**RESEARCH PAPER 98/13**
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# *Employment Rights (Dispute Resolution) Bill [HL] 1997/98*

**Bill 110**

This Bill stems from the Conservative Government's Green Paper, *Resolving Employment Rights: Options for Reform*, published in December 1994, and a draft Bill issued for consultation in July 1996. Its aim is to speed up procedures for resolving disputes about individual employment rights. Amongst other things, it renames industrial tribunals "employment tribunals", provides an alternative means of resolving disputes by voluntary referral to arbitration under a scheme to be drawn up by ACAS, extends the situations in which a chairman may sit alone and encourages the use of in-house appeal procedures. Although essentially a Government Bill, it was introduced in the Lords as a Private Peer's Bill by Lord Archer of Sandwell. It completed its passage through the Lords on 13 January 1998, was introduced in the Commons on 14 January 1998 and is due to have its Second Reading on 16 January 1998. The Member in charge is John Healey, MP.

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# I Introduction

The *Employment Rights (Dispute Resolution) Bill [HL] 1997/98* was introduced in the House of Lords on 9 July 1997 as a Private Peer's Bill, by Lord Archer of Sandwell.[1] Lord Archer is a Labour Peer (formerly the Labour MP, Peter Archer, who was Solicitor-General in the 1974-79 Labour Government) and currently Chairman of the Council on Tribunals. The Bill has Government support.[2] Lord Archer described his "symbiotic relationship with the Government" in relation to the Bill during his speech on second reading:

> "The Government would be pleased to see it on the statute book. So would I, and many others. But the Government, as your Lordships are already discovering, are faced with a heavy legislative programme. When I learnt that the Government did not intend to include the Bill in their programme for this Session but were prepared to make the text available to me, I ventured to introduce it, so that this House would not be denied the opportunity of considering it and, if it finds favour, of passing it for transmission to another place."[3]

The main purpose of the Bill is to speed up procedures for resolving disputes about individual employment rights. Its provisions include:

- renaming "industrial tribunals", "employment tribunals"
- permitting tribunals in some circumstances to determine proceedings without a full hearing
- extending the situations in which a chairman may sit alone
- providing an alternative means of resolving disputes by voluntary referral to arbitration under a scheme to be drawn up by the Advisory, Conciliation and Arbitration Service (ACAS)
- encouraging the use of in-house appeals procedures

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1 HL Bill 20

2 DTI Press Notice, 10 July 1997, *Government supports Bill to provide new voluntary alternative to industrial tribunals*

3 HL Deb 25 July 1997, c 1579

# II Background

The Bill is the result of a lengthy consultation exercise. On 14 December 1994, the Conservative Government published a Green Paper, *Resolving Employment Rights Disputes: Options for Reform*, which contained a wide range of proposals for changing industrial tribunal procedures to help them deal with the increasing volume and complexity of cases.[4] On 20 November 1995, Ian Lang, then Secretary of State for Trade and Industry, announced that most of the proposals in the Green Paper had been "widely supported". Although one or two of the proposals would be dropped in response to criticisms, the Government would be going ahead with most of them.[5] The main proposals dropped at this stage were those imposing a statutory requirement on employees to try to resolve disputes through internal procedures before taking a case to a tribunal, and on chairmen to sit alone in certain circumstances.

On 17 July 1996, the Government issued a draft *Employment Rights (Dispute Resolution) Bill* for consultation.[6] At the same time, it announced that some of the Green Paper's proposals would be taken forward by using secondary rather than primary legislation. These were:

- the extension of the time limit for entering a notice of appearance from 14 to 21 days[7]
- allowing tribunals to dismiss a case at any time during a substantive hearing if it becomes clear that it will fail[8]
- allowing tribunals to award costs where a party has refused a reasonable offer of a settlement[9]

The Conservative Government did not find time to introduce the Bill before the General Election on 1 May 1997. The Labour Government has made some further changes to the Bill, the most significant of which is the removal of the option of submitting a dispute to private arbitration. The Conservative draft Bill would have allowed the parties to a dispute to agree to submit it to binding arbitration either by ACAS or a private arbitrator. If they did this they would exclude the jurisdiction of a tribunal. Under the present Bill, tribunal jurisdiction can only be excluded by reference to ACAS arbitration.

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4 Cm 2707, December 1994

5 HC Deb 20 November 1995, c 20W

6 *Resolving Employment Rights Dispute: Draft Legislation for Consultation*, DTI, July 1996

7 implemented by the *Industrial Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 1996 SI No 1757*

8 This proposal has now been dropped

9 This proposal has now been dropped

# III Industrial Tribunals

Industrial tribunals were originally established under the *Industrial Training Act 1964* to hear appeals against the assessment of industrial training levies. From these small beginnings, they have grown into "quasi-labour courts, adjudicating in disputes between employers and employees" under many different Acts of Parliament and Statutory Instruments.[10] It was the Donovan Commission's report on *Trade Unions and Employers' Associations,* published in 1968, which recommended their expansion into labour tribunals which would hear all disputes between individual workers and their employers. The Report explained:

> "The object we have in mind in making this recommendation is not only to overcome the present multiplicity of jurisdictions. It is also, and primarily, to make available to employers and employees, for all disputes arising from their contracts of employment, a procedure which is easily accessible, informal, speedy and inexpensive, and which gives them the best possible opportunities of arriving at an amicable settlement of their differences."[11]

These words have often been quoted as the purpose of industrial tribunals. For example, Phillip Oppenheim, then a junior Employment Department Minister, used them when announcing the publication of the Green Paper, *Resolving Employment Right. Options for Reform*:

> "The Government believe that the industrial tribunals have proved to be a fair and effective means for adjudicating employment rights disputes. They are firmly committed to ensuring that they continue to provide an "easily accessible, informal, speedy and inexpensive" means of redress in accordance with the criteria laid down in 1968 and accepted by all governments since then."[12]

There can be little doubt that the caseload of industrial tribunals, and associated delays have increased markedly in recent years. The Green Paper recognised that:

> "The problem remains that the backlog of cases and the delays have risen to unacceptable levels in many locations over the past two years. There have been unprecedented increases in the caseloads which have more than doubled from 34,697 in 1989/90 to 71,661 in 1993/94 and are likely to continue growing in the years ahead."[13]

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10 Justice, *"Industrial Tribunals"*, 1987
11 Cmnd 3623, June 1968, para 572
12 HC Deb 14 December 1994, c 696W
13 Cm 2707, December 1994, para 1.6

In England and Wales only 54% of complaints were heard within 26 weeks in 1993/94.[14] The percentage has improved since then. In 1995/96, the percentage of cases coming to a hearing within 26 weeks was 76%, and the estimate for 1996/97 was 78%.[15] The Employment Tribunals Service has been set a target of bringing 85% of single cases to a first hearing within 26 weeks of application for 1997/98.[16]

Since the Green Paper was published the number of cases has risen still further - to 88,910 in 1996/97, with a forecast over 109,000 for the year 2000.[17] Fuller details of industrial tribunal workloads are given in Appendix 2 to this paper.

