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Employment Bill [HL] 2007-08

Bill 117 of 2007-08

The Bill contains proposals to reform existing law covering industrial relations and employment protection.

It will repeal dispute resolution measures which were intended to reduce employment litigation. These statutory procedures will be replaced by a new non-regulatory system.

It also seeks to clarify and strengthen the enforcement framework for the National Minimum Wage (NMW) and employment agency standards.

Changes are proposed to the industrial relations law to ensure compliance with the ECHR judgement concerning rights for trade unions to determine their membership.

Vincent Keter

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Summary of main points

The Bill was introduced in the House of Lords on 6 December 2007, having been announced in July 2007 in the Government's Draft Legislative Programme.[1] It contains diverse proposals to reform existing law covering industrial relations and employment protection, with a particular focus on vulnerable workers.

The Bill will repeal the *Employment Act 2002 (Dispute Resolution) Regulations 2004* which were intended to reduce employment litigation. There is a consensus, particularly among judiciary and lawyers, that the intentions of the 2004 Regulations have failed to produce the desired policy outcome. The Government commissioned a review which was undertaken by Michael Gibbons and which recommended the complete repeal of the statutory dispute resolution procedures. Following the Gibbons Review there was a consultation on proposals to implement the Review. It is intended that the statutory dispute resolution procedures will be replaced by a new non-regulatory system; a package of measures to encourage early/informal resolution of employment disputes with increased support for the involvement of Acas. Consultations on a new code of practice, and non-statutory guidance, have been published by Acas and are ongoing.

The Bill will also seek to clarify and strengthen the enforcement framework for the National Minimum Wage (NMW) as well as employment agency standards to address some of the concerns about vulnerable workers.

The European Court of Human Rights (ECHR) judgement in *Aslef v UK*, requires clearer rights for trade unions to determine their membership, after domestic courts held that trade unions could not lawfully expel British National Party (BNP) activists. The Bill will make changes to the relevant law, in particular section 174 of the *Trade Union and Labour Relations (Consolidation) Act 1992* to ensure compliance with the ECHR judgement.

Key documents relating to the bill are listed in an appendix to this Paper. They include: the Bill itself;[2] the Explanatory Notes;[3] and the Impact Assessment.[4]

Progress of the Bill can be tracked on the Parliamentary website at:

http://services.parliament.uk/bills/2007-08/employment.html

The Bill amends existing legislation applying in England Wales and Scotland. National Minimum Wage legislation also applies in Northern Ireland. There are no devolved matters or matters transferred to the Northern Ireland Assembly.

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1 *The Governance of Britain—The Government's Draft Legislative Programme* (Cm 7175)
2 The Bill: http://www.publications.parliament.uk/pa/cm200708/cmbills/117/08117.i-ii.html
3 Explanatory Notes: http://www.publications.parliament.uk/pa/cm200708/cmbills/117/en/index_117.htm
4 Impact Assessment: http://www.berr.gov.uk/files/file44363.pdf

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I Dispute Resolution

A. Dispute Resolution Regulations

The Bill will repeal in their entirety the *Employment Act 2002 (Dispute Resolution) Regulations 2004 SI No.752* and section 98A of the *Employment Rights Act 1996* (ERA).

Prior to the *Employment Act 2002*, there had been a sustained growth in the workload of employment tribunals.[5] In 1988/89, there had been 29,304 registered tribunal applications in Great Britain. By 2000/01, this had grown to 130,408.[6] Governments, both Conservative and Labour, had sought to address this by making changes to tribunal procedures and encouraging the use of alternative approaches to dispute resolution. In December 1994, the Conservative government published a Green Paper, *Resolving Employment Rights Disputes: Options for Reform*.[7] These proposals, with some modifications, eventually became law in the *Employment Rights (Dispute Resolution) Act 1998*.[8] One proposal that was dropped by the Conservatives was the imposition of a statutory requirement on employees to try to resolve disputes through internal procedures before taking them to tribunals.[9]

Employment Disputes

> **Mr. Butler**: To ask the President of the Board of Trade what plans he has for taking forward the proposals contained in the Green Paper "Resolving Employment Rights Disputes: Options for Reform" [1275]
>
> **Mr. Lang**: A large number of responses to the Green Paper was received and the Government have given careful consideration to all views submitted. Most of the Green Paper proposals were widely supported and accordingly the Government have decided to implement them.
>
> The Government continue to believe that employment disputes should, where possible, be resolved in-house through employers' own procedures. However, they recognise the reservations expressed by many responding to the Green Paper that the proposal to require employees to attempt to resolve disputes with their employers before being able to make an application to an industrial tribunal might lead to increased delays and complexity in tribunal procedures, rather than alleviating them. The Government have decided not to take forward this proposal.

Measures introduced by the 1998 Act included providing an alternative means of resolving disputes about unfair dismissal by voluntary referral to arbitration under a

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5 Detailed background on the history of this issue is contained in section III of the Library Research Paper on the *Employment Bill 2001-02*: Library Research Paper RP 01/93 *Employment Bill* [Bill 44 of 2001-02] 15 November 2001

6 Employment Tribunal Service Annual Reports 1997/98 and 2000/01

7 Cm 2707

8 For a fuller account of the background, see Library Research Paper 98/13, 16 January 1998, *Employment Rights (Dispute Resolution) Bill [HL] 1997/98*

9 HC Deb 20 November 1995, c 20W

scheme to be drawn up by the Advisory, Conciliation and Arbitration Service (Acas). The Acas scheme came into operation on 21 May 2001.[10]

1. Employment Act 2002

The *Employment Act 2002* introduced statutory dispute resolution procedures including "three step" minimum dismissal, disciplinary and grievance standards.[11] Dismissals without the use of the minimum procedures are automatically unfair. Claims to tribunals without the use of the minimum grievance procedures are, in most cases, inadmissible. The provisions made in the 2002 Act are now contained in the *Employment Act 2002 (Dispute Resolution) Regulations 2004* which came into force on 1 October 2004.[12] They apply to both employers and employees. The DTI (now the Department for Business Enterprise and Regulatory Reform) produced guidance on the regulations:[13]

> The new law is designed to encourage employers and employees to discuss problems first, before resorting to tribunals. All employers and employees must follow the minimum 3-step process, when dealing with most dismissals, disciplinary actions or grievances. If they don't, they could face a financial penalty should a dispute reach a tribunal.[14]

The aim of these measures was:

- to help to improve employment relationships;
- open up the way parties handle problems that arise; and
- lead to a reduction in the number of employment tribunal applications as a result of more effective workplace procedures and a greater use of conciliation.

The provisions:

- Introduced minimum internal disciplinary and grievance procedures; most employees will need to raise grievances with their employer before applying to tribunal;
- Provided limited extension to time limits for lodging a tribunal complaint to allow procedures to complete;
- Allowed variation of tribunal awards to support use of the procedures;
- Reinforced compliance with the written statement of employment particulars and remove the 20-employee threshold for small firms on provision of information on disciplinary and grievance procedures;
- Altered the way unfair dismissals are judged so that, provided the minimum standards set out in the Act are met and the dismissal is otherwise fair, procedural shortcomings can be disregarded. (Employers will always have to

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10 *ACAS Arbitration Scheme (England and Wales) Order 2001*, SI 2001/1185; see also Acas information on the website on how the scheme currently operates.

11 The Act provided for these to be incorporated into all contracts of employment as an implied term, although this was never brought into force. See HL Deb 4 February 2008 c451-6GC

12 *The Employment Act 2002 (Dispute Resolution) Regulations 2004*

13 Further information is available from the BERR website on Resolving Disputes

14 DTI leaflet, *New laws for resolving disputes*

follow the basic procedures but will no longer be penalised for irrelevant mistakes beyond that – provided the dismissal would otherwise be fair. This means that the dismissal must have been for a fair reason and the employer must have acted reasonably in treating it as a reason for dismissing the employee.);

- Provided for timely and amicable settlement through introducing a fixed period of conciliation;
- Provided for efficient, swifter delivery of tribunal services through practice directions, management of weak cases, revision of the costs regime and mandatory tribunal forms.

At the time the *Employment Bill 2001-02* was introduced in November 2001, concerns were raised by small businesses about whether they would have the personnel resources to ensure that minimum procedures were complied with, and some lawyers feared that the emphasis on procedural fairness may lead to more, not fewer cases ending up in tribunals.[15]

One year after they came into force, the CBI called for changes to the regulations. They published a report in September 2005 containing recommendations for reform.[16] A CBI Press Release summarised these concerns as follows:

> … companies are very concerned about the complexity of the new procedures even though the number of tribunal cases has fallen since the reforms were introduced last October.
>
> The system is supposed to provide cheap and effective resolution of workplace disputes. But too many firms are still settling cases they have a strong chance of winning because they fear the costs of going to tribunals which, they believe, too often allow weak and vexatious claims to be heard.[17]

In practice the regulations did not work as intended. In fact, it appeared that tribunal claims were made more likely as the procedures introduced an element of formalism that employers found actually got in the way of resolving the disputes amicably. The decisions of the Employment Appeal Tribunal also reflected concerns about the constitutional implications of restricting access to justice and accordingly defined in wide terms what kinds of actions by the employee could count as raising a grievance. The Government commissioned a review which was conducted by Michael Gibbons. This confirmed what had become widely acknowledged and resulted in the current proposals to repeal the regulations and give more support (including financial support) to Acas.

