering a good employee relations climate with high employee satisfaction and commitment, supported by robust, up-to-date systems, procedures, and training, will reduce the likelihood of claims arising.[45]

c. The Draft Regulations under the Employment Act 2002

Following consultations on *Routes to Resolution* the Government decided to introduce a statutory requirement that all employers should have minimum internal procedures for dealing with individual disputes in the workplace. The result was the *Employment Act 2002*, which established a framework for the scheme, leaving the details to be spelt out in regulations to be made by the Secretary of State. The new statutory provisions under the *Employment Act 2002* are due to come into force on 1 October 2004. These have been published as the *Draft Employment Act 2002 (Dispute Resolution) Regulations* and are included as annex A to a DTI consultation document of 9 July 2003.[46] The main effects of these will be:

- Employees of all employers, regardless of size, will be entitled (save in cases of gross misconduct) to have the benefit of a minimum standard formal dispute resolution process before they are dismissed.
- Employees will not be able to make claims to employment tribunals about grievances unless they have first raised a formal grievance with the employer and have not received satisfaction.

The consultation document states that:

> Employers and employees will be required to follow a minimum three-stage process to ensure that disputes are discussed at work. The process will require:
>
> - the problem to be set out in writing with full details provided to the other party;
> - both parties to meet to discuss the problem; and
> - an appeal to be arranged if requested.

Non-compliance with the procedure will be automatically treated as unfair dismissal and carry a minimum compensation of four weeks' pay. The procedures were spelt out in

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44 *TUC response to Government Consultations, Routes to Resolution: Improving Dispute Resolution in Britain*, 3 October 2001, http://www.tuc.org.uk/law/tuc-3802-f0.cfm

45 CBI, *Managing a compensation culture: improving case management in the employment tribunal system*, May 2000

46 http://www.dti.gov.uk/er/individual/DRcondoc.pdf

Schedule 2 *Employment Act 2002* under section 29 (1) of that Act. These can be found in Appendix 4 of this paper. They consist of a *standard procedure*, covering cases where at the start of the procedure the employer has yet to dismiss or take action against the employee; and a *modified procedure*, covering allegations of more serious misconduct where the employer has already dismissed the employee before the start of the procedure.

During the consultation, many respondents argued that the use of internal procedures was not always appropriate. The TUC response sets out some of the difficulties:

> 1.24 We believe that for discrimination cases it may often be inappropriate for a worker to be made to go through an internal procedure, particularly in a small business where the person hearing the case may be the perpetrator of the discrimination and where hurt to feelings are a central issue. A recent report by the EOC showed that a third of women who were victims of sexual harassment named their line manager as the person responsible for the harassment and a third named the director or owner of the organisation. Similarly, where a worker had been bullied by their manager, it would be wholly inappropriate for the worker to have to raise a grievance with that manager. In some cases, for example, unlawful deductions, the employer may have misunderstood the law and will not concede the point until ACAS, or the tribunal has convinced him or her.[47]

The draft regulations address some of these concerns:[48]

> 5. (1) A party shall not be treated as being subject to any of the statutory procedures if –
> (a) he has reasonable grounds to believe that complying with that procedure would result in a significant threat to himself, his property or any other person;
> (b) the other party has subjected him to harassment; or
> (c) his circumstances are such that it is not practicable for him to comply with that procedure for the foreseeable future.

Section 33 *Employment Act 2002* allows the Secretary of State to amend the time limits for submitting claims covered by the statutory dispute resolution procedures by regulations. At present most claims, including those for unfair dismissal must be submitted within three months. Many of those commenting on *Routes to Resolution* pointed out that a requirement to pursue internal procedures before submitting a claim to a tribunal could prevent applicants from getting their claims in within the limit.

