**RESEARCH PAPER 98/99**
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# Fairness at Work

**Cm 3968**

The White Paper, *Fairness at Work*, published in May 1998, contains a wide range of proposals on individual and collective employment rights and on family friendly employment policies. These include the introduction of a statutory right to trade union recognition; increases in the coverage of, and compensation for, unfair dismissal; and implementation of the *EC Parental Leave Directive.* This Research Paper describes the background to the proposals and some of the responses they have provoked.

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# Summary of main points

The *Fairness at Work* White Paper, published on 21 May 1998, contains the Labour Government's proposals for trade union and employment legislation which are intended to form "an industrial relations settlement for this parliament".

Its main proposals include:

- reducing the qualifying period for claiming unfair dismissal from two years to one year
- abolishing the upper limit on compensation awards in unfair dismissal cases
- introducing a statutory right to trade union recognition "where a majority of the relevant workforce wishes it"
- allowing people dismissed for taking part in lawfully organised industrial action the right to make unfair dismissal claims
- giving employees the right to be accompanied in grievance and disciplinary proceedings
- reducing the qualifying period for extended maternity leave from two years to one year
- increasing the length of basic maternity leave from 14 to 18 weeks
- laying the groundwork for the implementation of the *EC Directive on Parental Leave* which gives all parents (men and women) the right to three months' parental leave and introduces a right to time off for urgent family reasons

Under the proposals, trade union recognition would be granted where a ballot showed that a majority of those voting and at least 40% of those eligible to vote were in favour. However, recognition would be granted automatically without a ballot where over 50% of the relevant workforce were already union members. Small firms with 20 or fewer employees would be exempt.

Employers are particularly concerned about the proposal to grant automatic recognition where over half the workforce are union members; the removal of the cap on compensation limits; the burdens which will be imposed by the implementation of the *Parental Leave Directive* and the cumulative effect of so many new rights for employees coming on top of the rights already being introduced under the National Minimum Wage and Working Time legislation.

Unions welcome many of the proposals but believe that the requirement that 40% of those eligible to vote should support recognition is too tough. They also fear that the Government may yet water down some of the White Paper proposals and renege on a "done deal".

It is expected that a Bill to implement the White Paper will be introduced early in the 1998/99 session. When it is, the Government will publish explanatory notes, a Regulatory Appraisal and an analysis of responses to the White Paper.

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# I Introduction

Labour's Manifesto for the May 1997 General Election contained four major commitments in the field of industrial relations law: the introduction of a national minimum wage; the implementation of the Working Time Directive's rights to paid annual leave and limits on working time; the signing of the Social Chapter; and the introduction of a statutory right to trade union recognition. The first three have already been implemented by the *National Minimum Wage Act 1998*, the *Working Time Regulations 1998*, and the Treaty of Amsterdam. It was expected that the long-awaited *Fairness at Work* White Paper would concentrate on trade union recognition. However, when it was published on 21 May 1998, it ranged very much wider than this.[1] Not only does it contain detailed proposals for a statutory right to trade union recognition, but it also proposes significant changes to the law on individual employment rights, other aspects of trade union law and "family friendly" policies.

In a foreword to the Paper, the Prime Minister, Tony Blair, says that it seeks to "draw a line under the issue of industrial relations law" and forms "an industrial relations settlement for this Parliament". He describes it as steering "a way between the absence of minimum standards of protection at the workplace, and a return to the laws of the past":

> There will be no going back. The days of strikes without ballots, mass picketing, closed shops and secondary action are over. Even after the changes we propose, Britain will have the most lightly regulated labour market of any leading economy in the world. But it cannot be right to deny British citizens basic canons of fairness - rights to claim unfair dismissal, rights against discrimination for making a free choice of being a union member, rights to unpaid parental leave - that are a matter of course elsewhere.
>
> (...)
>
> We intend, subject to the consultation following publication of this document, to legislate to carry it into effect and then to allow a proper process of acceptance, adjustment and stability. So what we set out here are our proposals for an industrial relations settlement for this Parliament.

Margaret Beckett, then Secretary of State for Trade and Industry, emphasised the Government's desire to encourage a new "partnership" approach to industrial relations in her statement to the House:

> The White Paper looks to the future, not the past. There will be no going back to the days of strikes without ballots, mass picketing and the closed shop. We are setting out to foster and support a new culture in the workplace--a culture of partnership. That culture is already evident in many of our most successful and

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> modern companies, but the framework of our existing law all too often undermines or runs clean counter to it.
>
> We expect and anticipate that many of the matters that we address, where differences of interest or of emphasis may genuinely arise, will be settled voluntarily and without recourse to the law, but, if required, the law must be able practically and sensibly to provide peaceful means to resolve disputes if they arise. [2]

John Redwood, the Opposition spokesman, took a different view, arguing that the proposals would turn the clock back to the "bad old days":

> The White Paper is a down payment on the bill the country will pay for trade union support of the Labour party. The unions gave more than £100 million to the Labour party during its Opposition years. Understandably, they now seek a return on their investment. (…)
>
> The proposals begin a journey back to strife. They begin a journey back to the bad old days and back to the bad old ways. They will do further damage to manufacturing, which is already damaged by high sterling and the recession that the Government have created. They demonstrate, if more demonstration were needed, that Labour is bad for business.[3]

Generally, trade unions welcomed the package. Bill Morris, General Secretary of the TGWU, said that it "turned the tide" in industrial relations.[4] Employers were less happy. Tim Melville-Ross, Director General of the Institute of Directors thought it represented a significant swing in the employer/employee balance towards the employee; taken with the minimum wage and the European Social Chapter, it would mean a "plethora of extra regulations and costs on business".[5]

The White Paper groups its proposals under three headings: individual rights, collective rights and family friendly policies. Under each heading there are some firm proposals for legislation and some issues on which advice is sought. These are summarised below:

**Individual Rights**

Proposals

- reducing the qualifying period for protection against unfair dismissal from two years to one year

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2 HC Deb 21 May 1998, c 1101
3 Ibid, cc 1104-1105
4 *Guardian*, 22 May 1998, "Scale of ministers' concessions on workers' rights surprises unions"
5 Ibid

- abolishing the ceiling on compensation awards for unfair dismissal (currently £12,000)

- index-linking limits on those statutory awards and payments which are subject to a maximum rate

Advice sought

- whether limits on additional and special awards should be retained or whether tribunals should be able to award aggravated damages

- options for changing the law which allows employees with fixed term contracts to waive their rights to unfair dismissal and statutory redundancy payments

- whether further action should be taken to address the potential abuse of zero hours contracts (without undermining labour market flexibility)

- whether power should be taken to extend the coverage of some or all existing employment rights by Regulation to all those who work for another person

**Collective Rights**

Proposals

- enabling employees to have a trade union recognised by their employer "where a majority of the relevant workforce wishes it". The White Paper contains detailed proposals for a statutory recognition procedure.