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15 "The jury is out over tribunal reform plan", *Financial Times*, 15 November 2001

16 CBI, *A matter of confidence: Restoring faith in employment tribunals*, 28 September 2005

17 CBI Press Release, *Tribunal system - one year on government reforms falling short*, 28 September 2005

2. Review and Consultation

a. Gibbons Review

In March 2006, the Government brought out a consultation on "Protecting Vulnerable Workers" which in a section on better regulation announced a review of the dispute resolution regulations.[18]

> In some areas, employers and employees have said that employment law is complex and hard to understand. By simplifying the law and improving the advice and guidance available to employers, they will find it easier to comply. It is our intention to:
>
> - Review the scope to reduce the numbers of cases going to Employment Tribunal, seeking to resolve more disputes in the workplace thus keeping more workers in their jobs. This will include a full review of the Dispute Resolution Regulations with a view to publishing a formal consultation document in the Autumn.

On 12 December 2006 Alistair Darling, Secretary of State for Trade and Industry, appointed Michael Gibbons to review the options for simplifying and improving all aspects of employment dispute resolution. In March 2007 the Gibbons Review of dispute resolution was published.[19] The overall conclusion was summarised as follows:

> In conducting the Review I was struck by the overwhelming consensus that the intentions of the 2004 Regulations were sound and that there had been a genuine attempt to keep them simple, and yet there is the same near unanimity that as formal legislation they have failed to produce the desired policy outcome. This is perhaps a classic case of good policy, but inappropriately inflexible and prescriptive regulation.

The key recommendations were:

- ensure that employment tribunals at their discretion take into account reasonableness of behaviour and procedure when making awards and costs orders;
- introduce a new simple process to settle monetary disputes without the need for tribunal hearings;
- increase the quality of advice to potential claimants and respondents through an adequately resourced helpline and the internet; and
- offer a free early dispute resolution service, including where appropriate mediation.

Following publication of the Gibbons Review the Government initiated a consultation seeking views on "measures to help resolve employment disputes successfully in the

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18 DTI, *Success at Work: Protecting Vulnerable Workers, Supporting Good Employers*, March 2006

19 BERR, Michael Gibbons, *Better dispute resolution, A review of employment dispute resolution in Great Britain*, March 2007

workplace".[20] This covered a range of measures building on the Gibbons Review, not all of which would require primary legislation:

> The Government is considering measures to help resolve more disputes successfully in the workplace by:
>
> • repealing the Employment Act 2002 (Dispute Resolution) Regulations 2004 and the corresponding sections of the Employment Act 2002, and examining any consequential changes to other areas of law;
> • providing clear guidelines on good practice for resolving disputes, building on the work currently being done by Acas;
> • providing encouragement to follow good practice in resolving disputes, which could include penalties for those who make little or no attempt to resolve their dispute before an employment tribunal hearing; and
> • inviting employer and employee organisations and others to develop guidelines for using alternative dispute resolution and to promote its use to their members.
>
> The Government is considering measures to help employers and employees to resolve disputes beyond the workplace by:
>
> • providing a new advice service on dispute resolution accessible by telephone and internet;
> • providing a new, swift way to settle straightforward monetary disputes without the need for employment tribunal hearings; and
> • encouraging earlier conciliation in appropriate cases and removing the fixed conciliation periods which place time limits on Acas' duty to conciliate employment tribunal claims.
>
> The Government is considering measures to make the employment tribunal system simpler and cheaper by:
>
> • simplifying employment tribunal forms;
> • considering unifying time limits and the grounds for extension;
> • improving procedure and encouraging more active case management;
> • simplifying management of multiple-claimant claims;
> • improving the handling of weak claims and vexatious claimants; and
> • considering when chairs should sit alone in employment tribunals.

B. Tribunals

The Bill makes various changes to powers of tribunals some of which are consequent on repealing the dispute regulations.

1. Tribunals caseload[21]

The table below displays the total number of claims accepted by Employment Tribunals in Great Britain over the period 1997/99 to 2006/07.[22] While the number of claims

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[20] BERR, *Success at work: resolving disputes in the workplace: a consultation*, March 2007

[21] Prepared by Ed Beale, Economic Policy & Statistics Section

accepted by Employment Tribunals has varied considerably between years over the time period displayed, 2006/07 represented the largest number of claims in the past ten years at 132,577. This was 15.2% higher than 2005/06 and 64.8% higher than 1997/98.

Total claims accepted by Employment Tribunals (a)
Great Britain

	Claims accepted	% change on previous year
1997/98	80,435	
1998/99	91,913	14.3%
1999/00	103,935	13.1%
2000/01	130,408	25.5%
2001/02	112,227	-13.9%
2002/03	98,617	-12.1%
2003/04	115,042	16.7%
2004/05	86,181	-25.1%
2005/06	115,039	33.5%
2006/07	132,577	15.2%
Change 1997/98-2006/07:		
Level	+52,142	
%	+64.8%	

Note: (a) A claim may be brought under more than one jurisdiction or subsequently amended or clarified in the course of proceedings but will be counted only once.

Sources: Employment Tribunal Service, Annual Reports 1999/00 to 2006/07

2. Impact of the regulations

Initially there appeared to be a reduction in tribunal cases related to the regulations. A Financial Times Article covered a report from a manufacturing employers' organisation:

> The number of cases heard by employment tribunals fell by 28 per cent last year as new dispute resolution rules began to take effect, according to a survey of manufacturers published today.
>
> Peter Schofield, director of employment and legal affairs at the EEF manufacturing employers' organisation, said: "These figures suggest that the increasing tide of litigation we have seen over the last few years may have started to ease in response to a concerted attempt by employers and government."[23]

However this particular decline in cases may not have been due to the regulations. In the prior period there had been bulges in tribunal caseloads caused by specific types of case which subsequently receded as those cases were determined, For example, there were around 9,000 claims from retained firefighters in respect of their rights as part-time workers.[24] Also, about 60,000 claims for backdated access to pension schemes had

22 Note, a claim may be brought under more than one jurisdiction or subsequently amended or clarified in the course of proceedings but will be counted only once.
23 Andrew Taylor, “Employment tribunal cases on decline”, *Financial Times*, 1 May 2006
24 TUC Press Release, *The 'compensation culture' myth*, 10 September 2001

been lodged by part-time workers.[25] These arose out of decisions of the European Court of Justice.[26] The first cases were lodged in November 1995. The drop in tribunal cases in the period 2002-03 to 2003-04 (see table) may have been part of these fluctuations.

There has also been speculation that increases in tribunal cases have been driven by a "compensation culture". However a report from the Better Regulation Task Force (BRTF) – an independent advisory body set up in 1997 – found that the total cost of compensation cases has remained the same in real terms since 1989 despite the introduction of conditional fee arrangements.[27] The suggestion that the increase in claims may be related to the availability of conditional fee arrangements was addressed in the Gibbons Review:[28]

> 1.29 A report by the Department for Constitutional Affairs (DCA) in July 2004 analysed whether the UK was seeing a growth in compensation culture and examined 'no win no fee' arrangements, otherwise known as conditional fee agreements (CFAs), in relation to employment tribunals. Their analysis suggests that although CFAs may increase private settlement rates in employment tribunal cases, and may achieve higher settlement terms for claimants, there is no evidence that they create more cases.[29]

3. The Polkey principle

Prior to the introduction of the dispute regulations, dismissals were often found to be unfair because the employer had failed to follow their own internal disciplinary procedures. This followed a decision by the House of Lords in 1987 in *Polkey v A E Dayton Services Ltd* that an employer could not justify a failure to follow disciplinary procedures by arguing that to have done so would have made no difference to the outcome.[30] Employers have long complained that this means they lose tribunal cases because of minor procedural failings rather than on the merits of the case. *Polkey* also provided that, other than the basic award, the tribunal could reduce the compensation payable by up to 100% if it found that the employee would have been dismissed anyway even if the correct procedures had been followed. The *Routes to Resolution* consultation similarly proposed that tribunals should be able to disregard procedural mistakes beyond those laid down in the statutory scheme, where they make no difference to the outcome. Section 34 of the Act made this change. There was also provision for a minimum award of four weeks' pay where the statutory procedures had not been followed.

The Bill will repeal section 98A of the *Employment Rights Act 1996* which was inserted by section 34(1) and (2) of the *Employment Act 2002* and came into force on 1 October 2004:

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25 HC Deb 19 May 2003, c637W

26 *Vroege -v- NCIV Instituut Voor Volkshuisvesting BV*, 1994 IRLR 651 and *Fisscher -v- Voorhuis Hengelo BV*, 1994 IRLR 662

27 Better Regulation Task Force, *Better Routes to Redress*, May 2004

28 DCA, *Too much blame and claim? An analysis of litigiousness and the compensation culture*, 2004

29 BERR, Michael Gibbons, *Better dispute resolution, A review of employment dispute resolution in Great Britain*, March 2007

30 *Polkey v A E Dayton Services Ltd [1988] AC 344*

> **98A Procedural fairness**
>
> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
>
> (a) one of the procedures set out in Part 1 of Schedule 2 to the Employment Act 2002 (dismissal and disciplinary procedures) applies in relation to the dismissal,
>
> (b) the procedure has not been completed, and
>
> (c) the non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements.
>
> (2) Subject to subsection (1), failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of section 98(4)(a) as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure.
>
> (3) For the purposes of this section, any question as to the application of a procedure set out in Part 1 of Schedule 2 to the Employment Act 2002, completion of such a procedure or failure to comply with the requirements of such a procedure shall be determined by reference to regulations under section 31 of that Act.