Regulation 9 of the draft regulations provides for this. The time limits will be extended by three months provided that the employee has submitted (as the procedures require) a written statement of the grievance within the time they would have had to present a claim

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47 *TUC response to Government Consultations, Routes to Resolution: Improving Dispute Resolution in Britain*, 3 October 2001, http://www.tuc.org.uk/law/tuc-3802-f0.cfm

48 Draft *Employment Act 2002 (Dispute Resolution) Regulations* are included as annex A to a DTI consultation document of 9 July 2003: http://www.dti.gov.uk/er/individual/DRcondoc.pdf

to the tribunal. Of course, the employee might try to present a claim to the tribunal within the usual time limit and then be prevented by the tribunal from doing so because, under section 32 of the Act, the employee should have used the statutory grievance procedure. In this case the time limit for bringing the claim to the tribunal in the future is extended by three months. The tribunal still has the usual discretion to extend time limits.

d. Other provisions in the Employment Act 2002

Section 30, *Employment Act 2002* will make it an implied term of every contract of employment that the statutory minimum procedures apply in the circumstances specified by the regulations.

Section 31 provides for employment tribunals to reduce or increase awards by between 10 and 50 per cent if the statutory procedures have not been followed, unless there are exceptional circumstances. This will replace the existing power to vary awards where internal procedures have not been used, currently contained in section 127A of the *Employment Rights Act 1996*.

Schedule 3 lists the jurisdictions to which section 31 applies. It covers the vast majority of matters on which claims are taken to tribunals including unfair dismissal; redundancy payments; sex, race and disability discrimination; equal pay equality clauses; detriment in relation to trade union activities, the National Minimum Wage and tax credits; and breach of the *Working Time Regulations 1998*. The Secretary of State can amend the list by order.

Section 34 amends the provisions on unfair dismissal contained in part X of the *ERA 1996*. A dismissal will be unfair if the employer has failed to comply with the minimum statutory procedure - unless this failure was a result of circumstances beyond his control.

D. Jurisdiction and Caseload

1. Current Jurisdiction

The employment tribunals can only hear matters which are specifically assigned to them by statute. This currently covers most matters arising out of employment, but there is a complicated borderline between the jurisdiction of tribunals and the civil courts. This is particularly the case if the claim is contractual. The original position was that all common law claims, including contractual claims had to be taken through the civil courts even if the claim was in respect of a contract of employment. The *Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994* gave tribunals the ability to

decide contractual cases up to a £25,000 limit.[49] Restrictions were also placed on the type of contractual claim and the following claims are still outside the tribunal's jurisdiction:

- Damages for personal injury
- A term relating to living accommodation provided by an employer
- A term relating to intellectual property;
- A term imposing an obligation of confidence
- A term which is a covenant in restraint of trade.

There is a further requirement that the claim must be one which "arises or is outstanding on the termination of the employee's employment". The Employment Tribunal Taskforce (see below) has recommended that these categories be reviewed and that the upper limit of £25,000 be abolished.

The territorial jurisdiction of the employment tribunals is governed by general law. Section 196 of the *Employment Rights Act 1996* meant that most employees who ordinarily work outside the UK were not entitled to unfair dismissal and some other rights. This was repealed by the *Employment Relations Act 1999* which came into force on 25 October 1999.

A list of legislation containing matters within employment tribunals' jurisdiction can be found at Appendix 2 below. A full list of types of complaint can be found on the employment tribunal website.[50] It is also necessary to bear in mind that it is not only matters relating to employment which can be heard, since various Acts cover things such as vocational training and qualification.

2. Caseload and the Increase in Jurisdiction

The Employment Tribunals Service Annual Report, published by the Department for Trade and Industry, sets out the yearly caseload figures. In the year 2002/03, more than 98,000 applications were lodged. In the same year around 95,000 were disposed of, roughly 22,000 of which resulted in a hearing. Figures for applications lodged can be found in Appendix 1 below. These show a dramatic increase between 1989 and 2001, from 29,000 to around 104,000. Since then this has eased off to 112,000 in 2001/02 and still further to 98,000 in 2002/03.