- giving people dismissed for taking part in lawfully organised official industrial action the right to make a complaint of unfair dismissal to an employment tribunal

- making it unlawful to discriminate by omission on grounds of trade union membership, non-membership or activities

- prohibiting blacklisting of trade unionists

- amending the law on strike ballots so that unions no longer need to give employers the names of employees covered

- giving employees the right to be accompanied by a fellow employee or trade union representative during grievance and disciplinary procedures

- abolishing the Commissioner for the Rights of Trade Union Members (CRTUM) and the Commissioner for Protection Against Unlawful Industrial Action (CPAUIA) and giving new powers to the Certification Officer to hear complaints involving most aspects of the law where CRTUM is currently able to provide assistance

- making funds available to contribute to the training of managers and employee representatives in order to assist and develop partnerships at work.

Advice sought

- whether training should be among the matters automatically covered by an award of trade union recognition

- how a procedure for derecognition should work

- how protection against dismissal for those taking part in lawfully organised industrial action should be implemented

- how to simplify the law and Code of Practice on industrial action ballots and notice

**Family Friendly Policies**

Proposals

- extending maternity leave from 14 to 18 weeks to align it with maternity pay

- reducing the qualifying period for extended maternity absence from two years to one year. The same qualifying period would apply to parental leave which has to be introduced by December 1999 under the EC *Parental Leave Directive*.

- providing for the contract of employment to continue during the whole period of maternity or parental leave, unless expressly terminated by either party

- providing similar rights for employees to return to their jobs after parental leave as currently apply after maternity absence

- providing three months' parental leave for adoptive parents. (This is a requirement of the *Parental Leave Directive*)

- providing a right to reasonable time off for family emergencies which will apply to all employees regardless of length of service. (Leave for urgent family reasons is a requirement of the *Parental Leave Directive*)

- ensuring that employees are protected against dismissal or detriment if they exercise their rights to parental leave or time off for urgent family reasons.

Advice sought

- simplifying notice of maternity leave

- options for framing legislation to comply with the *Parental Leave Directive*

- the particular difficulties small firms might face in complying with the *Parental Leave Directive*.

There were 474 responses to the White Paper. A list of those responding was placed in the House of Commons Library.[6] The account of "reactions" to the White Paper contained in this Research Paper is based on only a handful of responses, but it is hoped that they are representative.

A Bill to implement the proposals is expected early in the 1998/99 session.[7] A regulatory impact assessment will be published with the Bill.[8] Press reports suggest that the Government may yet water down the proposals before they legislate. They may, for example, retain a cap - albeit a much higher one - on compensatory awards, and may require workers to have been members of a union for three to six months before they count towards the 50% membership needed for automatic recognition.[9]

# II Individual Rights

## A. Qualifying period for protection against unfair dismissal

### 1. Background

The right to claim unfair dismissal was introduced by the *Industrial Relations Act 1971.* At that time the qualifying period was two years.[10] This was reduced to one year in 1974 and to six months in 1975 by the *Trade Union and Labour Relations Act 1974.*[11] It was increased again to one year in 1979 by the *Unfair Dismissal (Variation of Qualifying Period) Order 1979 SI No 959* and to two years for employees in firms with fewer than 21 employees in 1980 under the *Employment Act 1980.* Finally, it was raised to two years in all cases in 1985 by the *Unfair Dismissal (Variation of Qualifying Period) Order 1985 SI No 782.*

Originally, the only people able to claim unfair dismissal were those who worked 21 hours or more a week.[12] The *Employment Protection Act 1975* reduced this to 16 hours a week and allowed part-time workers who worked between 8 and 16 hours a week to claim the

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6 Dep 98/1087
7 *Times*, 23 October 1998, "Mandelson may bow to employers on union rights"
8 Ian McCartney, HC Deb 5 November 1998, c 623W
9 See, eg, *Times*, 5 November 1998, "Workplace reforms are facing a rethink"
10 Section 28
11 Schedule 1, para 10
12 *Industrial Relations Act 1971,* section 27(1)(f)

right after five years' service.[13] On 3 March 1994, the House of Lords ruled that this law amounted to indirect discrimination against women as so many more women than men work under 16 hours a week. It was, therefore, incompatible with EC law.[14] The Government eventually laid a Statutory Instrument which amended the *Employment Protection (Consolidation) Act 1978* to take account of this judgment.[15] It removed all references to hours worked from the Act so that all employment rights now apply equally whatever hours are worked. The two year qualifying rule applies not only to the right to claim unfair dismissal but also to the rights to a redundancy payment, to extended maternity leave and to a written statement of reasons for dismissal.

So the current rule is that people only have the right to claim unfair dismissal at an industrial tribunal if they have been continuously employed by the same employer for two years.[16] A recent Court case (*Seymour-Smith and Perez)* has raised doubts about the validity of this condition. Two women have argued that the rule conflicts with EC equal treatment legislation as a smaller proportion of women than of men are able to comply with it. The House of Lords has referred the question to the European Court of Justice and its decision is still awaited.[17]

At one time Labour Party policy appeared to be to remove the qualifying period for unfair dismissal altogether. Their manifesto for the 1992 General Election said: "We will give all employees equal rights and status under the law, whether they are full-time or part-time, permanent or temporary." John Smith, in his speech to the TUC Conference on 7 September 1993, went further, saying that his party would give workers basic employment rights which would come into force "on the first day of their employment".[18] However, this pledge was dropped by the time the employment policy document, *Building Prosperity - flexibility, efficiency and fairness at work*, prepared by David Blunkett and Stephen Byers, was published in June 1996. This document merely said:

> Industrial tribunals are an important part of securing justice for people at work. We will oppose Tory plans to remove 10 million people working in small companies from employment protection. The Judicial Committee of the House of Lords is shortly to consider issues relating to unfair dismissal and in the light of their decision we shall review the whole question of the procedures of industrial tribunals in order to see how they can provide greater fairness, operate more effectively and reduce the massive delays currently being experienced by those using the system.