Following consultation, the Government has decided to repeal this section in its entirety. This will mean a reversion to the situation which applied previously based on the *Polkey* line of cases.

4. Statutory Codes of Practice

Clause 3 of the Bill deals with cases where the relevant statutory Codes of Practice are not followed. Clause 1 repeals current provisions which require a tribunal to adjust an award in these cases.[31] Clause 3 provides an alternative mechanism to encourage compliance with a relevant Code of Practice. Only statutory codes which relate "exclusively or primarily to procedure for the resolution of disputes" are covered. The explanatory notes read as follows:

> 20. Under Part IV, chapter 3 of TULRCA 1992, the Secretary of State and Acas may issue Codes of Practice subject to Parliamentary approval ("statutory codes"). Section 207 of TULRCA 1992 provides that a statutory code, although not legally binding, is admissible in evidence and can be taken into account by the employment tribunal.
>
> 21. In order to provide an incentive to follow recommended practice, clause 3 contains provisions giving employment tribunals the discretion to vary awards for unreasonable failure to comply with any relevant Code of Practice relating to workplace dispute resolution, by introducing a new section 207A and Schedule

[31] Section 31 of the *Employment Act 2002*

> A2 to TULRCA 1992. The relevant Code of Practice is one which relates exclusively or primarily to procedure for the resolution of disputes. Of the existing six codes issued under TULRCA, such a definition only applies to the Acas Code of Practice on disciplinary and grievance procedures, which Acas is substantially revising for reissue at the time the Bill comes into force.
>
> 22. Subsection (2) of the new section 207A provides that the employment tribunal may, if it considers it just and equitable, increase any award to an employee by up to 25% if it appears to the tribunal that the employer has unreasonably failed to comply with the relevant Code of Practice.
>
> 23. Subsection (3) of the new section 207A provides that the employment tribunal may, if it considers it just and equitable, decrease any award to an employee by no more than 25% if it appears to the tribunal that the employee has unreasonably failed to comply with the relevant Code of Practice.[32]

Attempts were made in committee in the House of Lords to restrict these codes to those issued by Acas, thus excluding codes which might at some point in the future be issued by ministers.[33]

5. Determination of claims without a hearing

Although cases in employment tribunals are currently decided at a hearing, the *Employment Tribunals Act 1996* contains a measure, inserted in 2002, which would allow some cases to be heard without a hearing, perhaps by an employment judge sitting alone.[34] This provision has never been used. The consultation which directly followed publication of the Gibbons Review announced "a new, swift way to settle straightforward monetary disputes without the need for employment tribunal hearings".[35] This in itself would not require primary legislation.

Concerns were raised about this in the Lords. At Second Reading Lord Wedderburn questioned whether such a fast track procedure would be compatible with Article 6 of the European Convention on Human Rights which guarantees rights to a fair trial.[36] However, this does not appear to have been taken up by the Joint Committee on Human Rights which reported on the Bill in April 2008.[37]

Baroness Turner of Camden tabled an amendment which would require consent in writing from employees before this procedure could be used. The Government responded favourably this suggestion was "worthy of further consideration".[38] Accordingly, government amendments were subsequently made. The Explanatory Notes describe this as follows:

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32 Explanatory Notes to Bill 117 of 2007-08
33 HL Deb 4 February 2008 cc 463 – 470GC
34 Section 7(3A) of the *Employment Tribunals Act 1996*
35 BERR, *Success at work: resolving disputes in the workplace: a consultation*, March 2007
36 HL Deb 7 January 2008 c674
37 Joint Committee on Human Rights, *Seventeenth Report of Session 2007-08*, HL Paper 95; HC 501, 28 April 2008
38 HL Deb 4 February 2008 c477-481GC

> 28. Clause 4 inserts a new section 7(3AA) and 7(3AB) into the ETA 1996 to specify that employment tribunal procedure for determinations without hearing must ensure that all parties to the proceedings consent in writing to the process. The clause also ensures that tribunals may continue to issue default judgments without a hearing, and that the consent of parties is not required in these circumstances. [39]

6. Lay members

Employment tribunals are governed by the *Employment Tribunals Act 1996* and the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004*, SI No.1861. Under the Constitution and Rules of Procedure the three members of the tribunal are drawn from three different panels. 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 possibility of increasing the efficiency of tribunal proceedings through greater provision for tribunal chairmen to determine certain matters without lay colleagues has been a long standing issue. In December 1994, the Conservative government's Green Paper, *Resolving Employment Rights Disputes: Options for Reform* contained proposals in this regard.[40] In response to consultation, they decided not to proceed with these:

> The Government also recognise the concerns voiced about the proposals to require chairmen to sit alone, without lay members, in certain cases and have decided not to introduce any such statutory requirement. However, the Government are minded to extend the existing discretion for chairmen to sit alone where they consider this appropriate for certain technical cases, such as the determination of entitlement to redundancy payments. [41]

More recently concerns have been widely voiced (including by lay members themselves) that the Bill may be amended at some point during its passage with the effect of significantly downgrading tripartite decision making and the role of lay members in employment tribunals. These concerns appear to have arisen from comments made by the Government in a recent consultation document entitled *Transforming Tribunals*.[42] Apart from the Bill the role of non-legal tribunal members may be subject to some changes and the imposition of general requirements as regards which hearings they should participate in as part of general principles covering all tribunals in the new unified Tribunals Service.

In March 2007, the following recommendation appeared as part of the Gibbons Review of dispute resolution:

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39 Explanatory Notes to Bill 117 of 2007-08
40 Cm 2707
41 HC Deb 20 November 1995, c 20W
42 Tribunals Service, *Transforming tribunals: implementing part 1 of the Tribunals, Courts and Enforcement Act 2007*, 28 November 2007

> 16. Review the circumstances in which it is appropriate for employment tribunal chairs to sit alone, in order to ensure that lay members are used in a way that adds most value.[43]

In response to the Gibbons Review the Government published a consultation document seeking views on various questions, including:[44]

> **Do you have views on when employment tribunal chairs should sit alone to hear cases?**

This consultation explained that any further policy development on this issue would be taken forward in the context of the *Tribunals, Courts and Enforcement Bill*. Part 1 of the *Tribunals, Courts and Enforcement Act* 2007 created a new, simplified statutory framework for tribunals aimed at providing coherence and to enable future reform, bringing the tribunal judiciary together under a Senior President. Many more cases are heard in tribunals than in the courts.[45] The *Transforming Tribunals* consultation set out the Government's plans for implementing part 1 of the *Tribunals, Courts and Enforcement Act 2007*. The consultation recognised the special position of employment tribunals within the overall system of tribunals, and confirmed that the existing statutory requirements for sitting on the employment tribunals and the employment appeals tribunal will be retained.[46]

Transforming Tribunals, in chapter 9, sets out proposals concerning the role of non-legal members. These are general principles that would apply across the range of tribunals, not just employment tribunals. However, there is a reference to non-legal members in employment tribunals:

> **229** Whatever may have been the policies that led to existing statutory rules on tribunal composition, the government's approach is centred on the user. In a number of tribunals, cases are routinely heard by more than one member. Generally, there are good reasons for that, and there is some evidence that users prefer this approach. However, it may not be necessary in all cases. It must be acknowledged that most tribunal users simply want to have their cases disposed of quickly, rigorously and fairly, with the right kind of expertise brought to bear. It is reasonable to note that all civil trial courts and many existing tribunals (particularly the Social Security Commissioners, the AIT, the VAT and Duties Tribunal and the Lands Tribunal) rarely have more than one member sitting on a case, and in other tribunals much of the work is dealt with by one judge or member sitting alone. There is no evident

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43 BERR, Michael Gibbons, *Better dispute resolution, A review of employment dispute resolution in Great Britain*, March 2007

44 BERR, *Success at work: resolving disputes in the workplace: a consultation*, March 2007

45 There are over 70 different administrative tribunals in existence, many of which were created on an ad-hoc basis. Prior to the Act, the lack of a coordinated approach to the establishment and operating of these tribunals contributed to a complex, fragmented administrative and judicial landscape without common standards for performance or accountability.