Not surprisingly, as legislation has been passed extending the jurisdiction of employment tribunals or creating new causes of action, caseloads have generally increased. The following milestones can be identified:

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49 *Employment Tribunals Extension of Jurisdiction (England and Wales) Order* SI 1994/1623

50 http://www.employmenttribunals.gov.uk/england/enghomeind.html

- 22 November 1993 - the total removal of limits on statutory compensation in sex discrimination cases.[51]

- 3 July 1994 - the statutory limit for cash compensation for racial discrimination was removed.[52]

- 2 December 1996 - the employment provisions of the *Disability Discrimination Act 1995* came into force. Originally firms with fewer than 20 employees were exempt but this threshold was reduced to 15 from 1 December 1998 and is soon to be abolished by the *Disability Discrimination Act 1995 (Amendment) Regulations 2003* SI 2003/1673 which come into force on 1 October 2004;

- 1 October 1998 - the *Working Time Regulations* with new rights to paid annual leave and weekly and daily rest breaks came into force.[53]

- 1 April 1999 - the National Minimum Wage came into force.[54]

- 1 June 1999 - the qualifying period for unfair dismissal was reduced from two years to one year.[55]

- 25 October 1999 - the upper limit on compensation for unfair dismissal was increased from £12,000 to £50,000.[56] Since 2001 there have been annual increases to the current £53,500[57] which will increase to £55,000 from 1 February 2004.[58]

- 15 December 1999 - new rights to parental leave and time off for dependants and more generous maternity leave arrangements came into force.[59]

- 1 July 2000 - a new right for part-time workers not to be treated less favourably than comparable full-time workers was introduced.[60]

- February 2001 – House of Lords judgement on part time worker pension rights following the European Court of Justice ruling in 1994 (see below)

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51 *Sex Discrimination and Equal Pay (Remedies) Regulations* SI 1993/2798

52 *Race Relations (Remedies) Act 1994,* s.1. At the time of its removal the limit was £11,000.

53 *Working Time Regulations 1998, SI No 1833*

54 *National Minimum Wage Regulations 1999, SI No 584*

55 SI 1999/1436, *Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 1999*

56 *Employment Relations Act 1999 (Commencement No 2 and Transitional and Saving Provisions) Order 1999.* SI 1999/2830

57 *Employment Rights (Increase of Limits) Order 2002,* SI 2002/2927

58 *Employment Rights (Increase of Limits) Order 2003,* SI 2003/3038

59 *Maternity and Parental Leave etc Regulations 1999, SI No 3312,* and *Employment Relations Act 1999*

60 *Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI No 1551*

3. Part Time Worker Pension Cases

Part time worker pension cases currently occupy a singularly large block of the employment tribunals' caseload. The number of registered live applications outstanding in employment tribunals as at 31 March 2003 was 106,621.[61] Of these, a massive 47,140 were part time worker pension cases. This included the backlog of cases from previous years, although a further 2,799 new part time worker pension cases were lodged in the year 2002-2003.

The employment tribunals website gives full details and current information including the history of the part time worker pension cases:[62]

> In 1994, two European Court of Justice judgments (*Vroege -v- NCIV Instituut Voor Volkshuisvesting BV, 1994 : IRLR651 and Fisscher -v- Voorhuis Hengelo BV, 1994 : IRLR 662*) were published which said that an occupational pension scheme which excluded part-time workers contravened European equal pay laws if the exclusion affects a much greater number of women than men, unless the employer shows that the exclusion of part-timers can be objectively justified on grounds unrelated to sex. Subsequently, unions in England and Wales from the health, local Government, education, banking and electricity supply sectors lodged a number of test cases with the employment tribunal on behalf of members who worked part-time.
>
> In November 1995, the test cases, referred to as *Preston & Others -vs- Wolverhampton Healthcare NHS Trust & Others*, came before a Tribunal which found that:
>
> - Pension rights should be granted to part-time workers
> - Rights should be back-dated two years
> - Rights should only be granted where the Applicant had commenced their employment tribunal applications within six months of leaving their employer
>
> The decision, available in full [*via the employment tribunals website*] was appealed by the unions. The Tribunal's findings were upheld by the Employment Appeals Tribunal in 1996 and, upon further appeal, by the Court of Appeal.
>
> Following the decisions of both higher courts, the matter was referred to the House of Lords in September 1999. Whilst the Tribunal's decision relating to the six month time limit for lodging Applications was upheld by the Law Lords, the two-year period of back-dating granted by the Tribunal was deemed to contravene European law. In seeking to address this specific issue, the Law Lords

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61 *Employment Tribunals Service annual report and accounts 2002-2003*, p.4.