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13 Schedule 16, Part II, para 14 - brought into force on 1 February 1977 by the *Employment Protection Act 1975 (Commencement No 6) Order 1976 SI No 1996*

14 *Regina v Secretary of State for Employment ex parte Equal Opportunities Commission and Another*

15 *The Employment Protection (Part-time Employees) Regulations 1995*, SI No 31

16 *Employment Rights Act 1996*, section 108

17 *R v Secretary of State for Employment ex parte Seymour-Smith and Perez*, [1997] IRLR 315 HL

18 *Times*, 8 September 1993, "Smith reaffirms support for unions"; and *Labour Research*, October 1993, "Smith promises workers' rights 'on day one' "

Press reports suggested that one reason the pledge had been dropped was that Labour was concerned that the tribunal system would collapse under the weight of complaints if the qualifying period were moved to the first day of work.[19]

There was no mention of the qualifying period in the 1997 Election manifesto. It was generally believed that the Labour Government would wait for the outcome of the *Seymour-Smith* case before deciding what to do on qualifying periods, so that the White Paper's announcement of a reduction to one year came as something of a surprise.

At present, 2.9 million people have between one and two years' continuous employment with the same employer.[20]

## 2. The Proposal

The White Paper said:

> **3.9 The period of employment before employees qualify for protection against unfair dismissal is currently set at two years**. As the economy becomes more dynamic, leading to more frequent job changes, the Government is concerned that this period is too long and a better balance between competitiveness and fairness would be achieved if it were reduced:
>
> - employees would be less inhibited about changing jobs and thereby losing their protection, which should help to promote a more flexible labour market;
>
> - more employers would see the case for introducing good employment practices, which should encourage a more committed and productive workforce.
>
> **3.10** Some employers claim that a long qualification period is needed to allow mistakes made in recruitment to be rectified without heavy costs. The Government accepts such mistakes happen but believes that the present period is longer than is needed to allow them to come to light and be dealt with. For all these reasons, and to increase protection against arbitrary dismissal**, the Government therefore proposes to reduce the qualifying period to one year.**

## 3. Reaction

Organisations responding to the White Paper have, in the main, welcomed this reduction although those representing small firms are opposed.

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[19] *Financial Times*, 22/23 June 1996, "Unions disappointed as Labour drops jobs pledge"

[20] Labour Force Survey, Summer 1998

The British Chambers of Commerce (BCC) fear that the reduction will just lead to an increase in the number of spurious claims and consequent costs for small businesses. In a survey in 1997, only 17% of small business members thought the period should be reduced while 71% thought it should stay as it was.[21] The Federation of Small Businesses (FSB) also opposes the reduction, arguing that it will encourage employers to take people on on six or nine month contracts.[22]

The CBI "can see merit in the plans to reduce the qualifying period to one year" but would strongly oppose any further reduction.[23] Similarly, the Institute of Personnel and Development (IPD) opposes any further reduction because the threshold is "probably the most important single indicator for many employers of the level of employment regulation". But they believe the reduction to one year will "help to reduce employees' perceptions of insecurity and contribute to a more positive psychological contract".[24] The Institute of Directors is "not against" it.[25] The Industrial Society supports this reduction, and would go further:

> There is a case for taking it down to six months. Employers usually know by then whether an employee is suitable and competent.[26]

The Employment Law Bar Association says there is no evidence that increasing the qualifying period has led to an increase in employment opportunities:

> Employers typically give new employees probationary periods of three to six months. A probationary period in excess of one year is practically unheard of. The change will reduce the opportunity for abuse by employers who in some cases in the past have employed workers for up to 23 months before dismissing them.[27]

Both the Law Society and the Employment Law Bar Association argue that the qualifying period for written reasons for dismissal and for redundancy payments should be similarly reduced.[28]

The TUC "believes that employment rights should apply from the first day of employment". It argues that any qualifying period may be subject to abuse by employers because they can use short term contracts which expire before the qualifying period is

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21 BCC response
22 FSB response, 30 July 1998
23 CBI response, July 1998
24 IPD response, 31 July 1998
25 Memorandum of evidence to the Trade and Industry Committee on *Fairness at Work*, HC 980 1997-98, 21 July 1998, p 24
26 Ibid, p 90
27 Ibid, p 48
28 Law Society, ibid, p 36

completed.[29] The TUC, too, urges a similar reduction in the qualifying period for written reasons for dismissal and redundancy pay.[30] The National Association of Citizens Advice Bureaux (NACAB) echoes this sentiment. They say that the qualifying period is "*the* dominant feature in the employment experience" of huge numbers of their clients. 84% of those dismissed with under two years' service had no prior warning about the quality of their work. NACAB's ideal would be no qualifying period, but they suggest that three months is sufficient.[31]

The Advisory, Conciliation and Arbitration Service (ACAS) believes that the reduction will greatly increase their individual conciliation caseload but that it should also "encourage the adoption of sounder based procedures for recruitment, selection and induction".[32]

## B. Limits on unfair dismissal compensation awards

### 1. Background

Unfair dismissal awards are made up of a basic award, based on age, length of service and pay and a compensatory award which is the amount the tribunal considers just and equitable for the loss which the employee has suffered as a result of his dismissal.

The *Industrial Relations Act 1971,* which introduced the right to take a case to an industrial tribunal for unfair dismissal, made no provision for a basic award. Compensation was to be "such amount as the ... tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the aggrieved party in consequence of the matters to which the complaint relates, in so far as that loss was attributable to action taken by or on behalf of the party in default".[33] There was a limit on the amount of compensation of 104 weeks' pay or £4,160 (that is to say 104 x £40) whichever was the less.[34] This limit was increased to 104 weeks' pay or £5,200 (that is to say, 104 x £50) by the *Trade Union and Labour Relations Act 1974.*[35] Under the *Employment Protection Act 1975*, which introduced the basic award, the compensatory award remained limited by the 1974 Act formula - ie to a maximum of £5,200.[36] There is no requirement to review this limit annually, though it has been raised since 1975 as follows:

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29 Memorandum of evidence to the Trade and Industry Committee on *Fairness at Work*, HC 980 1997-98, 21 July 1998, p 4
30 TUC response, July 1998
31 NACAB response
32 ACAS press release, 29 July 1998, *A new look for industrial relations*
33 section 116
34 section 118
35 schedule 1, para 20
36 section 76, 1975 Act

| Limit on compensation award | |
|---|---|
| | £ |
| 1971 | 4,160 |
| September 1974 | 5,200 |
| February 1979 | 5,750 |
| 1 February 1980 | 6,250 |
| 1 February 1982 | 7,000 |
| 1 February 1983 | 7,500 |
| 1 April 1985 | 8,000 |
| 1 April 1987 | 8,500 |
| 1 April 1989 | 8,925 |
| 1 April 1991 | 10,000 |
| 1 June 1993 | 11,000 |
| 27 September 1995 | 11,300 |
| 1 April 1998 | 12,000 |