46 Tribunals Service, *Transforming tribunals: implementing part 1 of the Tribunals, Courts and Enforcement Act 2007*, 28 November 2007, Paragraphs 99-105, pages 22 - 23

> dissatisfaction from tribunal users. The government considers that the reputation of tribunal justice is high enough not to need to be buttressed by rigid rules on composition.
>
> **230** The government intends to map existing tribunal non-legal members into the new roles in a way which maximises the opportunity for their flexible use in appeals. The overriding principle will be that the use of non-legal members on a particular hearing should bring to the table skills, experience or knowledge that tribunal judges cannot provide (**in certain employment tribunal cases, for example, there can arguably be circumstances in which little value is added by their presence** [*emphasis added*]. However, there is a clear body of opinion in support of their use in more complex cases). [47]

Lord Wedderburn, at Second Reading of the Employment Bill in the House of Lords, raised the position of lay members and the *Transforming Tribunals* consultation:

> There is at the moment very widespread concern that the position of the lay members of the employment tribunals is being undermined. One of the reasons for that is that the tribunals appear to come within the scope of the Ministry of Justice. One might have thought that it would have taken care to understand the nature of tribunals and employment tribunals, but it has not, as its recent document Transforming Tribunals, issued in 2007, makes abundantly clear. I ask for clarification of just how far the Ministry of Justice is likely to go in its campaign to downgrade lay members of the tribunals.[48]

On behalf of the Government Lord Bach responded to this concern as follows:

> The noble Lord also asked whether we can guarantee that a lay member role in tribunals will be maintained. Responses to the consultation showed the great importance placed by many tribunal service users on the role of lay members. I emphasise that the proposals in the Bill make no changes to that role.[49]

7. Compensation for financial loss

Clause 7 gives tribunals new powers to make compensatory awards in cases where the claim is for unauthorised deductions or non-payment of wages; or non-payment of redundancy entitlements. Unlike the civil courts, tribunals have no powers which are not given to them by statute. Currently, they are limited to making awards in respect of the above non-payments but not any consequential financial losses that the employee may suffer as a result of not receiving payment. These can be recovered separately in the civil courts. The effect of the changes in the Bill is to simplify the employee's methods of recovery in these circumstances.

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47 Tribunals Service, *Transforming tribunals: implementing part 1 of the Tribunals, Courts and Enforcement Act 2007*, 28 November 2007 pages 47 - 48

48 HL Deb 7 January 2008 c675. These concerns were taken up by Lord Wedderburn again in Grand Committee: HL Deb 4 February 2008 c481-2GC

49 HL Deb 7 January 2008 c698

C. Acas

1. The role of Acas

On 6 February 2008 increased financial support for Acas was announced by the Department for Business, Enterprise and Regulatory Reform (BERR):

> The Government will today announce up to £37 million to prevent work place disputes unnecessarily going to employment tribunals.
>
> The measures are part of package designed to simplify the dispute resolution system, saving business and employees over £175m a year.
>
> The extra funding, over three years, will allow Acas to boost its helpline and advice services and offer help at any stage of a dispute to make sure it is never too late to choose an informal resolution.
>
> Minister for Employment Relations, Pat McFadden, said:
>
> "The link between successful employment relations and productivity is clear. Early action can often prevent the need for tribunals, bringing enormous benefits to business and employees.
>
> "We want to move from the current overly rigid and legalistic process to one where there is more conciliation between employers and employees.
>
> "This new system will strike a balance between ensuring workers can protect their rights through employment tribunals while helping them to resolve disputes as early as possible."
>
> Acas will conduct pilot programmes over the next year to conciliate disputes which look set to become a claim to the tribunals with the aim of making this service available throughout Great Britain in 2009.
>
> Recent research from the National Institute of Economic and Social Research showed that for every pound Acas spends, over £16 is returned, equating to £800 million a year in benefits to UK companies, employees and the economy.[50]

The Bill, in repealing the dispute resolution regulations, leaves a gap which the Government intends will be supplemented by an enlarged role for Acas. Scrutiny of the Bill's proposals in clauses 1 to 7 naturally focuses on Acas and the arrangements that will replace the current provisions. This is important both in terms of the long-standing objective of better dispute resolution, but also the possible ongoing effects described in the Gibbons Review of an unhelpful atmosphere of legal formality that the regulations may have introduced into employment relations. At Lords Second Reading, Lord Razzall asked about responses to the Bill from Acas:

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[50] BERR, *Extra cash to aid early resolution of workplace disputes*, 6 February 2008 ; See also: Acas, *Independent study reveals Acas adds £800m to UK economy*, 13 November 2007

> As the Minister will realise, I welcome the approach that his department has taken during the past 10 years to legislation, in the sense of bringing it in, having a review to see how it is working and then implementing what the review comes up with. Although the consultation on the Gibbons review has ended, we have not seen the Government's formal response, except in this Bill. I understand that ACAS has a concern but has not yet commented on the Bill because it is waiting to see the government response to the Gibbons review. I notice that behind the Minister a number of his colleagues are nodding. This is a significant point.[51]

Lord Wedderburn asked about revised codes and guidance from Acas:

> I have two questions for my noble friend Lord Bach. First, why does the Bill not make it clear just when the ACAS procedural code is, and is not, the relevant code of procedure? Secondly, why cannot the Government delay the Bill until we can see the nature of the new ACAS code that is being rewritten? My noble friends have made that point already, but it bears repetition. To ask the House to pass the Bill before we even know what is in the new ACAS code is asking it to buy a pig in a poke. That is not satisfactory.[52]

By Committee Stage in the Lords, the Government had provided copies of the draft code. Lord Wedderburn expressed contentment with the draft code he had seen, but had reservations about the fact that consultation on it had yet to conclude.[53]

2. Acas codes and guidance

a. Revised code of practice on discipline and grievance

On 2 May 2008 Acas published a consultation on the revised discipline and grievance code.[54] This explained that the Government plans to introduce the changes in workplace dispute resolution in April 2009 and that the revised code is likely to come into effect on the same date. The draft code is a statutory code. Provisions in the *Trade Union and Labour Relation (Consolidation) Act 1992* (TULRCA) allow Acas to issue Codes of Practice subject to Parliamentary approval.[55] Such codes are not legally binding although section 207 of TULRCA provides that a statutory code is admissible in evidence and can be taken into account by the employment tribunal. The draft code sets out the following basic principles:

- Issues should be dealt with promptly. Meetings and decisions should not be unduly delayed.
- Employers should act consistently and ensure that like cases are treated alike.
- Appropriate investigations should be made, to establish the facts of the case.
- Any grievance or disciplinary meeting should, so far as possible, be conducted by a manager who was not involved in the matter giving rise to the dispute.
- Where the employer is raising a performance problem the immediate manager would be involved.

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51 HL Deb 7 January 2008 c646
52 HL Deb 7 January 2008 c673
53 HL Deb 4 February 2008 c452GC
54 *Acas launches consultation on revised discipline and grievance code*, 2 May 2008
55 Part IV, chapter 3 of the *Trade Union and Labour Relation (Consolidation) Act 1992*

- An employee should be informed of the basis of the problem and have an opportunity to put their case in response before any decisions are made.
- An employee has the right to be accompanied at any disciplinary or grievance meeting.
- An employee should be allowed to appeal against any formal decision made.[56]

There does not appear to be a time limit on responses to this consultation.

b. Non-statutory guidance

On 12 June 2008 Acas issued a further consultation on non-statutory discipline and grievance guidance. This gives more detailed guidance on handling discipline and grievances in the workplace. It is non-statutory and therefore does not give rise to the same interpretive effects in employment tribunals. The guidance is designed to support the code. Responses to the consultation should be emailed by 25 July 2008 to DGguide@acas.org.uk.[57]

3. Acas conciliation

The *Employment Rights (Dispute Resolution) Act 1998* included provision for an alternative means of resolving disputes about unfair dismissal by voluntary referral to arbitration under a scheme to be drawn up by Acas. The scheme came into operation on 21 May 2001.[58] A separate scheme was set up with effect from 6 April 2003 covering disputes concerning requests for flexible working.

Acas describes how the scheme operates as follows:

> In conciliation, an independent Acas conciliator discusses the issues in an employment tribunal claim, or potential claim, with both sides to find common ground on which the claim could be settled without the need for the employment tribunal to hear the case. It's the same as mediation but the term conciliation is used when an employee is making, or could make, a specific complaint against their employer to an employment tribunal. It's unlike arbitration because the conciliator has no authority to seek evidence or call witnesses, or make decisions or awards.
>
> The impartial conciliator tries to encourage the parties in dispute to come to an agreement between themselves. The aim is to help those involved get a better understanding of both sides of the issue to try to sort out the problem without a tribunal hearing.
>
> Acas' free conciliation service is automatically offered when an employment tribunal claim is made. Either party can also ask for conciliation before putting in a claim, if the dispute is one that could be taken to a tribunal. It's voluntary but both parties must agree to conciliation.[59]

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56 Acas, *Draft Code of Practice on discipline and grievance*, May 2008

57 *Acas consults on non-statutory discipline and grievance guidance*, 12 June 2008

58 *ACAS Arbitration Scheme (England and Wales) Order 2001*, SI 2001/1185; see also Acas information on the website on how the scheme currently operates.