The proposals in the Green Paper were designed to deal with this problem and stem precisely from concern that "the industrial tribunals have departed from their original objectives".[18] The Green Paper attributes this in part to "increased labour turnover in the economy", but also to:

> "the tribunals' extending jurisdiction and a growing propensity to litigation in defence of employment rights. At the same time, the developing case law in both domestic and European courts has added to the complexity of the deliberations of the tribunals. These developments have placed considerable pressures on the tribunals, leading - despite the injection of increased resources - to unreasonably long delays in many locations and the seemingly inexorable growth of 'legalism' in their proceedings."[19]

The TUC would add such matters as "worsening industrial relations" and the extension of rights to part time workers to the reasons for the growing caseload and delays.[20]

The main jurisdictions of industrial tribunals are listed below:[21]

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14 Ibid, para 3.12
15 DTI Departmental Report, March 1997, Cm 3605, p 45
16 HC Deb 20 March 1997, c 785W
17 Lord Archer, HL Deb 25 July 1997, c 1578
18 Green Paper, para 1.2
19 Ibid
20 TUC, *Justice for Working People*, December 1995
21 DTI Departmental Report, March 1997, Cm 3605, P 46

| **Jurisdiction** | **Applications** | | |
|---|---|---|---|
| | 1993-94 | 1994-95 | 1995-96 |
| | | | |
| Unfair Dismissal | 58% | 44% | 37% |
| Redundancy Pay | 12% | 11% | 6% |
| Wages Act | 15% | 19% | 16% |
| Race and Sex Discrimination and Equal Pay | 8% | 17% | 30% |
| Others | 7% | 9% | 11% |

Possible reasons for the increase in the relative proportion of discrimination cases over the period include the fact that, unlike unfair dismissal cases, they do not have a two year qualifying period nor, since 1995, a limit on the amount of compensation which can be awarded.

A detailed list of the matters which an industrial tribunal may be asked to decide is given in Appendix 1 to this paper.

Industrial tribunals consist of a legally qualified chairman, appointed by the Lord Chancellor in England and Wales, and in Scotland by the Lord President of the Court of Session; and two lay members, one drawn from a panel of employer members, the other from a panel of employee members. Lay members are appointed by the Secretary of State for Trade and Industry following consultation with organisations representing employers and employees. The tribunal system in England and Wales is supervised by a President who is supported by 11 Regional Chairmen who oversee the work of tribunals sitting within their region. Most hearings are arranged at the Regional Offices of Industrial Tribunals (ROITs) situated in the following major towns: London (two), Birmingham, Cardiff, Manchester, Nottingham, Bedford, Bristol, Leeds, Newcastle, Southampton .

There is a right of appeal against an industrial tribunal decision on a point of law to the Employment Appeal Tribunal (EAT). The administrative support to the industrial tribunals and EAT became a Next Steps Agency on 1 April 1997.[22]

[22] DTI Press Release, 9 May 1996, *An Executive Agency for the Industrial Tribunals - John Taylor.* The Agency's first year targets were announced on 20 March 1997, HC Deb cc 785-786W

# IV The Bill's Provisions

Part I of the Bill is concerned with industrial tribunal procedures; Part II with alternative means of resolving disputes; and Part III with awards of compensation. As the present Bill is so similar to that proposed in draft in July 1996 - the wording of most clauses is almost identical - the exposition which follows draws heavily on the Consultation Paper issued with the draft Bill at that time.[23] Annex A to that paper contained a summary of responses to the Green Paper proposals. It merely gives the number of responses in favour or against particular proposals, with no indication of their weight. Nevertheless, these figures are reproduced below. The DTI prepared a guide to the provisions of the Bill and very detailed Notes on Clauses for the debate in the Lords, and these, too, have been drawn upon where they add significantly to the Consultation Paper.[24] Major amendments made in the Lords have been noted.

## A. Industrial Tribunal Procedure

### 1. Change of name [Clause 1]

The clause changes the name of the tribunals from "Industrial Tribunals" to "Employment Tribunals".

The July 1996 Consultation Document explained:

"The new name will better reflect the tribunals' modern role in dealing with employment rights disputes rather than their original purpose of considering appeals by employers against levies imposed under the Industrial Training Act."

59 responses were for; 26 against and 116 took no view

### 2. Determinations without a hearing or full hearing [Clause 2]

The clause allows the tribunal procedure rules to be amended so that some cases can be determined without a full hearing:

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[23] DTI, *Resolving Employment Rights Disputes: Draft Legislation for Consultation*, July 1996

[24] DTI, *House of Lords: Guide to the Provisions of the Employment Rights (Dispute Resolution) Bill*, July 1997; and DTI, *House of Lords: Notes on Clauses to the Employment Rights (Dispute Resolution) Bill*, October 1997

a) where both parties consent to its being decided on the basis of written evidence alone.

The July 1996 Consultation Document explained:

> "2.9 The aim of the proposal is to streamline the procedures by allowing a Chairman to determine a case, without a hearing, on the basis of written evidence. Both parties' consent would be required and the parties themselves could opt for this or the tribunal could, of its own volition, ask the parties whether they agreed that their case could be determined on written evidence alone.
>
> 2.10 A majority of the respondents to the Green Paper supported the proposal. Some concerns were expressed that applicants might be at a disadvantage in preparing a written case. But against this, some argued that written evidence would in practice put the applicant and respondent on a more even footing than through cross-examination at a tribunal hearing. The tribunal would decide what evidence they required and, where necessary, seek this from the parties in each individual case. The parties would be free to submit additional information."

67 responses were for; 33 against; 101 expressed no view.

b) where the respondent has done nothing to defend the case

The July 1996 Consultation Document explained:

> "2.11 It is proposed that tribunals be given discretion to determine cases without a hearing where the respondent has not entered a notice of appearance (i.e. the respondent is not intending to contest the case). This will apply only where it is clear from the written evidence that the applicant's case will succeed.
>
> 2.12 A large majority of those responding to the Green Paper were in favour of this proposal. However, there was concern about what would happen if for any reason an employer failed to receive notification of a case. Such cases are likely to be few and it would, in any case, be open to an employer to seek a review of the tribunal's decision. Express provision to do this already exists under rule 11(1)(b) of the Industrial Tribunal Rules of Procedure SI 1993/2687 (as amended)."

65 responses were in favour; 17 against; 119 expressed no view.

c) if there is doubt about whether the case falls within the tribunals' jurisdiction

The July 1996 Consultation Document explained:

> 2.13 The aim of the proposal is to streamline the internal procedure of the tribunals and also to save a potential respondent being unnecessarily involved in tribunal proceedings. At present if the Secretary to the tribunal considers that a complaint does not fall within the tribunal's jurisdiction, he or she may write to the applicant explaining why it is thought that the tribunal is unable to deal with this complaint. If the applicant notifies the tribunal that he or she nevertheless wishes the complaint to proceed, then the case is registered and the respondent notified. If there is still a doubt about the entitlement to bring the complaint a Chairman may under the Rule 6 proceedings determine this issue. However before doing so, the tribunal must notify both parties and allow each to submit written representations and advance oral argument.
>
> 2.14 The proposal would allow regulations to be made to allow a Chairman to determine the applicant's entitlement to contest the proceedings **without notifying the respondent.** The applicant would be able to submit written representations and advance oral argument where relevant. There will also be provision for a review of the decision in those circumstances where a respondent considers the determination to be wrongly made."

58 responses were in favour; 19 against; 124 expressed no view

d) if the case is bound to fail because of the decision of a superior court

The July 1996 Consultation Document explained:

> "2.15 The aim of the proposal is to give tribunals greater powers to dismiss a case before it reaches a full hearing when this is the only possible outcome because of clear legal precedent - i.e. the tribunal is bound by the authority of a superior

court. Such cases would be determined by a Chairman and thus remove the need to hold a full hearing in cases that are clearly going to fail.

2.16 This strength of the tribunal process is based on the proposal in the Green Paper to dismiss 'weak' cases, which was supported by a majority of those responding. The proposal has been developed to define a 'weak' case. There would be a right of appeal to the EAT against the tribunal's decision."