Had the limit been increased in line with average earnings since 1971, it would now be about £52,800. In fact very few unfair dismissal awards approach the current limit. The median award in 1996-97 was £2,575 and only 223 awards exceeded £9,000.[37]

Compensation for sex discrimination and race discrimination used to be subject to the same limits, but they were removed after the European Court of Justice ruled in 1993 that the limit on compensation for sex discrimination was a breach of EC equal treatment legislation.[38] Since then, there have been some very high awards. A former senior official of Hackney borough council received £380,000 in an out of court settlement of a race discrimination claim in October 1998.[39] And a former assistant director of social services at Southwark borough council was awarded £234,000 by a tribunal in a sex discrimination case in December 1997.[40] Eight race discrimination and eight sex discrimination awards exceeded £20,000 in 1997, but the median race discrimination award was £3,312 and the median sex discrimination award, £2,073.[41]

## 2. The Proposal

The White Paper expressed the hope that the new procedures introduced by the *Employment Rights (Dispute Resolution) Act 1998* would increase the number of employment disputes settled without recourse to an industrial tribunal:

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37 DTI evidence to Trade and Industry Committee, *Fairness at Work*, HC 980 1997-98, 21 July 1998, p 64
38 *Marshall v Southampton and South West Hampshire Health Authority (No 2)*, IRLR [1993] 445 ECJ
39 *Guardian*, 14 October, 1998, "£380,000 record race payout by council"
40 *Guardian*, 11 December 1997, "Council official wins record sex bias award".
41 *Equal Opportunities Review*, September/October 1998, "Compensation awards '97"

> **3.5** Nevertheless, some disputes will still have to be resolved by industrial tribunals. Tribunals must be seen to be fair to both parties. Where a tribunal finds that individuals have been unfairly dismissed, they should receive a proper remedy. Tribunals issue very few re-employment orders, so the amount of compensation for unfair dismissal is very important. Although many awards are well below the current limit on compensation, which the Government has recently increased, the existence of a limit prevents some individuals from being fully compensated for their loss. The likelihood of proper compensation being awarded should also encourage employers to put proper voluntary systems in place. The current cap on compensation for unfair dismissal, which has steadily fallen in real terms, provides no such incentive. **The Government therefore proposes to abolish the maximum limit on such awards.** Abolition in sex discrimination claims has not led to a significant rise in the number of cases and although race discrimination cases have risen, these are relatively few in number.

## 3. Reaction

This proposal has proved very much more controversial and it is one of the key issues on which employers' organisations have sought to persuade the Government to change its mind.

The CBI report that the proposal has "provoked widespread concern within the business community". They fear that the "removal of the compensation cap will make settlements outside tribunals less attractive and lead to an avalanche of new claims". They argue that it will undermine the *Employment Rights (Dispute Resolution) Act 1998* which aims to remove cases from tribunals to ACAS arbitration. Many CBI companies have "noted the increased pressure on out of court settlements in race/sex claims since the limit was removed." Companies often prefer out of court settlements. They save management time and people are willing to accept them as they can be more than they would get from a tribunal. The CBI argue that it is the already well-paid who will benefit from the removal of the cap:

> While the losses of many employees in the lower and medium salary bands are already adequately met, there are senior managers who currently prefer to settle unfair dismissals outside the tribunal system precisely because of the cap. Legislation should not be seen as promoting bigger rewards for those already doing well.

Instead of removing the cap, the CBI propose that it should be increased to £40,000, which is approximately two years' average earnings.

The IPD argue that the complete removal of the cap might encourage a "'sky's the limit' lottery culture on awards". They would prefer a limit of £40,000 or one year's pay, whichever is the lower.

The BCC is concerned that the abolition will lead to a sizeable increase in spurious claims. It argues that the limit should be increased to £20,000 (average annual gross

earnings) and index linked thereafter. Large awards could "threaten the very survival of some smaller businesses".

The TUC supports the proposal. They point out that under EC law, compensation should be "effective, proportionate and dissuasive" and argue that the same should apply to rights (like unfair dismissal) which do not derive from EC law. They believe the Government should go further and remove the limits on "a week's pay" used in calculating the basic award and the £25,000 limit on breach of contract claims.

NACAB also welcomes removal of the limit:

> It has been a long-standing concern of the Service that existing levels of compensation do not provide an effective incentive for employers not to unfairly dismiss workers.

However, they believe that for most workers the key award is the basic award and, like the TUC, argue that the limit on a week's pay should be abolished.

The Law Society has welcomed the removal of the cap. It supports the "civil law principle that a person who has suffered financial loss by reason of the legal wrong of another, should be fully compensated by the wrongdoer." They point out that the cap has led to applicants trying to find a sex or race discrimination angle in an otherwise straightforward unfair dismissal case. They doubt whether removing the cap will, in practice, lead to a large increase in cases.[42]

## C. Index-linking Limits

### 1. Background

The *Employment Rights Act 1996* [ERA] consolidated earlier employment legislation. It allows for the limits on a number of other compensatory payments to be reviewed and increased from time to time. The limits involved are:

- The limit on a week's pay used in calculating redundancy payments, basic awards for unfair dismissal, and additional awards where an employer fails to comply with an order for re-instatement or re-engagement;

- Guarantee payments during lay-offs;

- Debts owed by insolvent employers to employees;

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[42] Memorandum of evidence to the Trade and Industry Committee, *Fairness at Work*, HC 980, 1997-98, 21 July 1998, pp 35-43

- Special awards made to people dismissed on specific grounds (mainly concerned with employee representation duties)

When Margaret Beckett, then Secretary of State for Trade and Industry, announced the latest increases in these limits, she also announced a general review of employment protection limits:[43]

> Employment protection provisions are an important element in our strategy for encouraging a partnership approach in the workplace, which includes fair minimum standards and a successful and competitive business environment.
>
> Effective rights need effective remedies. The increases in the limits on payments and industrial tribunal awards will ensure that their real value is not eroded. The provisions help to encourage employers to put in place fair practices which in turn improve the productivity and commitment of employees.
>
> In the longer term, we will want to consider whether the limits, and the arrangements for reviewing them, work in the best way to meet our aims.