59 Acas website: Conciliation

Clause 5 of the Bill covers conciliation before bringing of proceedings and makes amendments to current provisions governing the circumstances in which Acas is either obliged, or has the power, to offer conciliation.[60] The Explanatory Notes clarify that the various amendments are intended:

- to enable Acas to prioritise cases where demand for conciliation exceeds resources available for conciliation and to relieve Acas of the obligation to offer conciliation in pre-tribunal disputes where there is no prospect of success;

- to substitute a discretionary power to seek reinstatement or reengagement in pre-tribunal disputes in situations where currently Acas must attempt to secure reinstatement or reengagement or additional compensation in lieu

Clause 6 covers conciliation after bringing of proceedings. After the expiry of the fixed conciliation period Acas is not required to offer assistance in reaching a settlement. The Gibbons Review found that the parties' knowledge of this fact did not mean that disputes were being settled earlier. Relevant provisions are repealed with the effect that the duty on Acas to conciliate continues throughout employment tribunal proceedings until the tribunal delivers a judgment.[61]

II National Minimum Wage Enforcement

A. National Minimum Wage

1. Rates

The NMW applies to most workers and sets minimum hourly rates of pay. It is intended to benefit business as well by ensuring that companies compete on the basis of quality of the goods and services rather than low prices based mainly on low rates of pay. The rates are set in regulations made by the Secretary for State, with parliamentary approval, based on the recommendations of the Low Pay Commission (LPC).[62]

The main (adult) rate for workers aged 22 and over is currently:

- £5.52 per hour from 1 October 2007[63]

The development rate for workers aged 18-21 inclusive is currently:

- £4.60 per hour from 1 October 2007[64]

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60 These are contained in section 18 of the *Employment Tribunals Act 1996*
61 Section 18(2A) and 19(2) of the Employment Tribunals Act 1996 are repealed
62 *National Minimum Wage Regulations 1999, SI No.584* (as amended)
63 From 1 October 2008 this will be £5.73 *Low Pay Commission Website* [on 8 April 2008]
64 From 1 October 2008 this will be £4.77 *Low Pay Commission Website* [on 8 April 2008]

With the exception of apprentices, a new minimum wage rate of £3 for 16 and 17 year olds was introduced in October 2004. From 1 October 2007 this rose from £3.30 to £3.40.[65]

2. Agricultural workers

Agricultural workers are covered by the National Minimum Wage. In addition, the Agricultural Wages Board for England and Wales issues an agricultural wages order each year.[66] This contains a number of provisions fixing minimum terms of employment and defines various categories of worker and the rates of pay applicable to each category. These have usually been set at rates above the NMW. The *National Minimum Wage Regulations* have a specific effect on employers of agricultural workers. Employers are required to keep sufficient records to be able show in the event of a challenge that the worker has been paid at least the agricultural minimum rate applicable under the current AWO. In addition the N*ational Minimum Wage Act 1998* gives workers the right to inspect such records. The Agricultural Wages Team can be contacted by telephone: 0845 0000134 (local call rates apply) or 020 7271 6132.

In England and Wales the agricultural minimum wage is enforced by the Department of the Environment, Food and Rural Affairs (DEFRA). There are different arrangements for Scotland where the Scottish Agricultural Wages Board performs a similar function.[67] It is a criminal offence for an employer to pay less than the minimum agricultural wage to agricultural workers.

On 1 October 2007 a new Agricultural Wages Order is in force.[68] The minimum rates of pay are set out in section 4 of the order. The Scottish Agricultural Wages Board set different rates, applicable from 1 October 2007.[69]

If the contract of employment states a lower agricultural wage than that set by the Order or the NMW, then that term of the contract is legally void even if the worker has agreed to it. A court will replace that term with another term providing for the current minimum agricultural wage.[70]

Copies of the Agricultural Wages Orders can be obtained from the Secretary to the Agricultural Wages Board for England and Wales or one of DEFRA's Regional Service Centres.[71] There is an Agricultural Wages Helpline on: 0845 0000 134 or 020 7271 6132 as well as the National Minimum Wage helpline on 0845 6000 678 (local call rates).

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65 From 1 October 2008 this will be £3.53 *Low Pay Commission Website* [on 8 April 2008]
66 *Agricultural Wages Act 1948,* section 3
67 See *Agricultural Wages (Scotland) Act 1949,* section 3
68 *Agricultural Wages Order 2007*
69 Scottish Executive: Agricultural Policy, The *Agricultural Wages (Scotland) Order (No 55) 2007*
70 *Gutsell v Reeve* [1936] 1 KB 272
71 The Agricultural Wages Team, DEFRA, Area 3A, Ergon House, Horseferry Road, London SW1P 2AL

B. Enforcement

1. Background

The National Minimum Wage is enforced by Her Majesty's Revenue and Customs (HMRC) pursuant to powers of appointment by the Secretary of State contained in the *National Minimum Wage Act 1998*.

The HMRC website describes this as follows:

> **What is HM Revenue & Customs (HMRC) involvement with the national minimum wage?**
>
> The role of HMRC is to enforce the national minimum wage. We do that by responding to complaints made about employers suspected of not paying the minimum wage, and by visiting a sample of employers about whom no complaints have been made, to check that all employers meet their obligations under the National Minimum Wage Act.
>
> **How does HM Revenue and Customs enforce the law?**
>
> There are two key aspects to our approach to enforcement:
>
> - A telephone helpline
> - A network of 16 teams of national minimum wage Compliance Officers.
>
> **What can I do if I want to make a complaint about an employer not paying the minimum wage?**
>
> There are a number of ways in which you can make a complaint about the non-payment of the minimum wage:
>
> - You can download a complaint form (PDF 219K) and post this to the address on the form
> - You can also call the helpline if you want to make a complaint about an employer who you suspect is not paying the minimum wage.
> - You can complete an online complaint form and send this to us from this web site.[72]

The BERR website has web page on the NMW which contains both short and more detailed guides for employers and employees.[73] The detailed guidance contains the following summary information on enforcement:[74]

> **Record-keeping**
>
> Requirement on employers to keep minimum wage records
> Workers have a right of access to records

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72 HMRC, National Minimum Wage [on 8 April 2008]
73 BERR, National Minimum Wage [on 8 April 2008]
74 BERR, *A Detailed Guide to the National Minimum Wage* [on 8 April 2008]

Tribunal can award worker 80 x minimum wage if access denied

Enforcement agency

Enforcement agency is Inland Revenue
Enforcement officers have certain powers to obtain information
Enforcement officers can exchange certain information with agricultural wages inspectors

Enforcement action

By individuals
Workers have a right to recover unpaid minimum wage through employment tribunal or other civil court

By enforcement officers
Enforcement officers have power to issue enforcement notices to require employers to pay minimum wage. If the enforcement notice is ignored, an officer has the power:

- to bring a case before a tribunal or court on behalf of the worker(s); and/or
- to impose a penalty on the employer of twice the current rate of the minimum wage (e.g. rate £4.85 x 2 = £9.70 per day), per worker, in respect of whom the employer is in breach.

Criminal offences and prosecution

Six criminal offences

- refusal or wilful neglect to pay minimum wage;
- failing to keep minimum wage records;
- keeping false records;
- producing false records or information;
- intentionally obstructing an enforcement officer;
- refusing or neglecting to give information to an enforcement officer.

Fine for each offence: up to £5,000 (level five) – (as at April 2004).

Other enforcement mechanisms

In civil cases the burden is on the employer to show that he has paid the minimum wage. Acas conciliation officers have a conciliation role in cases involving tribunals The Secretary of State must publish information about the minimum wage when the Regulations change.

2. The Bill

The changes in the Bill follow consultation on the national minimum wage and employment agency standards enforcement published in May 2007.[75] The Government

[75] BERR, *National minimum wage and employment agency standards enforcement*, 16 May 2007

response came in December 2007.[76] The BERR website explains the changes that are being made to the enforcement of the minimum wage as follows:

> The Government is proposing changes to the National Minimum Wage (NMW) Act to create a clearer deterrent to non compliance and to provide a fairer way of dealing with arrears of NMW.
>
> The changes are being taken forward in the Employment Bill which is currently going through Parliament. Subject to parliamentary approval, the Government intends the NMW provisions to come into force on 6 April 2009.
>
> The proposed changes will introduce:
> - A fairer method of calculating arrears for workers who have been underpaid;
> - A penalty payment for employers who do not pay their workers the NMW.
> - New inspection powers for NMW compliance officers; and
> - A strengthening of the criminal regime for NMW offences.
>
> **What is the new method of calculating arrears?**
>
> Changes in the Employment Bill will mean that the arrears of NMW which are owed to any worker who has been paid less that the NMW will be calculated by reference to the current rate of NMW when the current rate is higher than the rate in force at the time of the underpayment. This means that the worker will be repaid any underpayment of NMW by his employer at a higher rate if the NMW rate has increased since he was underpaid. The formula for this calculation is set out in the Bill and this provision ensures that the calculation of arrears takes into account the length of time that arrears have been outstanding.
>
> The new method of calculating arrears will apply to any arrears of NMW that are outstanding on or after the date the Bill comes into force. This includes arrears resulting from underpayments of NMW made before that date.
>
> **What changes to enforcement of the NMW does the Bill make?**
>
> In addition to introducing a fairer method of calculating arrears for workers and a penalty payment for employers who fail to pay the NMW to a worker, the Bill gives further powers to HMRC officers in obtaining NMW information from employers, allowing them to take information away from the employers premises in order to copy it.
>
> The Bill also makes changes to the way the criminal offences existing under the NMW Act are investigated and enforced: in particular, for the most serious cases, offences will be triable in the Crown Court.[77]

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[76] BERR, *National minimum wage and employment agency standards enforcement: Government response*, December 2007

[77] BERR, Proposed changes to how the National Minimum Wage is enforced

C. Voluntary sector

1. Background

The question of whether or not voluntary workers qualify for the National Minimum Wage (NMW) has proved a difficult one to answer from the outset.