62 History of the PTWP cases: http://www.employmenttribunals.gov.uk/england/enghomeind.html

> referred the question to the European Court of Justice (ECJ) for a preliminary hearing.
>
> The Law Lords published their judgment in February 2001, and is available in full [*via the website*]. The summary of their findings is:
>
> - Access to an employer's pension scheme could be back-dated to 8th April 1976, or to the commencement of the employee's employment, whichever is the latest date
> - Those working on a series of short-term contracts could qualify for access to a pension scheme provided that their contracts could be proved to be a stable employment relationship with their employer
> - The six month time limit for bringing proceedings to a Tribunal still applied

There have been a number of further developments in these cases which are outlined on the website. The Treasury and six public sector unions have agreed a privately-negotiated settlement model which is also available.

II Proposals for Reform

A. The Leggatt Report: A Unified Tribunal Service

In addition to the moves to promote the resolution of employment disputes through internal discipline and grievance procedures various other consultations and proposals for reform have been taking place, all of which focus on the rising number and cost of employment disputes.

The Report on the Review of Tribunals was published in March 2001 under the chairmanship of Sir Andrew Leggatt.[63] This review looked at the entire system of tribunals and went beyond employment tribunals. It recommended a unified tribunals service. In August 2001, the Lord Chancellor's Department published a consultation paper.[64] In March 2003 the responses to the consultation were published.[65] At the same time the Lord Chancellor's Department issued a press release which announced the government's intention to create a unified tribunals service with the top 10 non-devolved tribunals which currently exist throughout departments in Whitehall at its core:

> The Government's proposals will be the biggest change to the tribunal system in over 40 years. They are part of a larger Government strategy of modernisation which has included reforms in the civil and criminal justice systems.

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63 Report of the Review of Tribunals by Sir Andrew Leggatt: *Tribunals for Users - One System, One Service*, March 2001 http://www.tribunals-review.org.uk/

64 Consultation Paper on Leggatt Report, August 2001: http://www.dca.gov.uk/consult/leggatt/leggatt.htm

65 http://www.dca.gov.uk/consult/leggatt/leggattresp.htm

> The Government's announcement today will form the foundation for policy proposals to be outlined in a forthcoming White Paper which will:
>
> - increase accessibility to tribunals;
> - raise customer service standards and;
> - improve administration.
>
> Lord Irvine said, "I want to ensure that the three great pillars of the justice system are reformed and the reforms are brought into effect successfully and efficiently. We have substantially reformed the civil justice pillar and are embarking on major reform of the criminal pillar; the third is the administrative justice pillar, tribunals justice."[66]

At the same time there was a parliamentary question in the Lords as well as a statement in the Commons. It was said that proposals for the structure and governance of the unified system will be set out in a White Paper which it was hoped would be published in late 2003.[67]

The DTI published information on its website about the application of the recommendations to the employment tribunals system:[68]

> What's the purpose of the unified service?
>
> To achieve better quality of service for tribunal users. The transfer of the Employment Tribunals Service, which is the agency that administers employment tribunals and the Employment Appeal Tribunal (EAT), will allow costs and resources to be shared across other major tribunals. For example, accommodation, IT systems, and other facilities can be pooled, and good administrative practice shared between tribunals.

B. The Employment Tribunal System Taskforce

The Employment Tribunal System Taskforce ('ETST') was set up on 26 October 2001.[69] Their job was to make recommendations on how the various employment tribunal services can be made more efficient and cost effective for users in the context of rising caseloads. The remit of the taskforce did not cover the primary legislative framework within which the system operates or the employment rights which are protected.[70] The

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66 LCD Press Notice: Review of Tribunals, 11 March 2003

67 HL Deb 11 March 2003 c167-8WA; HC Deb 12 March 2003 c18WS
http://www.dca.gov.uk/civil/tribsann.htm

68 http://www.dti.gov.uk/er/individual/tribunal.htm

69 Employment Tribunal Taskforce website: http://www.dti.gov.uk/er/individual/taskforce.htm

70 The ETST terms of reference can be found at Appendix A of the Government's response to the ETST report at: http://www.dti.gov.uk/er/individual/govresponse.pdf