79 responses were in favour; 39 against; 83 expressed no view.

e) where the proceedings relate only to a preliminary issue.

## 3. Hearings by the Chairman sitting alone [Clause 3]

The clause extends the categories of cases in which a chairman 'sits alone', unless he or she exercises the discretion to sit as a tribunal of three, to certain straightforward cases, including those on the right not to suffer unauthorised deductions of trade union subscriptions, the right to receive a written statement of employment particulars, and redundancy payments.

The July 1996 Consultation Document explains:

"2.17 The proposal is to increase the number of jurisdictions under which Chairmen have discretion to 'sit alone' without lay members. The additional categories are for certain technical cases. By far the most common will be disputes over redundancy payments, which currently account for about 10% of the tribunals' caseload. The others include :

i) proceedings under Section 11 of the Employment Rights Act 1996 (the right to receive a written statement of employment particulars, the right to a statement of changes in employment particulars and the right to be given an itemised pay statement);

ii) proceedings under Section 34 of the Employment Rights Act 1996 (relating to guarantee payments);

iii) proceedings under Section 70 of the Employment Rights Act 1996 relating to a claim under Section 64 (right to remuneration on suspension on medical grounds);

iv) proceedings under Section 170 of the Employment Rights Act 1996 (relating to an application for an employers' payment against the Secretary of State under Section 166 of the of the Employment Rights Act 1996);

v) proceedings under Section 68A of the Trade Union and Labour Relations (Consolidation) Act 1992 (unauthorised or excessive deduction of union subscriptions from wages);

vi) proceedings under Section 68A of the Trade Union and Labour Relations (Consolidation) Act 1992 (employer's failure to pay in whole or in part remuneration under a protective award);

vii) proceedings under regulation 11(5) of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (failure to pay compensation) as amended; and

viii) proceedings under Section 87 of the Trade Union and Labour Relations (Consolidation) Act 1992

2.18 This extension of the 'sit alone' practice was not included in the Green Paper, although it did include other 'sit alone' proposals. The original proposals, contained in the Green Paper, are not being pursued in the light of responses to that consultation exercise. Informal soundings have been taken with a number of organisations representing users of tribunals, including employers and employees. No significant objections to the proposed extension have been raised."

The present Bill adds another category - the appointment of an authorised person to conduct certain proceedings where an employee has died and there is no personal representative.

The Green Paper had proposed that the Chairman should be required to sit alone in all cases where he currently has discretion to sit alone or in all cases except those involving unfair dismissal or discrimination. It had also suggested that the Chairman should be given discretion to sit alone in unfair dismissal cases. The responses to these proposals were, respectively, 24, 21 and 19 for; 120, 126 and 129 against; 57,54 and 53, no view.

## 4. Hearings by Chairman and one lay member [Clause 4]

This clause would enable tribunal chairmen to sit with only one lay member where a party fails to attend and all other parties present agree.

The July 1996 Consultation Document explained:

> "2.19 The proposal is to enable a tribunal hearing to proceed where one of the lay members has failed to attend and one of the parties has also failed to attend. Currently, the law requires the consent of all parties, whether or not they are present, before a Chairman can sit with one lay member. This can lead to unnecessary delays and expense with hearings adjourned even where all those present wish to proceed and the absent party has no wish to be present."

61 responses were for; 19 against; 121 expressed no view.

## 5. Pilot scheme for appointment of legal officers [Clause 5]

This clause would allow an experiment in the use of legal officers to relieve Chairmen of some duties.

The July 1996 Consultation Document explained:

> "2.21 The aim of the proposal is to relieve tribunal chairmen, particularly in the large offices, of some of the interlocutory duties they currently are required to fulfil by appointing 'legal officers'. In England and Wales, legal officers would be either "authorised advocates" or "authorised litigators", as defined under Section 119 of the Courts and Legal Services Act 1990, and in Scotland they would have equivalent qualifications. They would be specifically recruited for this task, which would enable chairmen to devote more of their time to the important business, of hearing tribunal cases.
>
> 2.22 Legal officers would, for example, be able to grant postponements and extensions of time, make witness orders and dispose of cases being withdrawn. They would **not be able to conduct full hearings** but they would have the power

> to carry out pre-hearing reviews, the proposed determinations on written evidence alone, under Rule 6 of the Industrial Tribunal Rules of Procedure SI 1993/2687 (as amended) and where no notice of appearance has been lodged.
>
> 2.23 Consultation on the Green Paper suggested that the proposal would be welcomed with a majority of those responding in favour of a pilot; there were, however, doubts about practicability. The use of legal officers would first **be piloted in one or more tribunals** before a decision is taken about introducing them more widely."

49 responses were in favour; 19 against; 133 expressed no view.

The Notes on Clauses suggest a rather more limited range of functions for legal officers:

> "The appointment of 'legal officers' will relieve tribunal chairman of some of the interlocutory duties they currently carry out. Interlocutory duties include:
>
> - granting postponements and extensions of time,
> - making witness orders;
> - requiring parties to answer questions.,
> - ordering further and better particulars and the discovery of documents, and
> - disposing of cases being dismissed on withdrawal by parties."

An amendment (moved by Lord Archer) during the Third Reading stage in the Lords specifies certain matters (including pre-hearing reviews) which cannot be delegated to legal officers.

### 6. Jurisdiction in certain political fund contribution cases [Clause 6]

This clause will actually transfer a jurisdiction from the County Court to the tribunals, in the interests of consistency.

The July 1996 Consultation Document explains:

> "2.24 The aim of the proposal is to remove the current anomaly of an individual employment right issue being under the jurisdiction of the county court or the sheriff court rather than the Industrial Tribunals.

> 2.25 Members of trade unions have the right to choose whether or not to contribute to a union's political activities by paying the political levy as part of their union subscription. Employers may agree to deduct their employees' union subscriptions direct from their pay, and cases of dispute could arise when, for the purposes of convenience, an employer has not respected an employee's wishes regarding the deduction or non-deduction of the political levy.
>
> 2.26 Currently, an employee with such a dispute could apply to the county court or sheriff court. It is proposed that the jurisdiction for determining such disputes be transferred to the Industrial Tribunal, and that chairmen should have the discretion to 'sit alone' to decide such cases. There is also a remedy for members of a trade union in dispute with their trade union over political fund deductions. That is operated through the Certification Officer and remains unaffected by this proposal.
>
> 2.27 In the consultation on the Green Paper only two respondents objected, on the grounds that the tribunals had enough jurisdictions already. The number of such cases is likely to be very few."

30 responses were for; 2 against; 169 expressed no view.

## B. Alternative means of resolving disputes

### 1. ACAS Arbitration Scheme [Clauses 7-8]

These clauses are perhaps the most important in the Bill. They will allow parties in unfair dismissal disputes to opt for independent, binding arbitration provided by ACAS. (At present, ACAS has the power to arbitrate collective, but not individual, disputes.) Those agreeing to do this would lose the right to take the case to an industrial tribunal, but the awards made would have the same status as industrial tribunal awards. There is a power to extend this to other types of dispute by Order. The Labour Government has dropped the provision in the draft Bill which would have allowed private arbitration to replace a tribunal hearing, and has redrafted these clauses quite considerably. Nevertheless, the rationale for the change described in the July 1996 Consultation Document still stands:

> "2.28 The aim of this proposal is to provide a voluntary alternative to a tribunal hearing in cases of unfair dismissal by granting ACAS powers to fund and

provide an arbitration scheme. Parties would be able to opt for their unfair dismissal disputes to be resolved by arbitration using the ACAS scheme. The proposal would reduce the tribunals' caseload, whilst offering the parties to the dispute a more informal, speedier, private and less expensive means of settling their differences. At the same time we propose to make express provision in the law on 'compromise agreements', which settle employment disputes without a tribunal hearing, to encourage agreements to resolve disputes by arbitration.