**Limit on a week's pay**

Under the ERA, redundancy payments and basic awards for unfair dismissal are both calculated in the same way:

(i) for each year's service aged 41- 64 ( inclusive).....1.5 weeks' pay
(ii) for each year's service aged 22 - 40 (inclusive).....1 week's pay
(iii) for each year's service aged 18 - 21 (inclusive).....0.5 week's pay

However, there is a maximum of 20 years' service which counts and a limit on the amount of a week's pay which counts. This is currently £220. So the present maximum redundancy payment or basic award is £6,600.

The additional award, paid on top of basic and compensatory awards in unfair dismissal cases where employers fail to comply with orders for reinstatement or re-engagement, is usually between 13 and 26 weeks' pay. In sex or race discrimination cases, it is between 26 and 52 weeks' pay. The maximum award in ordinary unfair dismissal cases is, therefore, £5,720: in discrimination cases, it is £11,440.

Section 208 of the ERA requires the Secretary of State to review the limit on a week's pay "in each calendar year" to see whether it should be "varied". In making the review, he must consider:

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[43] DTI press release, 18 February 1998, *Employment Protection Payments set to rise: Margaret Beckett announces results of annual review of limits*

(a) the general level of earnings obtaining in Great Britain at the time of the review;
(b) the national economic situation as a whole; and
(c) such other matters as he thinks relevant.

If he decides the limit should be varied, he must lay a draft order before both Houses of Parliament under the affirmative procedure. If he decides to make no change, he must lay a statement before both Houses explaining this decision.

The Labour Government increased the limit on a week's pay in April 1998. Before that, it had not been raised since September 1995. Between 1978 and 1992, it was raised regularly every year. Statutory redundancy payments were introduced earlier than unfair dismissal payments – on 6 December 1965, under the *Redundancy Payments Act 1965* - so the figure for the limit on a week's pay dates all the way back to 1965:

| | Limit on a week's pay |
|---|---|
| | £ |
| December 1965 | 40 |
| August 1974 | 80 |
| 1 February 1978 | 100 |
| 1 February 1979 | 110 |
| 1 February 1980 | 120 |
| 1 February 1981 | 130 |
| 1 February 1982 | 135 |
| 1 February 1983 | 140 |
| 1 February 1984 | 145 |
| 1 April 1985 | 152 |
| 1 April 1986 | 155 |
| 1 April 1987 | 158 |
| 1 April 1988 | 164 |
| 1 April 1989 | 172 |
| 1 April 1990 | 184 |
| 1 April 1991 | 198 |
| 1 April 1992 | 205 |
| 27 September 1995 | 210 |
| 1 April 1998 | 220 |

If the limit on a week's pay had been increased in line with average earnings since December 1965, it would now be about £800. If it had been increased in line with average earnings since December 1975, it would now be nearly £500.

**Guarantee payments**

Employees are entitled to guarantee payments for days on which they would normally be required to work but on which their employer fails to provide them with any work and lays them off. The statutory entitlement is limited to a specified number of days in a relevant period. Section 208 of the ERA requires the Secretary of State to review the limit on the amount of the daily payment, the number of days for which it can be paid and the period over which these days are counted, every year, in exactly the same way as he is required to review the limit on a week's pay. The present limit on the number of payments is five days over a three month period. The limit on the amount of the guarantee payment is £15.35. This figure was set by the Labour Government in April 1998. The previous increase had been in September 1995. Before April 1992, it had been raised annually:

| | Guarantee Payments |
|---|---|
| | £ |
| 1 February 1977 | 6.00 |
| 1 February 1978 | 6.60 |
| 1 February 1979 | 7.25 |
| 1 February 1980 | 8.00 |
| 1 February 1981 | 8.75 |
| 1 February 1982 | 9.15 |
| 1 February 1983 | 9.50 |
| 1 February 1984 | 10.00 |
| 1 April 1985 | 10.50 |
| 1 April 1986 | 10.70 |
| 1 April 1987 | 10.90 |
| 1 April 1988 | 11.30 |
| 1 April 1989 | 11.85 |
| 1 April 1990 | 12.65 |
| 1 April 1991 | 13.65 |
| 1 April 1992 | 14.10 |
| 27 September 1995 | 14.50 |
| 1 April 1998 | 15.35 |

**Insolvency payments**

Under Part XII of the ERA, the Secretary of State (through the National Insurance Fund) must pay certain debts owed by an insolvent employer to his employees. The four principal debts covered are:

i) arrears of pay up to a weekly limit for a maximum of eight weeks;
ii) accrued holiday pay of up to a weekly limit for a maximum of six weeks;

iii) a compensatory payment for failure to give proper statutory notice, again up to a weekly limit; and

iv) an unpaid basic award (made by an industrial tribunal) of compensation for unfair dismissal.

The weekly limit on (i) to (iii) is the same as the weekly limit for redundancy payments and unfair dismissal awards - i.e. £220 at present.

**Special awards**

There are special awards payable where people are dismissed on grounds of trade union membership or non-membership[44] or on grounds of their activities as employee representatives on health and safety,[45] occupational pension fund trusts[46] or consultative bodies on collective redundancies or transfers of employment.[47] If an employee asks the tribunal for an order of re-instatement or re-engagement in these cases but the tribunal refuses to make such an order, the special award is normally 104 weeks' pay, subject to a minimum and maximum. These are currently £14,500 and £29,000. If a tribunal orders re-employment in these cases and the employer fails to comply with the order, the special award is normally 156 weeks' pay, subject to a minimum, which is currently £21,800. The Secretary of State is under no obligation to increase these minima and maxima but he "may" do so by an order approved by both Houses of Parliament.[48]

## 2. The Proposal

The White Paper said:

> **3.8** Many of the limits on compensation awards have, by law, to be reviewed annually. Others are reviewed at the Secretary of State's discretion. Reviews are time consuming, costly and produce results which could generally have been predicted. **The Government therefore proposes to introduce legislation to index-link limits, subject to a maximum rate.** This does not apply to awards for unfair dismissal where the Government proposes abolition of the limit.