At its simplest, volunteers who receive no money at all for the work they do and who are under no obligation to work for the organisation concerned are not eligible for the NMW because they are not "workers" under the legislation. People who are paid to work for charities or voluntary organisations are eligible for the NMW in just the same way as people who are paid to work for commercial or public sector organisations. However, there is a "grey area" of voluntary workers who are paid expenses or honoraria, but at a level well below the NMW. Although guidance has been issued both by the Government and by the National Council for Voluntary Organisations (NCVO) on the application of the law to this group, it continues to cause problems.

This question will depend on whether an individual will be legally classed as a "worker" within the meaning of the legislation. This is often a tricky legal question. In general the necessary elements of mutual obligation and contract would need to exist. For example, there may be no mutual obligation if the person would be free to go at any time. Further help may be available from the National Minimum Wage Helpline: **0845 6000 678**.

Section 44 of the *National Minimum Wage Act 1998* deals specifically with voluntary workers. It excludes from the scope of the NMW any worker "employed by a charity, a voluntary organisation, an associated fund-raising body or a statutory body" if he or she receives:

> (a) no monetary payments of any description, or no monetary payments except in respect of expenses
> (i) actually incurred in the performance of his duties; or
> (ii) reasonably estimated as likely to be or to have been so incurred; and
> (b) no benefits in kind of any description, or no benefits in kind other than the provision of some or all of his subsistence or of such accommodation as is reasonable in the circumstances of the employment.

In its report, *The National Minimum Wage The story so far*, published in February 2000, the Low Pay Commission outlined some of the difficulties that voluntary organisations were having in applying the law:

> **Voluntary Workers**
>
> In its consultation document on the draft National Minimum Wage Regulations (DTI 1998), the Government set out clearly the position of volunteers, stating that 'most volunteers will automatically be excluded from the Act, because they are not covered by the definition "worker", due to the absence of any intention to enter into legal relations and the resulting absence of a contract'. Thus genuine volunteers are not entitled to the minimum wage. In common usage, the distinction between a volunteer and a worker is clear. But the introduction in the legislation of two types of voluntary worker – the first entitled to the minimum

wage, and the second (who receives only expenses or subsistence) exempt – has created confusion.

Section 44 of the National Minimum Wage Act, which was drafted in consultation with voluntary organisations, created exemptions to the coverage of voluntary workers. While DTI produced guidance specifically on this issue, our evidence shows that some uncertainty remains over status: as the National Council for Voluntary Organisations stated in its evidence, 'grey areas remain around definitions of worker, voluntary worker and volunteer'. The National Centre for Volunteering summarised these concerns in its evidence:

Although the Minimum Wage Act is not intended to affect volunteers, the voluntary workers exemption clause (clause 44) is causing confusion in the voluntary sector and for lawyers in voluntary organisations.

This results from uncertainties about:

- *what constitutes an employment contract;*
- *what constitutes a contract between an organisation and its volunteers;*
- *what expenses may be reimbursed; and*
- *what benefits-in-kind are allowable.*

Typical of the problems raised is that of the sporting associations which cited the person who 'volunteers' to act as an official at a sporting event and receives some form of benefit, such as free tickets for a future event. The associations were concerned that such benefits might be interpreted as conferring worker status, and thus entitlement to the National Minimum Wage, on the individual. The British Red Cross Society was also concerned that the National Minimum Wage meant that 'we are now extremely limited in what we can offer to attract, reward and retain the volunteers that are vital to the service we provide'. Age Concern England mentioned that for many years it had paid its key volunteers, such as day centre organisers, honoraria of about £10–15 per week. The charity claimed that changes in the treatment of these honoraria required by the National Minimum Wage legislation had adversely affected the relationship between the organisation and its volunteers.

Because of the continuing confusion there remains the danger that in some cases genuine workers in voluntary organisations who are entitled to the minimum wage may not be receiving it. While we would not wish those voluntary workers who are exempt under Section 44 to be deterred from volunteering, we are concerned that organisations should not seek to use Section 44 as a loophole to avoid compliance.

Given the significant degree of confusion which continues to exist in the voluntary sector, we recommend that the Government should issue further detailed guidance on the definition of worker which is geared specifically to the needs of the voluntary sector. Where possible, the two more familiar terms should be used: 'volunteer' to include those who are not covered by the minimum wage, even though they may receive payments to reimburse expenses, and 'worker for a voluntary organisation' to cover those who are entitled to it. The guidance should help organisations and workers to distinguish not only between the status of genuine volunteers and workers for voluntary organisations, but also whether

> payments made, or benefits provided, to volunteers confer entitlement to the minimum wage.[78]

2. The Bill

The changes made by the Bill arise out of a review of the NMW launched in January 2007. A consultation was published in June 2007.[79]

Clause 13 excludes Cadet Force Adult Volunteers from the NMW. The Explanatory Notes provide further details:

> 78. A CFAV is a member of the Cadet Forces who is assisting in the delivery of the Ministry of Defence sponsored cadet force programme. The clause does not apply to those performing work for the Cadet Forces in the course of Crown employment, including employment by a Reserve Forces and Cadet Association set up under the Reserve Forces Act 1996. It does not affect any entitlement CFAVs may have to the NMW outside of their voluntary activities as a CFAV.
>
> 79. The Cadet Forces comprise of the Combined Cadet Force, Sea Cadet Corps, Army Cadet Force and Air Training Corps. Each is a separate national youth organisation supported by its own charity.
>
> 80. The Cadet Forces do not form part of the Armed Forces or the Reserve Forces, although some CFAVs may be serving members of the Armed Forces or the Reserve Forces.

The Consultation explained that this is "essentially as an avoidance of doubt measure".[80]

Clause 14 extends the kinds of expenses that can be paid to voluntary workers. Currently, only limited benefits in kind are permitted under section 44. These are: training, accommodation and subsistence. The training must be acquired in the course of carrying out voluntary work or provided solely or mainly to improve the voluntary worker's ability to perform that work. Any accommodation provided by a qualifying organisation would need to be reasonable in the circumstances. Subsistence means the provision of meals or refreshments.

The Bill will allow expenses which are reasonably incurred in order to enable the voluntary worker to perform their duties, but will maintain the existing position whereby accommodation can be provided; but accommodation expenses cannot be paid to voluntary workers.

The consultation said that these provisions:

> … are intended to complement section 44 by providing the necessary flexibility to enable the Act to cater for certain voluntary schemes that employ voluntary

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78 Cm 4571, February 2000, paras 5.3-5.7. The report is available on the Low Pay Commission's website, http://www.lowpay.gov.uk/lowpay/report2/complete.pdf

79 BERR, *National minimum wage and voluntary workers*, June 2007

80 BERR, *National minimum wage and voluntary workers*, June 2007, page 20

workers who should be excluded from the national minimum wage. The effect would be to provide greater certainty to the third sector and voluntary workers about their position in respect of the national minimum wage. [81]

III Vulnerable Agency Workers

1. Employment agency standards

There have been various changes to the regulation of employment agencies over recent years. Employment agencies and employment businesses in the UK are regulated by the *Employment Agencies Act 1973*, as amended ("the 1973 Act") and regulations made under this Act. The *Conduct of Employment Agencies and Employment Business Regulations 2003 SI No.3319* ("the 2003 regulations") came into force in April 2004 and replaced the previous regulations which were made in 1976.[82] Subsequently, the *Conduct of Employment Agencies and Employment Business (amendment) Regulations 2007 SI No.3575* ("the 2007 regulations") made amendments to the 2003 regulations – many of which came into force on 6 April 2008. This followed a government consultation on measures to protect vulnerable agency workers published in February 2007.[83]

There is a legal distinction between employment **agencies** and employment **businesses**. Employment **agencies**, under the Act, supply workers to work for companies on a permanent basis as employees of that company. Employment **businesses** supply workers, usually on a temporary basis, who are employed by the employment business to work in that company.

2. Licensing and the Employment Agency Standards Inspectorate

Until 3 January 1995, employment bureaux had to be licensed under sections 1-3 of the 1973 Act. Licences were issued by officers of the Department of Employment's Employment Agency Licensing Office who had powers to enter premises, inspect records and refuse or revoke licences on the grounds that the applicant or premises were unsuitable or that the business had been improperly conducted. In practice only about four licences were refused or revoked a year. Serious breaches of the minimum standards of conduct laid down in the Act and the Regulations made under it occurred despite the licensing system and the Conservative Government decided to repeal the licensing requirement. This was achieved by section 35 and schedule 10 of the *Deregulation and Contracting Out Act 1994*, which replaced the power to refuse or revoke licences with a new power to apply to an employment tribunal for an order to prohibit people from running an agency or business on grounds of unsuitability or misconduct.