2.29 There should be benefits to arbitration for both sides. It should be quicker, cheaper, more private and more informal than a tribunal hearing. The Government would expect the majority of parties who opt for arbitration to do so as a result of action taken by a conciliation officer. A compromise agreement would be another method of entry into the ACAS scheme.

2.30 Conciliation officers are already closely involved in the industrial tribunal system and a lot of the work that a conciliation officer does now goes on in parallel with work undertaken in the tribunal. This existing ACAS involvement should therefore ensure that there is no overall additional cost or delay caused by the possibility of arbitration as an alternative means of settlement.

2.31 Arbitration will be another option that ACAS can offer in their work to encourage parties to consider how they might settle their disputes. The draft Bill proposes that ACAS will draw up an arbitration scheme which will then be approved by the Secretary of State. The Bill proposes that the power be taken to extend the ACAS scheme beyond unfair dismissal. This will be considered in the light of experience. Annex B outlines how an ACAS scheme might work. It is for illustrative purposes only and is not a proposal from ACAS."

75 responses supported voluntary binding arbitration as an alternative; 55 opposed it; 71 expressed no view.

The Notes on Clauses identify those elements which will have to be included in the ACAS arbitration scheme under the Bill:

- "ACAS can revise the scheme with the Secretary of State's approval;
- Parties must agree in writing to submit to arbitration under the scheme;
- ACAS must appoint arbitration officers who are not officers or employees of ACAS to hear cases under the scheme,

- The Secretary of State can apply the provisions of Part I of the Arbitration Act 1996 to the scheme as she wishes and she can modify these provisions;
- Continuity of employment or re-employment after arbitration under the scheme can be preserved by the regulations, as it is after an order of reinstatement or re-engagement by an industrial tribunal;
- An order under the scheme to provide re-employment will be enforceable through a tribunal, as is any reinstatement or re-engagement order made by a tribunal.
- The amount of compensation equivalent to the "basic award" can be guaranteed by the Secretary of State should the employer become insolvent."

ACAS drew up a Memorandum outlining its thinking so far on the Arbitration Scheme for the debate in the House of Lords.[25] This is reproduced in full as Appendix 3 to this paper, but key points are:

> "The underlying principle adopted by the Service is to formulate the scheme so as to make it as similar as possible to the arbitrations currently undertaken by ACAS in resolving trade disputes. In this way the scheme produced will be a genuine alternative to the employment tribunal process rather than an imitation of it. The relevant key features of current ACAS arbitration in this respect are that it is relatively informal, free of legalism and confidential.
>
> Use of the scheme will be voluntary. It will be available only where both parties agree to opt for it. Before agreeing to go to arbitration both parties will be aware of the details of the scheme and the way it works. The scheme will be explained in leaflet(s) written in plain English. If either party is unhappy with the non-legalistic nature, the lack of appeal on a point of law, the private nature of proceedings or any other element of the ACAS scheme then they need not opt to go to arbitration. The industrial tribunal will continue to offer a way of resolving grievances for those who do not wish to use the ACAS scheme."

Access to the scheme will be via either a compromise agreement or via a written agreement after a conciliation officer has taken action.

Helen Leiser, Director of Employment Relations at the DTI, argued strongly in favour of the arbitration scheme during a speech to the Employment Lawyers Association on 26 November 1997:

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[25] ACAS, Memorandum for House of Lords, 1 October 1997, *ACAS Arbitration Scheme*

> "I would like to focus particularly on this last proposal. The Bill itself merely enables the development of a scheme which it will be for ACAS to develop, subject to approval by Ministers. The proposal attracted some controversy on its passage through the Lords. There is concern that arbitration will in some sense provide a less adequate remedy than determination by a full tribunal. There is, however, a saying about the "best being the enemy of the good". I would like to spell out the reasons why Ministers believe concerns about the proposed arbitration scheme are misplaced, and that it will in fact be a valuable addition to the options available to employees and employers: the scheme will operate to clear standards, based on the law, and underpinned by ACAS' knowledge of good employment practice. Access to the scheme is entirely voluntary. Important protections are built in for individuals attracted to using the scheme. Access will be possible only after advice from a conciliation officer, or via a compromise agreement (itself subject to important protections to ensure employees are well-advised). And though, in general, arbitration will not be subject to appeal, there will be provision for review in the event of any serious irregularity.
>
> The final point I want to make is the most important of all. We believe - based on evidence from our extensive consultations – that the arbitration option will be attractive to many people who wish to resolve their disputes in a less formal, more private and probably speedier way. It is not always in the parties' interests to pursue a dispute to the bitter end just because it may contain a point of law. There is benefit too to the tribunals - which are likely to have some substantial new tasks to cope with - if employers and employees who are keen to resolve unfair dismissal disputes without a full hearing, have the opportunity to do so.
>
> I hope therefore that in dealing with clients in circumstances where the scheme is likely to be attractive, you will encourage them to consider the option. I will know the scheme has succeeded when objective advice on this matter becomes standard practice among employment lawyers!"

An amendment (moved by Lord Archer) made during the Committee stage in the Lords provides that the arbitration scheme can only be extended beyond unfair dismissal cases (eg to sex or race discrimination cases) by affirmative resolution of both Houses of Parliament.[26]

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[26] HL Deb 21 October 1997, c 682

## 2. Qualifying sources of advice in compromise agreements [Clauses 9-10]

This clause would extend the qualifying sources of advice in compromise agreements and clarify the insurance provisions.

The July 1996 Consultation Document explained:

> "2.36 Under current legislation the parties to an 'individual employment rights dispute may settle that dispute, for example by reaching a financial agreement. In order for such an agreement to be binding, the parties must either reach such a settlement after an ACAS conciliation officer has taken action or enter into a private 'compromise agreement'.
>
> 2.37 In the case of a compromise agreement the applicant must have received independent advice from a lawyer as to the terms and effect of the agreement and, in particular, its effect on the applicant's ability to pursue their rights before a tribunal. In addition, the advice must be covered by a policy of insurance held by the lawyer so as to provide a means of remedy in the case of negligent advice.
>
> 2.38 The proposal is to remove the restriction that the advice must come from a qualified lawyer and instead permit any independent person to provide such advice provided that the advice is covered by a policy of insurance to cover the risk of negligent advice. This would allow, in addition to lawyers, others with relevant expertise and who were willing, such as trade unions or advice agencies, to give advice on compromise agreements.
>
> 2.39 There was a large majority of support for this proposal in the responses to the Green Paper. Subsequent informal soundings with a number of bodies suggest that this proposal would be welcomed and likely to prove beneficial to those involved in individual employment rights disputes."

83 responses were for; 20 against and 98 expressed no view.

> "2.40 The proposal is to provide legal clarification that solicitors who are covered by the Solicitors' Indemnity Fund are covered by a 'policy of insurance' relating to compromise agreements. Some doubts have been expressed, since the amendments to the 'compromise agreement' provisions which were contained in

> the Trade Union Reform and Employment Rights Act 1993, that the present provisions secure this effect. Removing any such doubts will further encourage the use of compromise agreements.
>
> 2.41 There was no opposition to this revealed by the consultations on the Green Paper."