Taskforce was chaired by Janet Gaymer, an eminent employment lawyer of Simmons & Simmons.[71] The taskforce report, called "Moving Forward" was published on 29 July 2002.[72] The ETST was then disbanded. It was later announced by the Secretary of State on 28 March 2003 that the ETST will "be reconstituted as a strategic body to monitor progress on the implementation of its recommendations".[73]

The taskforce's recommendations focus on improving the system overall and introducing a culture where employment tribunal hearings are used only as a last resort. The key points were as follows:[74]

a. Greater coherence

"We recommend the establishment of a high-level co-ordinating body to assist the system overall to move forward coherently, with a shared vision and key processes." Greater co-ordination is recommended in the administration of the system in such areas as information technology, best practice across regions and the delivery of continuous improvement.

b. Greater emphasis on the prevention of disputes

"We recommend greater emphasis on the prevention of disputes. It is in everyone's interests to prevent disputes from arising in the first place." ACAS should do more in this area. There should be more mediation services and the development of better internal grievance and disciplinary procedures. There should be pilot schemes in ADR (alternative dispute resolution).

c. Earlier disclosure of information

"We recommend the earlier disclosure of information by all parties. This is in line with our desire to see disputes resolved more quickly". Earlier access to the facts and an earlier understanding of the parties' positions would assist employers and employees, as well as their representatives, to settle or withdraw cases earlier. The tribunal judiciary's job of case-handling would also be made easier.

d. The right infrastructure

"The system cannot achieve its objectives without appropriate supporting resources". Recommendations are made concerning the development of IT; more training for all working in the system; and appraisal and support procedures.

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71 See DTI Press Release P/2001/679 of 3 Dec 2001

72 *Moving Forward: the Report of the Employment Tribunal System Taskforce*, 29 July 2002, DTI: http://www.dti.gov.uk/er/individual/etst-report.pdf

73 HC Deb 28 March 2003 c32WS

74 Taskforce report executive summary, 29 July 2002 http://www.dti.gov.uk/er/individual/execsum.pdf

e. Other improvements for users

"We make other recommendations to assist users further, including: better information about the system and each stage of the process; improved availability of sources of information and advice; improved, minimum standards of facilities and accommodation in Hearing Rooms and Hearing Centres; a National User Group; active local User Groups; and easier enforcement of employment tribunal awards."

The Government published its response to ETST report in November 2002.[75] There was broad agreement with the package of measures put forward by the ETST:

> Recommendations
>
> The Government welcomes, as a package, the recommendations of the Taskforce. It accepts the importance of developing a wider range of options for employers and employees to resolve disputes without resort to employment tribunals. It accepts the recommendations for improving the services provided by the employment tribunal system and for increasing its operational effectiveness. These recommendations provide a sense of direction and a clear agenda for pursuing the vision for the system.
>
> Taking the Taskforce Recommendations forward
>
> The Government will work with ACAS and ETS, with the agreement of the Presidents, to consider how best to incorporate the Taskforce recommendations into their business planning over the next three years and the longer term to achieve the greatest benefit for users. To this end, more detailed planning will be needed by ACAS and ETS to clarify resource requirements and priorities and to inform future funding decisions.
>
> A number of recommendations require secondary legislation. These will feed into the forthcoming revision of rules of procedure, on which there will be consultation in due course.

As promised, on 5 December 2003 the DTI published a consultation document with draft regulations to take forward the ETST recommendations.[76] The new proposals are summarised as follows:

> Changes to the Employment Tribunal procedures are being made to improve the service provided. The changes arise from provisions of the Employment Act 2002, from recommendations of the Employment Tribunal System Taskforce, and from suggestions offered by the Employment Tribunal Presidents (for England

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[75] Government's response: http://www.dti.gov.uk/er/individual/govresponse.pdf
[76] http://www.dti.gov.uk/er/individual/etregs_condoc.pdf

and Wales and for Scotland) to help make the system run more smoothly. The key reforms proposed are as follows.