The four regional licensing offices were re-named Employment Agency Standards Offices and officials still have the power to enter premises and inspect records.[84] On 19 September 1996, John Taylor, then Corporate and Consumer Affairs minister at the DTI, announced

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81 BERR, *National minimum wage and voluntary workers*, June 2007, page 17-18
82 *Conduct of Employment Agencies and Employment Business Regulations 1976 SI No 715*
83 DTI, *Success at Work, Consultation on measures to protect vulnerable agency workers*, February 2007
84 Employment Department Press Notice, 16 January 1995, "*Abolition of Employment Agency Licensing"*

that three of the regional offices - in Watford, Birmingham and Leeds - were being closed and that all complaints would be dealt with centrally in the DTI's headquarters building in 1, Victoria Street, London. A helpline for people with complaints or queries about agencies would allow people to ring at local call rates from anywhere in the country.[85] The number is now 0845 955 5105.[86] The Government has issued press notices and leaflets encouraging people to ring this helpline if they feel they have been ill-treated by an employment agency.[87] It also has a website which contains advice and an on-line complaints form.[88]

3. Prosecutions and fines[89]

Table 6 below displays prosecutions and fines imposed by the Employment Agency Standards Inspectorate under the *Employment Agencies Act 1973* and associated regulations.

Table 6

Prosecutions by the Employment Agency Standards Inspectorate

	Total cases	Level of fines (£)
1997/98	13	13,950
1998/99	3	0
1999/00	3	2,300
2000/01	2	5,000
2001/02	2	0
2002/03	8	500
2003/04	4	50
2004/05 (a)	4	1,800
2005/06	0	0
2006/07 (b)	1	2,500
2007/08 (c)	5	800

Notes: (a) Revised Conduct of Employment Agencies and Employment Businesses Regulations were introduced on 6 April 2004.
(b) In addition to the fines imposed, in one case in 2006-07, a confiscation order of £20,387.76 was made by a Court under the Proceeds of Crime Act.
(c) To February 2008 only.

Source: Employment Agency Standards Inspectorate

4. The Bill

The changes in the Bill follow consultation on the NMW and employment agency standards enforcement published in May 2007.[90] The Government response came in

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85 DTI Press Notice, 19 September 1996, "*John Taylor announces new help for employment agency users*"

86 BERR, *Employment Agency Standards*

87 See, eg, DTI press releases, 16 July 1997, *DTI obtains first prohibition order against employment agency proprietors,* and 5 November 1998, *Using an employment agency? - know your rights: Ian McCartney launches new advice leaflet*

88 BERR, *Law on Employment Agencies*

89 Prepared by Ed Beale, Economic Policy and Statistics Section

90 BERR, *National minimum wage and employment agency standards enforcement*, 16 May 2007

December 2007.[91] The Bill makes offences under the *Employment Agencies Act* capable of being tried in a Crown court; not just a Magistrates' court (as now). This effectively increases the penalty available to the court where the offence results in conviction on indictment. Offences tried in the Crown Court will have no limit on the fine that can be imposed. Additional inspection powers are conferred on the Employment Agency Standards Inspectorate.

5. Vulnerable workers

The Vulnerable Worker Enforcement Forum was launched by the Government in June 2007. Its members include representatives of industry, unions, enforcement agencies and Citizens Advice:

> The employment strategy paper, Success at Work, published in March 2006 committed Government to protecting vulnerable workers and tackling non-compliant employers.
>
> As part of this work, a Vulnerable Worker Enforcement Forum has been established. Chaired by the Employment Relations Minister, Pat McFadden, it brings together front line unions, workplace enforcement agencies, business groups and advice bodies to look at evidence about the nature and extent of abuse of workplace rights. It is also looking at whether abuses are being tackled effectively through existing enforcement and support mechanisms and whether improvements, or new approaches are needed to raise compliance without increasing burdens for good employers.[92]

The TUC set up a Commission on Vulnerable Employment which reported in May 2008.[93]

6. EU Agency Workers Directive

Parallel to these policies have been the complex developments, at both domestic and EU level toward employment rights for agency workers. These will entitle an individual agency worker to the same basic working and employment conditions as a comparable direct worker.

There have been ongoing calls for agency workers to have the right to equal treatment in comparison with permanent employees in the end user organisation. The European Commission published its original *Proposal for a directive of the European Parliament and Council on working conditions for temporary workers* (COM(2002)149) on 20 March 2002. It is being considered under the co-decision procedure which involves the European Parliament and is subject to qualified majority voting in the Council of Ministers. For many years Member States had failed to reach agreement about the draft directive in the European Council of Ministers.

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91 BERR, *National minimum wage and employment agency standards enforcement: Government response*, December 2007

92 BERR, Vulnerable Worker Enforcement Forum

93 TUC, *Hard Work, Hidden Lives*, 7 May 2008

At the meeting on 5 December 2007, it became clear that the UK had lost its blocking minority on the proposal. There was also domestic pressure for agency workers rights, including Andrew Miller's Private Members Bill, which precipitated an agreement between the TUC and the CBI.[94] This agreement provided that agency workers would get the right to equal treatment with permanent employees in the end user after a period of 12 weeks. At the subsequent meeting of the European Council on 9 June 2008 agreement was reached on a common position. This required amendments to ensure that the UK national level agreement between the TUC and CBI would allow derogation from the "day one" rights provided for in the draft directive. The proposals will now go forward to the European Parliament. Given the delays that have occurred and the fact that European Parliament elections are due in 2009, there is generally a strong will from all concerned to conclude the legislative process by the end of the current EU Parliament in 2009. It is not clear precisely when this will translate into domestic legislation.

IV Trade Union Membership

1. ECHR Judgement

Under UK law, any individual who wishes to join or remain a member of a trade union has the right to do so. The union may exclude or expel that person only for one of a number of permitted reasons which are set out in section 174 of the *Trade Union and Labour Relations (Consolidation) Act 1992* (TULRCA) as amended by the *Trade Union Reform and Employment Rights Act 1993*. This section gives trade union members the right not to be excluded or expelled from the union unless this is expressly permitted by the section.

2. Employment Relations Act 2004

Section 174 TULRCA was amended by the *Employment Relations Act 2004*. The intention at the time was to give more latitude to unions by separating membership of a political party from activities undertaken in the course of membership. Provisions were introduced in Commons Standing Committee of the *Employment Relations Bill 2003-04* intended to allow unions more flexibility in expelling racist or extreme right-wing political activists. This had been mentioned by Patricia Hewitt in the Second Reading debate on the Bill:

> Finally, I come to a matter of considerable importance to trade unions and to my hon. Friends. For some time we have been discussing with trade unions the very difficult issue of tackling the infiltration of their ranks by racist activists. Many of my hon. Friends have drawn to my attention, and that of my hon. Friend the Minister for Employment Relations, Competition and Consumers, the nauseating content of some British National party journals, which celebrate the fact that if its members take action against a trade union and are successful, they can receive compensation.

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[94] See Library Research Paper RP08/17, *Temporary and Agency Workers (Equal Treatment) Bill 2007-08 , Bill 27 of 2007-08*, 18 February 2008

> I can tell the House today that my hon. Friend will introduce new provisions in Committee, setting out how we will enable unions to tackle that problem, because it is utterly unacceptable that the vital work that unions and others have been doing to eradicate racism from society should be undermined by their inability to root out the political racists who seek to exploit trade unionism for their own purposes.[95]

3. European Court of Human Rights Judgement: *Aslef v UK*

On 27 February 2007, the European Court of Human Rights (ECHR) issued a judgement in the case of *Aslef v The United Kingdom*.[96] The case concerned the freedom of trade unions to exclude an individual (in this case, Mr Lee) on the grounds of their political party membership. The facts of the case as given in an Employment Appeal Tribunal Judgement are covered in Appendix 2. The ECHR judgement prompted a review of the law and the Department for Trade and Industry issued a consultation on a change in the law to ensure compatibility of Article 11 of the European Convention of Human Rights, of which the UK was found to be in breach.[97] Article 11 here was interpreted as "a right of the union to determine its own membership and the entitlement of its membership to decide in accordance with the union's rules with whom they wished, and did not wish, to associate as their fellow members."[98] The consultation sets out the current law:

> The union may exclude or expel that person only for one of a number of permitted reasons. Those reasons are set out in section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the "1992 Act"). One of them is that the person's "conduct" is unacceptable. However, the section sets out the three following three categories of conduct, jointly classified as "excluded conduct", for which it is always unlawful for a union to expel or exclude a person, even where such conduct was a minor reason among several reasons for the union's decision to exclude or expel:
>
> - current or former membership of a trade union ;
> - current or former employment ; or
> - conduct for which disciplinary action taken against an individual would be regarded as unjustifiable under section 65 of the 1992 Act.
>
> Section 174 also establishes a further category of conduct called "protected conduct", which is essentially current or former membership of a political party. However, Section 174 explicitly states that the activities a person undertakes as a member of a political party do not constitute "protected conduct". It is unlawful for a union to exclude or expel a person wholly or mainly on the grounds of that person's "protected conduct". The net effect of these provisions is to provide some scope for a union lawfully to expel or exclude its members on the basis of their political activities such as standing for political office or campaigning on behalf of a political party.[99]