An amendment (moved by Lord Archer) made during the Committee stage in the Lords restricts the groups of people able to give independent advice in compromise agreements to those such as independent trade union officials and advice centre workers, certified as competent.[27] Provisions in Clause 9 and Schedule 1 of the Commons Bill now list the "relevant independent advisers" who are able to give valid advice.

### 3. Settlements in redundancy cases [Clause 11]

This clause extends the powers of Conciliation Officers to conciliate in statutory redundancy payment cases.

The July 1996 Consultation Document explains:

> "2.42 The aim of the proposal is to give conciliation officers a duty to conciliate in claims relating to statutory redundancy payments. Conciliation officers currently have a duty to attempt to conciliate in almost all other individual employment rights disputes. Around two thirds of cases are either withdrawn or settled, many of them as a result of ACAS intervention. Redundancy payment cases currently account for around 10% of the tribunals' caseload and conciliation would help reduce the number of these cases going to a hearing.
>
> 2.43 This proposal was supported by a large majority of the responses to the Green Paper."

78 responses for; 9 against; 114 expressed no view.

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[27] HL Deb 21 October 1997, cc 684-686, 694

### 4. Dismissal procedures agreements [Clause 12]

This clause clarifies, streamlines and makes more flexible the current legislation surrounding Dismissal Procedures Agreements.

The July 1996 Consultation Document explains:

> "2.44 The purpose of these changes is to clarify, streamline and make more flexible the current legislation whereby employers and recognised independent trade unions can by entering a dismissal procedures agreement opt out of the statutory provisions on unfair dismissal, subject to certain requirements. The changes will bring the provision more into line with the thrust of the remainder of the Bill. The first is to ensure that agreements under the provisions are not required to include unrestricted access to arbitration (which, in effect, enables either party to require a case to be heard again if they dislike the decision). The second is to provide for payments to be made under the insolvency provisions in line with those provided in respect of industrial tribunal awards.
>
> 2.45 The proposal is technical and relates in practice only to the single agreement that has been reached under the terms of the relevant legislation."

The one agreement is that of the Joint Industry Board for the Electrical Contracting Industry.[28]

28 responses were for; 26 against; 147 expressed no view.

## C. Awards of Compensation

### 1. Use of internal appeal procedures [Clause 13]

This clause is designed to encourage employers and employees to make use of 'in-house' appeals procedures. It has been considerably redrafted since the draft Bill, but the intent is the same.

The July 1996 Consultation Document explained:

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[28] Green Paper, *Resolving Employment Rights Disputes: Options for Reform*, Cm 2707, December 1994, para 4.28

"2.46 The aim of the proposal is to encourage greater use to be made of internal procedures, with a view to increasing the number of cases settled without recourse to a tribunal hearing.

2.47 It is proposed that where an employer has an appeals procedure of which a complainant does not seek to make use, the tribunal should have the power to reduce the amount of any compensation awarded. Conversely, where an employer has an appeals procedure that the employee seeks to use and the employer fails to facilitate that procedure, the tribunal is to have the power to increase a compensatory award.

2.48 In order to ensure that an employee is not unfairly penalised, the tribunal's power will apply only where the employer has notified the employee of the appeal procedure. The amount of any reduction or increase in compensation awarded would be for the tribunal's discretion, taking account of the facts of the case. For example, there may be cases where a tribunal would consider it unreasonable for an employee to use internal procedures. Examples of these were given by respondents to the Green Paper such as cases of sexual harassment or where a relationship in a small firm had completely broken down. The tribunal would therefore have regard to the nature of the case and also to the size and administrative resources of the employer. **Views are invited on any other specific examples where it might be reasonable for an individual not to use internal procedures.**

2.49 The tribunal will not be required to investigate the existence of an appeals procedure or whether the applicant was notified of such a procedure. If the applicant is claiming that they attempted to use the procedure and the respondent prevented them, then the applicant will have to demonstrate that they attempted to use it and that the respondent prevented them. Similarly, if the respondent is claiming that the applicant was notified of an appeals procedure and did not exercise their right to use it then it will be for the respondent to demonstrate these facts. These issues will arise after the substantive case has been determined and will be taken into account in the assessment of compensation.

2.50 A majority of the responses to the Green Paper supported this proposal and many of those who were against were worried that it was not even-handed. The clause in the draft Bill is intended to meet that concern."

The Bill limits the amount of any such reduction or supplementary award to two weeks' pay.

73 responses were in favour; 49 against; 79 expressed no view. (NB This was on the Green Paper proposal which only applied to employees. The Bill also applies the proposal to employers.)

An amendment (moved by Lord Archer) made during Committee stage in the Lords restricted the possibility of reducing compensation where the dismissed employee had failed to make use of internal procedures to cases where he had been notified of the internal procedures at or shortly after the time of dismissal.[29]

## 2. Unfair Dismissal and Disability Discrimination [Clause 14]

This clause prevents double recovery of compensation where it is awarded in respect of the same act under both the *Employment Rights Act 1996* (unfair dismissal) and the *Disability Discrimination Act 1995*. Similar provisions already exist in respect of sex discrimination and race discrimination awards.

This was not in the draft Bill.

## 3. Northern Ireland [Clause 16]

The Bill extends to Great Britain only. It provides that corresponding provision for Northern Ireland may be made by means of an Order in Council under the Northern Ireland Act 1974, subject to the negative resolution procedure.

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[29] HL Deb 21 October 1997, cc 687-691

# V The Debate in the Lords

The Bill was debated at some length in the Lords where a number of eminent employment lawyers and academics such as Lords Wedderburn and McCarthy made substantial contributions. The Government's position was explained both by Lord Archer, the Bill's promoter/sponsor and by Lord Haskel, a Government Whip in the House of Lords.

The stages were:

Second Reading - 25 July 1997 - HL Deb cc 1577-1611

Committee Stage - 21 October 1997 - HL Deb cc 634-697

Report Stage - 20 November 1997 - HL Deb cc 693-720

Third Reading - 13 January 1998 – HL Deb cc 1012-1046

Topics which provoked some of the liveliest discussion included:

the role and qualifications of legal officers

the implications of parallel systems of justice (arbitration and tribunals)

the wisdom of extending arbitration beyond unfair dismissal

## A. Legal Officers

At Committee stage, Lord Haskel assured the Lords:

> "That it is our intention that legal officers will be qualified barristers, solicitors or advocates, to ensure that tribunal users and the public at large can have confidence in their determinations.
>
> Legal officers will not be able to conduct full hearings. We propose to restrict further their competency by the regulations during the pilot study. It is not envisaged in the pilot that they will conduct pre-hearing reviews or a determination under the new procedures introduced under Clause 2 of the Bill. My Lord Archer has already listed the kind of function which we expect to fall within the legal officers' remit. These might include disposing of settled or withdrawn cases, granting postponements, extending time limits, making orders

> for the provision of further and better particulars and making orders requiring the attendance of witnesses or the discovery or inspection of documents"[30]

On report, Lord Archer attempted to meet the concerns expressed in Committee about the lack of any restrictions on the face of the Bill over the matters which legal officers could deal with, by moving an amendment which would require the Secretary of State to make Regulations specifying those matters which could be delegated to legal officers and those which had to be dealt with by the Chairman. Lord Lester moved an amendment which sought to restrict legal officers' powers to "interlocutory" matters. Lord Archer, and Lord Haskel, the Government Minister, argued that "interlocutory" was difficult to define and that the pilot scheme might throw up areas which could usefully be dealt with by legal officers but which did not fit this description. Lord Haskel again listed the tasks they had in mind for legal officers:

> "The kind of tasks we have in mind for them include disposing of settled or withdrawn cases, granting postponements and extending time limits, making orders for the provision of further and better particulars and making orders requiring the attendance of witnesses or discovery or inspection of documents. However we shall discuss these with the presidents of the tribunals, who will be closely involved, both in drawing up the pilot experiment and in operating and evaluating it.
>
> As my noble and learned friend, Lord Archer, has indicated, I can confirm that legal officers will not be empowered to conduct pre-hearing reviews, determinations under the new provisions introduced under Clause 2 of the Bill, or rule 6 determinations."[31]

Lord Archer's amendment was agreed.[32] Lord Lester did not move his amendment but warned that unless more specific restrictions on legal officers' powers were introduced on Third Reading, he would divide the House on the matter.[33]

By Third Reading, a compromise solution had been found and Lord Archer moved an amendment, which proved acceptable to all the protagonists, specifying those activities which a Legal Officer would <u>not</u> be allowed to undertake:[34]

> "My Amendments…are designed to meet the anxieties expressed on Report by specifying on the face of legislation what a legal officer may not be empowered to do. He would not be empowered to carry out a pre-hearing review, nor any of the new procedures under Clause 2 of the Bill. He would

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30 HL Deb 21 October 1997, c 658
31 HL Deb 20 November 1997, c 699
32 c 703
33 c 704
34 Lord Archer, HL Deb 13 January 1998, c 1014

> have no power to determine proceedings except where an application has been withdrawn or the parties have reached a settlement."

## B. Arbitration

Lords Wedderburn, McCarthy and others were concerned at the possibility that two separate but parallel systems of justice for dealing with employment disputes could develop and might diverge: one (arbitration) would be private, would set no precedents and would contain no rights of appeal: the other (tribunals) would be public, governed by a body of law and contain rights of appeal. At Report stage, Lord Wedderburn moved an amendment (which he eventually withdrew) which would place on the face of the Bill the right to take an arbitrator's decision to judicial review or the European Court of Justice. He argued that no-one would choose arbitration if there was no appeal against perverse decisions. Baroness Turner and Lord McCarthy supported him. Lord Haskel and Lord Archer argued that the whole purpose of introducing the arbitration option was to simplify and speed up dispute resolution. The finality of an arbitrator's decision was its attraction, almost its defining feature. ACAS oppose appeals for this reason. However, the Government do intend to use section 68 of the Arbitration Act to deal with cases of serious irregularity:[35]

> "….in order to ensure that if there is something wrong…….a safety valve will be provided, we propose to apply the provisions of section 68 of the Arbitration Act 1996 which relates to serious irregularity, subject to discussion with ACAS, and with such modifications as are necessary to make them appropriate to a scheme for resolving an employment rights dispute."

There are two cases before the European Court of Justice at present which deal with the extent to which Member States must provide a channel for reference to the European Court in any arbitration procedures.[36] The UK Government has submitted observations (which, it appears, stress the importance of finality).[37]

On Third Reading, Lord Archer moved an amendment to deal with a problem that had come to light, namely, that the Arbitration Act does not apply to Scotland. The amendment provides for the ACAS scheme to make similar provision, via appeal to the Court of Session or Employment Appeal Tribunal, for challenges to arbitration awards in Scotland. Lords Wedderburn and McCarthy and Baroness Turner raised a number of concerns about the appropriateness of using the Arbitration Act at all, but withdrew their amendments and accepted Lord Archer's.[38] In the course of this debate, Lord Haskel made it clear that it was unlikely that the draft ACAS scheme would be available before the Bill had received Royal Assent.[39]

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35 Lord Haskel, HL Deb 20November 1997, c 713
36 *Eco Swiss China Time Ltd v Bennetton International* and the *Compagnie Maritime Belge*
37 Lord Archer, c 715
38 HL Deb 13 January 1998, cc 1021-1037
39 HL Deb 13 January 1998, c 1035

Extension of Arbitration

Lord Haskel assured the Committee that "at present the Government have no plans to introduce further arbitration schemes. ….. if the Government wished to consider other arbitration schemes - for example, as regards discrimination provisions - they would first consult widely with interested parties - for example, the Equal Opportunities Commission, the Commission for Racial Equality and groups of the disabled."[40]

## C. Amendments made in the Lords

Three substantial amendments were made in Committee:

Clause 7 was amended so that it will only be possible to extend the aritration scheme to other jurisdictions, such as discrimination, by affirmative resolution of both Houses of Parliament

Clause 9 was amended to restrict the groups of people able to give independent advice in compromise agreements to those such as independent trade union officials and advice centre workers, certified as competent

Clause 13 was amended to limit the possibility of reducing compensation where the dismissed employee had failed to make use of internal procedures to cases where he had been notified of the internal procedures at or shortly after the time of dismissal.

One substantial amendment was made on Report:

Clause 5 was amended to require the Secretary of State to make Regulations specifying those matters which could be delegated to legal officers and those which had to remain with Chairmen.

Two substantial amendments were made on Third Reading:

Clause 5 was amended again to replace the previous amendment with one specifying what a legal officer may not be empowered to do.

Clause 7 was amended to ensure like provision in Scotland, England and Wales. The Government had already said it would use section 68 of the Arbitration Act 1996 with any necessary modifications, to allow challenges to arbitration awards in cases of serious irregularity. But the Arbitration Act does not apply to Scotland. The amendment allows the ACAS scheme to make similar provision (via appeal to the Court of Session or Employment Appeal Tribunal) in Scotland.

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[40] HL Deb, 21 October 1997 c 675

# Appendix 1 Industrial Tribunal Jurisdiction

A detailed list of the matters on which an industrial tribunal may be asked to decide was given in Annex A to the Employment Tribunals Service Framework Document, published in 1997. This is reproduced below.

Further jurisdictions are imminent with the forthcoming implementation of European Directives on *Working Time* and *Parental Leave*. The *National Minimum Wage Bill*, published on 27 November 1997, also provides for enforcement by industrial tribunals.

**MATTERS WHICH MAY BE CONSIDERED BY AN INDUSTRIAL TRIBUNAL**

| | |
|---|---|
| **Disability** | Right not to be discriminated against in the field of employment, including employer's duty to make a reasonable adjustment. |
| | Definition of disability under the Disability Discrimination Act 1995. |
| | Right not to be victimised under the Act**.** |
| | Exclusions/Exemptions under the Act. |
| **Employment Agencies** | Prohibition of involvement in the running of an employment agency. |
| **Equal Pay** | Right to receive the same pay and other terms of employment as an employee of the opposite sex working for the same or an associated employer if engaged on like work, work related [sic] as equivalent under job evaluation or work of equal value. |
| **Guarantee payments** | Right to receive guarantee pay from employers during lay-offs. |
| **Insolvency of Employer** | Right to be paid by the Secretary of State certain debts owed by an insolvent employer. |
| | Right to be paid by the Secretary of State occupational pension scheme contributions owing on behalf of employees of an insolvent employer. |
| **Itemised Pay Statement** | Right to receive an itemised pay statement. |