- The Rules of Procedure are to be recast so that they follow a more logical structure and are expressed in more "plain English" terms, in order to make the system easier to use. This change will be complemented by the introduction of standard claim and response forms, the use of which will become mandatory from April 2005. These forms – on which there will be a separate public consultation – will seek fuller information "up front", to assist the parties, and the tribunal, in understanding cases.
- The circumstances in which a respondent may gain an extension of time for submitting a response form (the new, plain English term for what is currently referred to as a notice of appearance) are to be more tightly specified.
- There will be new pre-acceptance procedures to "sift out" claims and responses that (for one or more of a number of specified reasons) should not go forward.
- ACAS's duty to conciliate is to be limited to a fixed period in most cases, to encourage parties to settle in good time rather than just before the Tribunal hearing. This fixed period will be either a short 7 week period or a standard 13 week period, depending on what the case is about. However, in discrimination cases, which tend to be particularly complex, ACAS's duty to conciliate will remain unlimited in time.
- Where a case is uncontested, the Tribunal will in future usually issue a default judgment against the respondent without holding a hearing.
- Powers are to be provided for the Employment Tribunal Presidents to issue practice directions to ensure that a consistent approach is adopted to procedural issues.
- Explicit provision is to be made for cases to be struck out at a pre-hearing review, but only within the grounds on which Tribunals may currently strike out claims or responses outside such a review. (Such grounds include failure to comply with an order or direction, or the inclusion in the claim form or response form of anything scandalous, unreasonable or vexatious or conducting the proceedings in such a manner.)
- Two substantial changes are to be made to the present costs rules: (i) there will be a new provision for awards in respect of preparation time in some circumstances; and (ii) it will be possible for representatives (except not-for-profit representatives) to incur a costs award on account of their own conduct.
- The Rules will apply to the whole of Great Britain, replacing the current separate, but essentially equivalent, Rules for England & Wales and Scotland.[77]

[77] See also: HC Deb 8 December 2003 c73WS

Appendix 1: Employment tribunal statistics

Registered Employment Tribunal Applications

Great Britain

1988/89	29,304
1989/90	34,697
1990/91	43,243
1991/92	67,448
1992/93	71,821
1993/94	71,661
1994/95	88,061
1995/96	108,827
1996/97	88,910
1997/98	80,435
1998/99	91,913
1999/00	103,935
2000/01	130,408
2001/02	112,227
2002/03	98,617

Source: Employment Tribunal Service Annual Reports 1997/98 and 2002/03

Employment Tribunal number of claims by type of claim

Great Britain

Grounds for claim	1998/99	1999/00	2000/01	2001/02	2002/03	% Increase 1998/99 to 2002/03
Unfair dismissal	37,034	44,538	43,590	44,123	38,612	4%
Wages Act	16,689	21,285	22,698	22,685	20,987	26%
Breach of contract	8,986	9,725	10,187	9,796	9,417	5%
Sex discrimination	6,203	4,926	17,200	10,092	8,128	31%
Equal pay	5,018	2,391	6,586	4,663	4,414	-12%
Part Time Worker Regulations	-	-	10,530	1,430	1,403	na
Redundancy pay	4,812	5,911	5,408	2,624	2,716	-44%
Working Time Directive	636	2,314	1,828	5,314	3,077	384%
Disability discrimination	1,430	1,743	2,100	3,183	3,039	113%
Race discrimination	2,746	3,246	3,429	1,956	2,103	-23%
Written statement of terms and conditions	1,061	676	655	913	781	-26%
Transfer of undertakings – failure to inform and consult representatives	886	679	1,026	76	124	-86%
Unfair dismissal – transfer of undertaking	505	771	537	701	448	-11%
Unfair dismissal – pregnancy	765	648	468	207	152	-80%
Unfair dismissal – health and safety	313	255	479	758	426	36%
National minimum wage	-	357	337	391	316	na
Unfair dismissal – exercise of statutory right	242	386	396	184	173	-29%
Unfair dismissal – trade union membership	173	132	141	429	150	-13%
Other	4,414	3,952	2,813	2,699	2,801	-37%
All claims	91,913	103,935	130,408	112,227	98,617	7%

Note 1 As identified by ETS staff as the principal type of claim when first received. A claim may be brought under more than one jurisdiction or subsequently amended/clarified in the course of the proceedings, but will be counted only once for the purposes of the above table

Note 2 Includes approximately 12,000 Part-Time Worker Pension cases

Source: Employment Tribunal Service Annual Report 2000/01

Appendix 2: Legislative Jurisdiction of Employment Tribunals

Legislation containing matters within employment tribunal jurisdiction[78]