The White Paper also sought views on whether the limits on additional and special awards should be retained at all:

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44 Sections 157 - 158 TULRCA
45 Sections 100, 118 and 125 ERA
46 Sections 102, 118 and 125 ERA
47 Sections 103, 118 and 125 ERA
48 Section 125 (7) ERA; section 159 TULRCA

**3.6** The Government is also considering whether the **limits on additional and special awards** should be retained. A tribunal may grant an additional award when an employer fails to comply with a re-employment order. Higher special awards may be made if the dismissal was because the employee:

was, or was not, a trade union member;

had taken certain types of action on health and safety grounds;

had exercised a role as the trustee of a pension fund;

had represented, or been a candidate to represent, other employees in a consultation on redundancy or on the transfer of a business.

**3.7** There are minimum and maximum limits on both additional and special awards. It is therefore possible to receive an award without having suffered any loss. On the other hand, the upper limit may act as a deterrent to someone exercising a legitimate role or right. This issue has surfaced recently in the context of the Public Interest Disclosure Bill, which is aimed at protecting "whistleblowers". A majority of the respondents to the consultation exercise on this Bill, including the CBI and the TUC, took the view that there should be no limit on compensation awarded under the Bill. The Government's view is that it would wish the compensation to be in line with other employment rights. The Government has therefore proposed that awards made under the Public Interest Disclosure Bill should attract a higher special award as described in paragraph 3.6. An alternative approach to special awards would be to allow tribunals to award aggravated damages in these limited circumstances. **The Government would welcome views.**

## 3. Reaction

There is general support for the proposal to index link statutory limits from organisations ranging from the BCC and CBI to the TUC and NACAB. The TUC and NACAB both argue that the limit on a week's pay should be removed altogether and that all the limits should be restored in value before being linked to the average earnings index for future upratings.

The CBI argue that there should be no limit on special awards:

> Where an employee has suffered detriment as a result of an office they hold as an employee representative, or because of a characteristic of their role within a business (including as a "whistleblower") then it is in the wider interests of the public and other employees that tribunals have powers to award the fullest possible compensation.

They recommend that the size of these awards should be related to the employee's actual loss. The TUC believe that there should be aggravated damages for special awards. However, the BCC, IPD and FSB argue against removing the limits for the same reasons

as they oppose removal of the cap on the unfair dismissal compensation award. The Law Society, too, is opposed to change. They argue that additional and special awards are not intended to reflect actual financial loss. They are intended to deter employers from acting in a particular way. The Law Society does not support the proposal to award aggravated damages in these cases, believing that it would just lead to delays in settling cases.[49]

## D. Fixed Term Contracts

### 1. Background

There has been a growth in the use of fixed term contracts (FTCs) in recent years - from 587,000 (2.7% of all employees) in 1992 to 845,000 (3.6% of all employees) in 1998.[50] Often there is a genuine reason why a FTC is sensible: someone is employed to cover a maternity absence, to complete a specific project, or while particular funding is available. However, some people are employed on a succession of FTCs where their employment is really no different from that of others employed on open-ended contracts. Employment law provides some protection for such people in that ending a FTC without renewal counts as a dismissal for the purposes of unfair dismissal claims and redundancy payments.[51] But the ERA also allows people employed on a FTC of one year or more to waive their right to claim unfair dismissal and those employed on a FTC of two years or more to waive their right to redundancy pay.[52] The waiver provisions date back to the introduction of the benefits, although the unfair dismissal waiver originally applied to FTCs of two years or more as well.[53]

The European social partners - employer and union organisations at European level - are currently negotiating a framework agreement on fixed term contracts under Article 4 of the Maastricht Social Policy Agreement (the "Social Chapter"), so there may eventually be European-driven legislation to provide equal treatment for fixed term and permanent employees.[54]

### 2. The Proposal

The White Paper said:

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49 Aggravated damages are damages intended to compensate a plaintiff who has suffered an injury that has been aggravated by the motives or conduct of the defendant.

50 Office for National Statistics (Labour Force Survey Database), Spring 1992 and Spring 1998 (not seasonally adjusted) figures

51 Under section 95 (1) of the ERA for unfair dismissal and section 136 (1) for redundancy payments

52 section 197 (1) for unfair dismissal and section 197 (3) for redundancy pay

53 *Industrial Relations Act 1971*, section 30 and *Redundancy Payments Act 1965*, section 15

54 *European Report*, 2300, 18 March 1998, "Negotiations on fixed-term work contracts to be launched on March 23"

**3.11** Over 850,000 people in the UK have contracts for a fixed term or a fixed task, of whom some 160,000 have a contract for over 2 years. Fixed term contracts allow employers to engage people to work on short-term tasks or jobs which have a fixed duration. An important aspect of the law governing such contracts is that it allows **employees to waive their rights to unfair dismissal and statutory redundancy payments.** This allows employers to take on fixed term contract staff for specific projects without the fear of claims for unfair dismissal or redundancy when the project is completed. However, some employees are obliged to accept fixed term contracts and to waive these employment rights for open-ended jobs.

**3.12** The Government has identified and considered a number of options for tackling this problem. The main options are:

- promoting best practice by encouraging employers to limit the use of waivers;
- restricting the waiver to redundancy payments; or
- complete prohibition.

**3.13** The Government does not believe that promoting best practice alone would deter unscrupulous employers, but complete prohibition would remove a useful flexibility for genuine employers. The Government therefore favours prohibiting the use of waivers for unfair dismissal but allowing them for redundancy payments. Short-term workers know when they start work that their job will come to an end on an agreed date and do not therefore have the same claim for redundancy compensation when it finishes. In contrast, such employees can reasonably expect to be as protected against unfair dismissal as permanent employees. **The Government would welcome views on this approach and the alternatives.**

## 3. Reaction

The CBI, BCC and IPD all agree with the Government's preferred option of prohibiting waivers for unfair dismissal rights but retaining them for redundancies. The Law Society also supports this, pointing out that where a contract was genuinely for a fixed term, dismissal at its end is likely to be fair in any case. The FSB do not want any change in the law. They argue that it will encourage employers to give workers even shorter contracts. The TUC and NACAB believe that waivers should be abolished for redundancy payments too. The TUC says:

> There should be no provision in UK employment law which allows an employee to sign away their statutory rights in order to secure a job. Unscrupulous employers will always make use of such devices (…) The TUC also believes that fixed term contracts should be limited in their use to where the job concerned is genuinely short term… Currently many employers keep staff permanently employed on renewable fixed term contracts in order to ensure that they do not accrue employment protection.