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95 HC Deb 14 January 2004 cc827-8

96 *Aslef v The United Kingdom*, application number 11002/05

97 Department for Trade and Industry, *Echr Judgment In Aslef V UK Case – Implications For Trade Union Law, Consultation Document*, May 2007 http://www.berr.gov.uk/files/file39440.pdf

98 Department for Trade and Industry, *Echr Judgment In Aslef V UK Case – Implications For Trade Union Law, Consultation Document*, May 2007 http://www.berr.gov.uk/files/file39440.pdf

99 Department for Trade and Industry, *Echr Judgment In Aslef V UK Case – Implications For Trade Union Law, Consultation Document,* May 2007 http://www.berr.gov.uk/files/file39440.pdf

The consultation explains what the judgement means for trade union law:

> According to the Court, trade unions must be given greater autonomy to decide whether the political party membership of individuals should debar them from belonging to the union.
>
> The UK Government does not intend to appeal the judgment, and recognises that the relevant part of trade union law in this country should be amended to ensure compatibility with the Convention. The UK Government therefore concludes that those aspects of section 174 of the 1992 Act [the *Trade Union and Labour Relations (Consolidation) Act 1992*] which refer to political party membership and activities need to be changed to ensure complete compliance with Article 11.
>
> The Government is now undertaking a three month public consultation on its proposed approach to ensuring that the relevant parts of section 174 of the 1992 Act are compliant with Article 11.
>
> Options
> A summary of proposed options is set out below:
>
> Option 1: Amend Section 174 to ensure there is no explicit reference to a special category of conduct relating to political party membership or activities.
> Option 2: Retain the special category of conduct relating to political party membership and activities but significantly amend the rights not to be excluded or expelled for such conduct.[100]

The closing date for responses to the consultation was 8 August 2007. The Joint Committee on Human Rights reported on the Bill in April 2008 and dealt at length with this particular aspect.[101]

4. The Bill

Clause 18 amends section 174 of TULRCA to allow a trade union to expel or exclude an individual on the basis of their current or past membership of a political party, if membership of that political party is contrary to the rules or objectives of the trade union. There must be a degree of certainty about the relevant objective measured in relation to a person working in the same trade, industry or profession as the excluded individual at the time of at the time of their conduct; or by a member of the union. An individual must be given notice of a proposal to expel or exclude them (including reasons) and a fair opportunity to make representations. However, the expulsion or exclusion will still be unlawful if any of three conditions are met:

- The decision to exclude or expel does not comply with the union's rules;
- The decision is taken unfairly; and

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[100] Department for Trade and Industry, Echr Judgment In Aslef V UK Case – Implications For Trade Union Law, Consultation Document, May 2007 http://www.berr.gov.uk/files/file39440.pdf

[101] Joint Committee on Human Rights, *Seventeenth Report of Session 2007-08*, HL Paper 95; HC 501, 28 April 2008

- Loss of union membership would cause the individual to lose his livelihood or suffer other exceptional hardship.

Appendix: Key Documents

EMPLOYMENT BILL DOCUMENTS

Employment Bill [HL], Bill 117 2007-08
http://www.publications.parliament.uk/pa/cm200708/cmbills/117/08117.i-ii.html

Explanatory Notes to Employment Bill [HL], Bill 117 2007-08
http://www.publications.parliament.uk/pa/cm200708/cmbills/117/en/index_117.htm

Employment Bill Impact Assessments, February 2008
http://www.berr.gov.uk/files/file44363.pdf

Progress of the Bill can be tracked on the Parliamentary website
http://services.parliament.uk/bills/2007-08/employment.html

CONSULTATION DOCUMENTS

Paper part 1; Clauses 1–7: "Resolving Disputes in the Workplace" (21st March – 20th June 2007);
http://www.berr.gov.uk/consultations/page38508.html

Dispute resolution – Govt response to consultation, 19th May 2008
http://www.berr.gov.uk/files/file46233.pdf

Paper part 2:
Clauses 8-12 and 15-16: "National Minimum Wage and Employment Agency Standards Enforcement" (16th May – 8th August 2007);
http://www.berr.gov.uk/consultations/page39461.html

National Minimum Wage and Employment Agency Standards Enforcement – Govt response to consultation, 6th December 2007
http://www.berr.gov.uk/files/file42606.pdf

Paper part 3:
Clause 13-14: "National Minimum Wage and Voluntary Workers" (12th June – 4th September 2007);
http://www.berr.gov.uk/consultations/page39871.html

National Minimum Wage and Voluntary Workers – Govt response to consultation, 27th November 2007
http://www.berr.gov.uk/files/file42602.pdf

Paper part 4:
Clause 18: "European Court of Human Rights Judgment in Aslef v UK – Implications for Trade Union Law" (16th May – 8th August 2007).
http://www.berr.gov.uk/consultations/page39463.html

Trade union membership – Govt response to consultation, 28th November 2007
http://www.berr.gov.uk/files/file42603.pdf

Appendix 2: *Aslef v Lee*

On 21 May 2003 an employment tribunal found that Jay Lee, a train driver from Bexley, had been unfairly expelled from the train drivers union ASLEF. The relevant facts were set out in paragraphs 13 – 15 of the tribunal's decision:

> 13. On 17 April 2002, Marion Kearney of ASLEF sent a report to Mick Rix, the General Secretary of ASLEF, concerning Mr Lee ……The report states that Ms Kearney was first alerted via a telephone call from an Anti-Nazi League activist and she attached various information showing that Mr Lee was an activist in the British National Party. The information available was an extract from Searchlight, the magazine of the Anti-Nazi League, which showed that Mr Lee had stood as a candidate for Newham South for the British National Party in the local elections on 7 May 1998; and an extract from Spearhead for February 2000 with articles written by Mr Lee. Spearhead is the magazine of the British National Party. There was also an extract from Searchlight of February 2002 ….. which stated:
>
> "The tape is the latest chapter in the BNP's campaign against Islam which began after the summer riots in Oldham in Bradford, but intensified after the terrorist attacks of 11 September. In October, activists handed out anti-islamic leaflets outside Canterbury and York Cathedrals. J Lee, a BNP activist in Bexley, even adorned a priest's outfit for the occasion……..
>
> 14 There were also electioneering papers entitled "Northend Patriot" …..
>
> 15 Attached to Ms Kearney's report …. was a fax from Bexley Council for Racial Equality in which it was alleged:
>
> "He had seriously harassed ANL [Anti-Nazi League]
>
> leafleteers (female) including,
>
> - Taking pictures of them
>
> - Taking their car numbers
>
> -Making "throat cut"gestures
>
> - He followed one woman in his car all the way to Dartford then back to Bexley, where he saw where she had parked her car - clocking her house number.
>
> This has been reported to the police."

On these facts the tribunal found as follows:

> Mr Lee accepted that he took photographs but he does not deal with any of the other allegations that are made in the fax from the Bexley Council for Racial Equality….. In evidence, Mr Lee said that he had not been spoken to at all by the police and there was no other evidence that he had been. The Tribunal concluded that there was some evidence that Mr Lee did do some of the things alleged and that complaints were made. There has been no real rebuttal by Mr Lee in his evidence except on the issue of the matter having been reported to the police.

Following this Mr. Lee was expelled from the union. The General Secretary of the Union, Mr Rix, informed him of this in a letter dated 24 April 2002. It is set out in the Employment Appeals Tribunal judgement and read as follows:

> We are writing to advise you that your membership is…incompatible with Membership of ASLEF, and you will likely bring our Union into disrepute, and that you are against the objects of Rule 5 of our Union.
>
> You did not tell ASLEF that you are a member of the British National Party and an active member of a well-known fascist organisation. You did not tell us that your activities, on behalf of the BNP had been brought to the attention of the police. This information should have been supplied to us on application.
>
> Therefore due to our rule book requirements and a long standing policy of the 1978 AAD of ASLEF your membership has been terminated as it should not have been accepted in the first instance.

The Tribunal found that the expulsion was unlawful under sections 174(2)(d) and 174(4)(a)(iii) of the *Trade Union and Labour Relations (Consolidation) Act 1992,* which gives trade union members the right not to be excluded or expelled from the union because they belong to a particular political party.

The case was appealed to the Employment Appeals Tribunal (EAT) who, in February 2004, overturned the tribunal's decision and remitted it back to a different tribunal for a rehearing, giving the following clarification of the law:

> Conduct within s174(4)(a)(iii) of TULRA 1992 for which a Trade Union cannot expel a member is limited to being or ceasing to be a member of a political party (in this case BNP). A union can expel a member if its reason is exclusively his or her activities as a party member and not his or her party membership per se: and such conduct does not need to be *linked* to his or her membership of the Union.[102]

The second tribunal upheld Mr. Lee's complaint on the grounds that his expulsion "was primarily because of his membership of the BNP". Following this second decision ASLEF applied to the European Court of Human Rights claiming breach of Article 11 which provides for freedom of association.

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[102] *Associated Society of Locomotive Engineers and Firemen v. Jay Lee (24 February 2004) EAT, Appeal No: UKEAT/0625/03/RN*.