Colleges of Education (Compensation) Regulations 1975
Control of Major Accident Hazards Regulations 1999
Deregulation and Contracting Out Act 1994
Disability Discrimination Act 1995
Disability Rights Commission Act 1999
Employment Equality (Religion or Belief) Regulations 2003
Employment Equality (Sexual Orientation) Regulations 2003
Equal Pay Act 1970
Employment Rights Act 1996
Employment Relations Act 1999
Employment (Industrial) Tribunals Act 1996
Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002
Flexible Working (Procedural Requirements) Regulations 2002 and Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002
Health and Safety Consultation with Employee Regulations 1996
Health and Safety at Work Act 1974
Maternity and Parental Leave Regulations 1999
Maternity and Parental Leave (Amendment) Regulations 2002
Notification of Existing Substances (Enforcement) Regulations 1994
National Minimum Wage Act 1998
Paternity and Adoption Leave Regulations 2002
Public Interest Disclosure Act 1998
Part Time Worker (Prevention of Less Favourable Treatment) Regulations 2000
Race Relations Act 1976
Sex Discrimination Act 1975
Safety Representatives and Safety Committees Regulations 1977
Social Security Pensions Act 1975
Sunday Trading Act 1994
Tax Credits Act 2002
Trade Union and Labour Relations (Consolidation) Act 1992
Transfer of Undertakings (Protection of Employment) Regulations 1981
Trade Union Reform and Employment Rights Act 1993
Working Time Regulations 1998

[78] For a full list of types of complaint: http://www.employmenttribunals.gov.uk/england/enghomeind.html

Appendix 3: Free Representation and Legal Help in Tribunals

Citizens Advice Bureau: http://www.nacab.org.uk/
National Association of Citizens Advice Bureaux
Myddelton House
115-123 Pentonville Road
London N1 9LZ

Law Centres: http://www.lawcentres.org.uk/
The Law Centres Federation
Duchess House,
18-19 Warren Street
London W1T 5LR
Tel 020 7387 8570
Fax 020 7387 8368

The Free Representation Unit: http://www.fru.org.uk/
(Croydon, London North and Stratford East employment tribunals)
1st Floor, 49/51 Bedford Row
London WC1R 4LR
Tel: 020 7831 0692

Bar Pro Bono Unit: http://www.barprobono.org.uk/navigate/home.html
7 Gray's Inn Square
London WC1R 5AZ
Tel: 020 7831 9711

London Race Discrimination Unit: http://www.rdu.org.uk/
14 Bowden Street
London SE11 4DS
Tel: 0207-793 0378

Employment Lawyers Association: http://www.elaweb.org.uk/
P.O. Box 353
Uxbridge
UB10 0UN
Tel: 01895 256972
Fax: 01895 256972

The Legal Services Commission: http://www.legalservices.gov.uk/
Head Office:
85 Grays Inn Road
London WC1X 8AA
Tel: 020 7813 1000
Fax 020 7813 8638

Appendix 4: Disciplinary and Grievance Procedures

Employment Act 2002
SCHEDULE 2
STATUTORY DISPUTE RESOLUTION PROCEDURES

Section 29

Part 1
Dismissal and Disciplinary Procedures

Chapter 1
Standard Procedure

Step 1: statement of grounds for action and invitation to meeting

1 (1) The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee.

(2) The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2: meeting

2 (1) The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.

(2) The meeting must not take place unless—

(a) the employer has informed the employee what the basis was for including in the statement under paragraph 1(1) the ground or grounds given in it, and

(b) the employee has had a reasonable opportunity to consider his response to that information.

(3) The employee must take all reasonable steps to attend the meeting.

(4) After the meeting, the employer must inform the employee of his decision and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3: appeal

3 (1) If the employee does wish to appeal, he must inform the employer.

(2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.

(3) The employee must take all reasonable steps to attend the meeting.

(4) The appeal meeting need not take place before the dismissal or disciplinary action takes effect.

(5) After the appeal meeting, the employer must inform the employee of his final decision.