# E. Zero Hours Contracts

## 1. Background

Zero hours contracts have been defined as " a form of working where the worker is not guaranteed any work but has to be available as and when the employer needs them".[55] They hit the headlines in 1995 when a worker at Burger King was reported to have received only £1 for a five hour shift as he had been required to clock off whenever there were no customers.[56] Burger King, embarrassed by the publicity, eventually withdrew this form of contract and compensated the workers involved.[57] However, research suggests that contracts which could be classified as "zero hours" are widespread.[58] In a survey of 173 employers in both the public and private sectors, 21% reported employing people on zero hours contracts. The use of such contracts was concentrated in the service sector, particularly health care, retailing and local government. In some cases zero hours workers formed a significant proportion of the workforce. Commonly, they made up at least 10% of the workforce; had two or more years' service; were involved in skilled occupations such as teaching, nursing or social work; were expected to work at least as many hours as full timers when there was sufficient demand; yet received few of the contractual rights and benefits of their full-time counterparts.

Many employers use zero hours contracts principally to deal with fluctuations in demand and to reduce costs rather than to exclude workers from statutory protection. Nevertheless, there is a great deal of doubt about the legal status of zero hours contracts. Some employers believe that workers employed in this way are not "employees" and therefore not entitled to statutory protection against unfair dismissal or redundancy. This view is based on the argument that the workers do not have to accept the work when asked and that there is, therefore, no "mutuality of obligation". While some people employed in this way may have a real choice about whether to accept work, the reality can be very different. Some workers might find that they were never offered any more work if they once or twice refused.

The *Draft National Minimum Wage Regulations* published for consultation by the DTI on 11 September 1998 would require "downtime" or time spent "on call" or "on standby" where the worker is at the employer's premises and required to be there, to be paid at the National Minimum Wage (NMW) rate, so this might deal with the more obvious abuses of zero hours contracts.

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55 *Flexible Working*, January 1997, "Close to the core: zero hours working surveyed"

56 *Daily Mail*, 20 September 1995, "Burger King bosses on the griddle as student complains of 'slave wages'"

57 *Independent*, 19 December 1995, "Burger King pays £106,000 to staff forced to 'clock off'"

58 Katherine E Cave, *Zero hours contracts: a report into the incidence and implications of such contracts*, University of Huddersfield, 1997. Reported in *Flexible Working*, January 1997, "Close to the core: zero hours working surveyed" and May 1997, "Zero hours - the legal implications"

### 2. The Proposal

The White Paper said:

> **3.14** Some 200,000 people in the UK work under **zero hours contracts**. These contracts do not specify particular hours: the person may be required at any or at specified times. These contracts maximise flexibility for employers and suit some people who want occasional earnings. Many employers ensure the contracts are used sensibly, but they have the potential to be abused. For example, in theory, employees could be asked to "clock off" and so lose pay in quiet periods but without being able to leave the premises. Being "on call" might also create difficulties in claiming benefit, even though no work was being done or money earned.
>
> **3.15** The Government wishes to retain the flexibility these contracts offer business and believes that the National Minimum Wage and Working Time Directive will provide important basic protections against some of the potential abuses.
>
> **3.16 The Government would welcome views on whether further action should be taken to address the potential abuse of zero hours contracts and, if so, how to take this forward without undermining labour market flexibility.**

### 3. Reaction

Most commentators agree that this is an area where there has been abuse, but accept that in some cases, arrangements on these lines can suit both parties. Many (including the TUC and the IPD) believe that further research and consultation is required before any Regulations are introduced. The CBI is hopeful that the NMW will solve most of the difficulties. The TUC proposes that contracts should at least specify a minimum and maximum number of hours a worker can expect. NACAB report that Citizens Advice Bureaux (CABx) deal with many cases of problems associated with zero hours contracts such as job insecurity, uncertainty about income or hours from week to week and ineligibility for benefit even where there is no income. They propose that the law on the right to a written contract, specifying normal hours, should be strengthened.

## F. Extension of employment rights coverage

### 1. Background

Most of the rights conferred by the *Employment Rights Act 1996* are restricted to "employees". These rights include those to:

- a written statement of employment particulars
- an itemised pay statement
- guarantee payments during short-time working

- protection for shopworkers and betting workers who refuse to work on Sundays
- protection for employee representatives in health and safety, occupational pension and collective redundancy and transfer cases
- time off work for public duties, ante-natal care, employee representative duties
- maternity leave
- minimum notice
- a written statement of reasons for dismissal
- protection against unfair dismissal
- redundancy payments
- insolvency payments

An “employee” is defined as:

> an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment

A "contract of employment" is defined as:

> a contract of service or apprenticeship, whether express or implied, and (if it is express) whether it is oral or in writing

There is much case law on the distinction between a contract **of** service (employees) and a contract **for** service (self-employed) and a number of tests have been developed over the years:

- the "control" test emphasises the employer's power to control what the individual does. The more the employer can determine where someone works, how he does his work and what hours he keeps, the more likely is that individual to class as an employee

- the "integration" test looks at the extent to which the individual's work forms an integral part of the organisation. The test assumes that a self-employed person would normally be employed to perform a specific task which was not a regular part of the company's main business

- the "economic reality" test asks whether the individual is really in business on his own account. If he takes a degree of financial risk, has the chance to profit from sound management, uses his own equipment, hires his own helpers and has responsibility for investment and management, he is likely to be self-employed

- the "multiple" test recognises that no one test or set of criteria can be conclusive and that an overall assessment has to be made which takes into account all the relevant factors.

Rights under other pieces of employment legislation extend more widely to cover "workers" who personally perform work for another. The *Wages Act 1986* protected "workers" against unlawful deductions from wages. These provisions are now consolidated in the ERA which defines a "worker" as:

> an individual who has entered into or works under (or, where the employment has ceased, worked under) -
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.[59]

The *National Minimum Wage Act 1998* and the *Working Time Regulations 1998* both use this definition of a "worker" to define those covered.

The *Sex Discrimination Act 1975*, *Race Relations Act 1976* and *Disability Discrimination Act 1995* use slightly different definitions again, but they are closer to the wider "worker" definition than the "employee" definition. For example, section 82 of the 1975 Act defines "employment" as:

> employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly.

The definitions of self-employed and employed people used for tax and national insurance purposes are similar to those used in employment law, but it is possible for the same person to be treated as an employee for some purposes but as self employed for others. An Inland Revenue leaflet indicates the points which influence courts when deciding employment status for tax purposes by giving a series of questions:[60]

> *Employed*
> If you can answer "yes" to the following questions, you are probably employed:
> - Do you yourself have to do the work rather than hire someone else to do it for you?
> - Can someone tell you at any time what to do or when and how to do it?
> - Are you paid by the hour, week, or month? Can you get overtime pay?
> - Do you work set hours, or a given number of hours a week or month?
> - Do you work at the premises of the person you work for, or at a place or places he or she decides?