| | |
|---|---|
| **Maternity Rights** | Right not to be unfairly dismissed for reasons connected with pregnancy. |
| | Rights on suspension from work on maternity grounds. |
| | Right to receive written reasons for dismissal during pregnancy or on maternity leave. |
| | Right to paid time off work for ante-natal care. |
| | Right to return to work following absence because of pregnancy or confinement. |
| **Medical Suspension** | Right not to be unfairly dismissed on suspension on medical grounds relating to health and safety. |
| | Right to receive pay on suspension on medical grounds. |
| **Occupational Pension Scheme** | Right of recognised independent trade unions to be consulted about an employer's notice of application for a contracting out certificate relating to an occupational pension scheme, including any question about whether a union is independent or recognised to any extent for collective bargaining purposes. |
| **Race Relations** | Right not to be discriminated against in the employment, training and related fields on the grounds of colour, race, nationality or ethnic or national origins, or victimised, for example for pursuing rights under the Race Relations Act 1976. |
| | Appeals against non-discrimination notices. |
| **Redundancy** | Right of employee representatives to be consulted by the employer about collective redundancies. |
| | Right not to be unfairly dismissed or suffer detriment in connection with activities as an employee representative, or a candidate to be such a representative, to be consulted about collective redundancies. |
| | Right to receive payment under a protective award made by an industrial tribunal. |
| | Right to receive redundancy payment, and questions related to the amount of such payment. |

| | |
|---|---|
| **Sex Discrimination** | Right not to be discriminated against in employment, training or related fields on the grounds of sex, marriage, or victimised for example for pursuing rights under the Sex Discrimination Act 1976 or the Equal Pay Act 1970. |
| | Appeals against non-discrimination notices |
| **Time Off** (see also maternity rights and trade union membership/non membership rights) | Right to paid time off for safety representatives. |
| | Right to time off for public duties. |
| | Right to paid time off in the event of redundancy to look for work or to make arrangements for training. |
| | Right of employee representatives to paid time off in connection with consultation about collective redundancies and business transfers. |
| **Trade Union Membership Non-membership Rights** | Right to paid time off for trade union duties; right to time off for trade union activities. |
| | Right not to suffer action short of dismissal for trade union membership or activities. |
| | Right not to suffer action short of dismissal to compel union membership whether in or outside a closed shop. |
| | Right not to suffer action short of dismissal to compel payments in lieu of union membership. |
| | Right not to be unfairly dismissed for trade union membership or activities. |
| | Right not to be unfairly dismissed for non-membership of a trade union whether inside or outside a closed shop. |
| | Right not to be unfairly dismissed for not making payments in lieu of union membership. |
| | Right not to be chosen for redundancy because of trade union membership or activities or non-membership of a trade union whether inside or outside a closed shop. |
| | Application for interim relief (that is, re-employment or continuation of contract of employment) from an employee who complains to an industrial tribunal that he/she has been |

| | |
|---|---|
| | unfairly dismissed for non-membership of a union or for trade union membership or activities. |
| | Right not to be unreasonably excluded or expelled from a union in a closed shop. |
| | Right not to be unjustifiably disciplined by a trade union. |
| | Right not to be refused employment on grounds related to trade union membership. |
| | Right not to be refused the service of an employment agency on grounds related to trade union membership or non-membership. |
| | Right not to suffer unauthorised deductions of union subscriptions. |
| | Right of union to use employer's premises for a secret ballot. |
| **Transfer of Undertakings** | Right of employee representatives to be informed and consulted about the transfer of an undertaking to a new employer. |
| | Right not to be unfairly dismissed or suffer detriment in connection with activities as an employee representative, or a candidate to be such a representative, to be consulted about collective redundancies. |
| | Right not to be dismissed on the transfer of an undertaking to a new employer except for certain reasons |
| **Unfair Dismissal** (see also Disability, Maternity Rights, Medical Suspension, Transfer of Undertakings,Trade Union Membership/non-Membership rights) | Right not to be unfairly dismissed. |
| **Sunday Trading** | Right of shop workers not to be dismissed, made redundant, or subjected to detriment for refusing or proposing to refuse to work on Sundays. |
| | Right of betting workers not to be dismissed, made redundant or subjected to detriment for refusing or proposing to refuse to work on Sundays. |

| | |
|---|---|
| **Written Reasons for dismissal** | Right to receive a written statement of reasons for dismissal. |
| **Written Statement of Employment Particulars** | Right to receive a written statement of the particulars of employment or any alteration to them with sufficient details to meet the requirements of the Employment Rights Act 1996. |
| **Deductions from Wages** | Rights of all workers not to have deductions made from their wages (or to be required to make payments to their employers), unless allowed by statute, by the contract of employment or with the worker's prior written agreement.<br><br>Additional rights for workers in retail employment who suffer deductions from wages (or are required to make payments) because of cash shortages or stock losses. |
| **Health and Safety Activities** | Right not to be unfairly dismissed or suffer detriment for Health and Safety reasons.<br><br>Appeal against improvement or prohibition notice. |
| **Exercise of Statutory Rights** | Right not to be unfairly dismissed for exercise of statutory employment rights. |
| **Breach of Contract** | Decisions on certain specified disputes about contracts of employment. |
| **Training Levy Assessments** | Appeals against assessment for levy by an Industrial Training Board. |

# Appendix 2 Industrial Tribunal Statistics

Statistics on industrial tribunal cases and their outcomes are published every year or two in *Labour Market Trends* (previously the *Employment Gazette*). Some of the tables in the most recent article are reproduced below:[41]

Table 1 **Outcomes of industrial tribunal cases, 1994-96**

**Great Britain**

| | **All registered cases disposed of** | | **ASCAS conciliated settlements[a]** | | **Withdrawal** | |
|---|---|---|---|---|---|---|
| | **1994-95** | **1995-96** | **1994-95** | **1995-96** | **1994-95** | **1995-96** |
| Unfair dismissal | 40,039 | 38,557 | 15,485 | 14,682 | 11,389 | 11,526 |
| Other provisions of the Employment Protection (Consolidation) Act 1978 | 1,872 | 3,621 | 270 | 559 | 1,029 | 1,666 |
| Redundancy provisions of the Employment Protection Act 1975 | 553 | 400 | 120 | 110 | 247 | 177 |
| Equal pay | 418 | 694 | 98 | 128 | 286 | 456 |
| Insolvency pay | 474 | 234 | 0 | 0 | 179 | 57 |
| Redundancy pay | 6,926 | 6,390 | 0 | 0 | 3,013 | 3,443 |
| Race discrimination | 1,365 | 1,737 | 325 | 405 | 507 | 656 |
| Sex discrimination | 4,052 | 3,677 | 1,005 | 1,464 | 2,276 | 1,508 |
| Wages Act | 10,119 | 14,391 | 2,664 | 3,825 | 3,950 | 6,118 |
| Breach of contract | 597 | 3,495 | 262 | 1,338 | 221 | 1,141 |
| Others | 910 | 276 | 84 | 8 | 362 | 105 |
| **All** | **67,325** | **73,472** | **20,313** | **22,519** | **23,459** | **26,853** |

a Advisory Conciliation and Arbitration Service (ACAS) does not conciliate in the following jurisdictions: redundancy pay, insolvency pay, written statements of terms of employment, paid time off for safety representatives and certain health and safety matters.