Chapter 2
Modified Procedure

Step 1: statement of grounds for action

4 The employer must—

(a) set out in writing—

(i) the employee's alleged misconduct which has led to the dismissal,

(ii) what the basis was for thinking at the time of the dismissal that the employee was guilty of the alleged misconduct, and

(iii) the employee's right to appeal against dismissal, and

(b) send the statement or a copy of it to the employee.

Step 2: appeal

5 (1) If the employee does wish to appeal, he must inform the employer.

(2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a meeting.

(3) The employee must take all reasonable steps to attend the meeting.

(4) After the appeal meeting, the employer must inform the employee of his final decision.

Part 2
Grievance Procedures

Chapter 1
Standard Procedure

Step 1: statement of grievance

6 The employee must set out the grievance in writing and send the statement or a copy of it to the employer.

Step 2: meeting

7 (1) The employer must invite the employee to attend a meeting to discuss the grievance.

(2) The meeting must not take place unless—

(a) the employee has informed the employer what the basis for the grievance was when he made the statement under paragraph 6, and

(b) the employer has had a reasonable opportunity to consider his response to that information.

(3) The employee must take all reasonable steps to attend the meeting.

(4) After the meeting, the employer must inform the employee of his decision as to his response to the grievance and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3: appeal

8 (1) If the employee does wish to appeal, he must inform the employer.

(2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.

(3) The employee must take all reasonable steps to attend the meeting.

(4) After the appeal meeting, the employer must inform the employee of his final decision.

Chapter 2
Modified Procedure

Step 1: statement of grievance

9 The employee must—

(a) set out in writing—

(i) the grievance, and

(ii) the basis for it, and

(b) send the statement or a copy of it to the employer.

Step 2: response

10 The employer must set out his response in writing and send the statement or a copy of it to the employee.

Part 3
General Requirements

Introductory

11 The following requirements apply to each of the procedures set out above (so far as applicable).

Timetable

12 Each step and action under the procedure must be taken without unreasonable delay.

Meetings

13 (1) Timing and location of meetings must be reasonable.

(2) Meetings must be conducted in a manner that enables both employer and employee to explain their cases.

(3) In the case of appeal meetings which are not the first meeting, the employer should, as far as is reasonably practicable, be represented by a more senior manager than attended the first meeting (unless the most senior manager attended that meeting).

Part 4
Supplementary

Status of meetings

14 A meeting held for the purposes of this Schedule is a hearing for the purposes of section 13(4) and (5) of the Employment Relations Act 1999 (c 26) (definition of "disciplinary hearing" and "grievance hearing" in relation to the right to be accompanied under section 10 of that Act).

Scope of grievance procedures

15 (1) The procedures set out in Part 2 are only applicable to matters raised by an employee with his employer as a grievance.

(2) Accordingly, those procedures are only applicable to the kind of disclosure dealt with in Part 4A of the Employment Rights Act 1996 (c 18) (protected disclosures of information) if information is disclosed by an employee to his employer in circumstances where—

(a) the information relates to a matter which the employee could raise as a grievance with his employer, and

(b) it is the intention of the employee that the disclosure should constitute the raising of the matter with his employer as a grievance.

Appendix 5: Addresses and Contacts

Employment Tribunals

List of regional Offices:
http://www.employmenttribunals.gov.uk/england/enghomeind.html
Enquiry Line: 0845 7959775

The Employment Appeal Tribunal

Central Office
Audit House,
58 Victoria Embankment,
London EC4Y ODS
(tel: 0207 273 1041;
fax: 0207 273 1045)
Scottish Divisional Office
54-56 Melville Street,
Edinburgh EH3 7HF
Tel: 0131-226 5584
Fax: 0131-220 6847
EAT Library, (for transcripts of EAT judgments)
Tel: 0207 273 1049
Fax: 0207 273 1068
EAT website (with full text of EAT decisions):
www.employmentappeals.gov.uk.

Department for Constitutional Affairs
(Formerly the Lord Chancellor's Department)

Website: http://www.dca.gov.uk/index.htm
Email: general.queries@dca.gsi.gov.uk
Court Service website: http://www.courtservice.gov.uk/
Court Service email: cust.ser.cs@gtnet.gov.uk
General Departmental Enquiries
Selborne House
54-60 Victoria Street
London SW1E 6QW, United Kingdom
Telephone: +44-(0)20-7210 8614