(Continued on next page)

[41] *Labour Market Trends*, April 1997, "Industrial and Employment Appeal Tribunal statistics 1994-95 and 1995-96"

Table 1 **Outcomes of industrial tribunal cases, 1994-96 (Cont)**

**Great Britain**

| | Successful at tribunal hearing | | Dismissed at tribunal hearing (out of scope) | | Dismissed at tribunal hearing (other reasons) | | Disposed of otherwise | |
|---|---|---|---|---|---|---|---|---|
| | **1994-95** | **1995-96** | **1994-95** | **1995-96** | **1994-95** | **1995-96** | **1994-95** | **1995-96** |
| Unfair dismissal | 4,829 | 4,325 | 1,334 | 1,218 | 6,130 | 5,838 | 872 | 968 |
| Other provisions of the Employment Protection (Consolidation) Act 1978 | 253 | 362 | 70 | 69 | 162 | 366 | 88 | 599 |
| Redundancy provisions of the Employment Protection Act 1975 | 135 | 83 | 9 | 2 | 25 | 24 | 17 | 4 |
| Equal pay | 8 | 36 | 4 | 15 | 13 | 31 | 9 | 28 |
| Insolvency pay | 153 | 81 | 17 | 15 | 108 | 70 | 17 | 11 |
| Redundancy pay | 2,463 | 1,863 | 213 | 182 | 969 | 687 | 268 | 215 |
| Race discrimination | 72 | 109 | 78 | 78 | 312 | 375 | 71 | 114 |
| Sex discrimination | 340 | 218 | 52 | 67 | 298 | 289 | 81 | 131 |
| Wages Act | 2,096 | 2,543 | 216 | 256 | 1,128 | 1,222 | 65 | 427 |
| Breach of contract | 47 | 535 | 13 | 56 | 36 | 319 | 18 | 106 |
| Others | 26 | 64 | 21 | 9 | 119 | 77 | 298 | 13 |
| **All** | **10,422** | **10,219** | **2,027** | **1,967** | **9,300** | **9,298** | **1,804** | **2,616** |

*Source:* industrial tribunals

Table 2 **All unfair dismissal cases proceeding to a tribunal hearing, 1994-96**

**Great Britain**

| | **Number** | | **Percentage of unfair dismissal cases proceeding to a hearing** | | **Percentage of all unfair dismissal applications** | |
|---|---|---|---|---|---|---|
| | **1994-95** | **1995-96** | **1994-95** | **1995-96** | **1994-95** 100%=40,039 | **1995-96** 100%=38,557 |
| **Cases dismissed** | | | | | | |
| Out of scope | 1,334 | 1,218 | 10.9 | 10.7 | 3.3 | 3.2 |
| Other reasons | 6,130 | 5,838 | 49.9 | 51.3 | 15.3 | 15.1 |
| **All cases dismissed** | **7,464** | **7,056** | **60.8** | **62.3** | **18.6** | **18.3** |
| | | | | | | |
| **Cases upheld** | | | | | | |
| Reinstatement or re-engagement | 78 | 68 | 0.6 | 0.6 | 0.2 | 0.2 |
| Remedy left to parties | 1,638 | 1,476 | 13.3 | 12.97 | 4.1 | 3.8 |
| Compensation | 2,998 | 2,099 | 24.4 | 18.44 | 7.5 | 5.4 |
| No award made | 115 | 682 | 0.9 | 5.99 | 0.3 | 1.8 |
| **All cases upheld** | **4,829** | **4,325** | **39.2** | **38.0** | **12.1** | **11.2** |
| | | | | | | |
| **All cases proceeding to a hearing** | **12,293** | **11,381** | **100** | **100** | **30.7** | **29.5** |

*Source:* industrial tribunals

# Appendix 3 ACAS Arbitration Scheme

ACAS set out its thinking so far on the arbitration scheme in a memorandum prepared for the House of Lords debates, dated 1 October 1997. This is reproduced below:

"Introduction

1. The Employment Rights (Dispute Resolution) Bill provides for the Advisory Conciliation and Arbitration Service (ACAS) to draw up an arbitration scheme for the resolution of unfair dismissal disputes. The scheme would be subject to the Secretary of State's approval. The ACAS Council have supported the proposal and should this provision be enacted would submit a scheme to the Secretary of State. Without wishing to prejudge the outcome of the parliamentary process, the ACAS Council has been considering the main elements of a scheme. While there will be much detail to be considered, this memorandum contains the thinking so far on the format of such a scheme.

2. The underlying principle adopted by the Service is to formulate the scheme so as to make it as similar as possible to the arbitrations currently undertaken by ACAS in resolving trade disputes. In this way the scheme produced will be a genuine alternative to the employment tribunal process rather than an imitation of it. The relevant key features of current ACAS arbitration in this respect are that it is relatively informal, free of legalism and confidential.

3. Use of the scheme will be voluntary. It will be available only where both parties agree to opt for it. Before agreeing to go to arbitration both parties will be aware of the details of the scheme and the way it works. The scheme will be explained in leaflet(s) written in plain English. If either party is unhappy with the non legalistic nature, the lack of appeal on a point of law, the private nature of proceedings or any other element of the ACAS scheme then they need not opt to go to arbitration. The industrial tribunal will continue to offer a way of resolving grievances for those who do not wish to use the ACAS scheme.

4. The arbitration scheme will be available under the same circumstances that a conciliation officer can take action, that is where proceedings are under way or could be commenced.

Entry to the scheme

5. The parties will be able to enter the scheme by one of two routes; through a settlement of the complaint under the auspices of a conciliation officer or by means of a compromise agreement. A compromise agreement is a binding agreement settling a dispute, in which the employee waives his or her right to bring or to continue with an industrial tribunal claim relating to the dispute in question. Before entering such an agreement the employee must get independent advice. By limiting access to the scheme in this way any applicant opting for arbitration would have had the process explained to them by a conciliation officer or have been in receipt of advice from a professional person. The agreement must be in writing. The parties will be invited to submit the IT1 and IT3 to the arbitrator together with any other documentation they feel might be relevant. All documents submitted by one party will be copied to the other.

Appointment of arbitrator

6. An arbitrator would be appointed from a panel of arbitrators which would be established by ACAS. Both the hearing and the issue of the award would be arranged as soon as practicable.

Panel of arbitrators

7. Recruitment to the panel would be transparent, accountable and non-discriminatory. A person specification would be drawn up of which the core elements would be that any individuals appointed would need to be seen as impartial, to have wide experience of the world of work and to possess analytical and social skills. Due to the non-legalistic nature of many unfair dismissal disputes (which revolve around questions of fact rather than the law) legal experience is not considered necessary. An initial training course would be provided. Regular refresher training would need to be a part of the process. The panel would be supported by a separate ACAS secretariat.

The arbitrators remit

8. If both parties opt for arbitration they will be agreeing that there are no jurisdictional matters between them. If there are such differences, for instance as to whether an applicant is an employee, has the necessary two years service or whether a dismissal took place, they should take the case to a tribunal.

9. Once the parties have agreed to put the case to arbitration, the case may not be referred back to a tribunal except in limited circumstances ie where the case falls outside the jurisdiction of the scheme and is not unfair dismissal, or a valid compromise agreement has not been signed agreeing to refer the case to arbitration or a conciliation officer has not taken action resulting in a written agreement referring the case to arbitration.

Standard terms of reference

10. Standard terms of reference would be formulated which would be unambiguous, clear and concise. The ACAS Council envisages that they would ask the question whether the decision to dismiss should be confirmed, revoked and the applicant be re-employed or whether compensation should be paid. They might also instruct the arbitrator to have regard to the "ACAS Code of Practice on Discipline and Dismissal" and the ACAS Handbook "Discipline at Work" in making a decision.

The award

11. Any compensation awarded would be subject to the same limits as tribunal awards. In awarding compensation the arbitrator would have regard to the amount of loss incurred, both actual and future and take into account any monies already paid. The award would be legally enforceable. Should an award of re-employment not be complied with the case would be referred to an industrial tribunal for remedy in the form currently adopted when reinstatement or re-engagement is awarded by a tribunal itself.

Appeal

12. There would be no appeal on a point of law."