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59 ERA, section 230 (3)

60 *Employed or Self-Employed?*, IR56, May 1995

> *Self-employed*
> If you can answer "yes" to the following questions, it will usually mean you are self-employed:
> - Do you have the final say in how the business is run?
> - Do you risk your own money in the business?
> - Are you responsible for meeting the losses as well as taking the profits?
> - Do you provide the main items of equipment you need to do your job, not just the small tools many employees provide for themselves?
> - Are you free to hire other people on your own terms to do the work you have taken on? And do you pay them out of your own pocket?
> - Do you have to correct unsatisfactory work in your own time and at your own expense?

There is evidence that some employers purposely employ people as consultants, contractors, self-employed people or agency workers so that they do not acquire the statutory protection available to "employees".[61] In practice, they may really be employees, and the courts can determine that someone is an employee even if his contract states that he is not. However, this is a very complex area of employment law and people are often confused as to their exact status. Employers do not always benefit as much as they might hope from these arrangements as they can lead to a loss of commitment and increased recruitment, administrative and training costs.[62]

The Government has already announced its intention of reforming the law on agency workers so that it is clear that in normal circumstances "temps" supplied by employment bureaux have their contract with the bureau supplying them rather than the host employer.[63]

## 2. The Proposal

The White Paper said:

> **3.17** The Government wants to see flexibility in the labour market. But it must be coupled with fairness. In the interests of both employers and employees, greater flexibility in both working patterns and contracts must be reflected in employment legislation.
>
> **3.18** As a first step, the National Minimum Wage Bill is designed to ensure that the minimum wage applies to all those who work for another person, not just those employed under a contract of employment. The Government will take a similar approach in implementing the Working Time Directive. It now intends to

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61 See, for example, NACAB, *Flexibility abused*, September 1997

62 See, eg, *Financial Times*, 8 January 1998, "Mixed working patterns bring 'contract chaos'"

63 DTI press release, 25 September 1998, *Peter Mandelson signals new, clear rules for employment agencies and businesses*

> consult on the idea of **legislation enabling it similarly to extend the coverage of some or all existing employment rights by regulation.** The Government will consult fully on specific changes before exercising this power. The rules governing the conduct of employment agencies are also under review.

### 3. Reaction

Employers generally oppose any extension of the coverage of employment protection legislation, while other groups welcome it.

The CBI is against any extension of employment protection rights to those, such as the genuinely self-employed or those on commercial contracts, who do not have a genuine employment relationship. The BCC point out that small firms often need to use contractors and freelance workers as they cannot justify employing a member of staff for every function they require. Extending rights to them would reduce the amount of work they received. The FSB also believes that any extension of employment protection rights would be self-defeating. The IPD points out that many people like to be employed on a consultancy or casual basis and warns that:

> It would be a mistake to adopt enabling legislation in this area on the general grounds that the absence of employment status between employer and an individual is necessarily in the employer's interest rather than that of the individual.

The TUC welcomes the proposals and says that there is an urgent need for a review of this whole area, tied in with the review of employment agencies and zero hours contracts. The Law Society, too, calls for more consistency in this area. NACAB welcomes this review as many problems encountered in CABx concern employment status. They believe the approach adopted in the NMW legislation should be extended to all the ERA rights.

# III Collective Rights

## A. Trade Union Recognition

### 1. Background

At present recognition of a trade union for collective bargaining purposes is entirely voluntary. An employer may refuse to recognise a union even where a large majority of the workforce are members. This happened for example at Noon's Products where almost 90% of the workforce joined the GMB.[64] Employers can also derecognise unions more or less at will. There has been a small but steady decline in the coverage of recognition in recent years: 48.9% of employees were in workplaces with recognition in 1993 compared with

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[64] *Guardian*, 14 February 1998, "Union rights battle hots up: curry workers threaten action on recognition"

44.3% in 1997. In 1997, 8.1 million workers (35.5% of all employees) had their pay determined by a collective agreement.[65] However, the TUC report a recent upsurge in recognition agreements, possibly in anticipation of the Labour Government's legislation. In the period from July 1997 to February 1998, recognition deals outpaced derecognitions in terms of numbers of employees affected by 45 to one.[66] Dixons, for example, has recently signed an agreement which restores bargaining rights to the AEEU in the Mastercare Brown Goods Services Section. The union was derecognised in 1996.[67]

There have, though, been two periods in the relatively recent past when there have been statutory recognition provisions: 1971-1974 under the *Industrial Relations Act 1971* and 1976-1980 under the *Employment Protection Act 1975.*

**Industrial Relations Act 1971**

Sections 44-50 of the 1971 Act allowed registered trade unions to apply to the National Industrial Relations Court (NIRC) for recognition as a "sole bargaining agent" in respect of a bargaining "unit". The NIRC was able to refer the questions of whether a specified group of employees should be recognised as a "bargaining unit", whether a sole bargaining agent should be recognised, and, if so, which union should be that agent, to the Commission on Industrial Relations (CIR). CIR recommendations could be submitted to a ballot, and, if approved by a simple majority of employees in the bargaining unit, the NIRC would make an order defining the unit, specifying the trade union and employer and designating that union as sole bargaining agent. The *Industrial Relations Act's* provisions were undermined by the TUC's successful campaign of non-registration, so comparatively little use was made of the statutory recognition procedure. While the CIR was a statutory body - (it was first established as a Royal Commission in 1969) - it only reported on 25 cases referred under the statutory recognition procedures of section 46 of the Act.

**Employment Protection Act 1975**

Sections 11-16 of the *Employment Protection Act 1975* allowed an independent trade union to apply to the Advisory, Conciliation and Arbitration Service (ACAS) to settle a recognition issue. ACAS would seek to settle the issue by agreement, but, if this failed, it could publish a report making a recommendation on recognition. In the course of its inquiries, ACAS was required to ascertain the opinion of the workforce by any means it thought fit, including a formal ballot. If an employer failed to comply with ACAS' recommendation for recognition and did not bargain properly with the union, the union could, as a last resort, refer the matter to the Central Arbitration Committee (CAC) which could impose its own award of terms and conditions.

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65 *Labour Market Trends*, July 1998
66 TUC, *Trade Union Trends: focus on recognition*, April 1998
67 *People Management*, 25 June 1998, "Dixons deliver the goods with first partnership deal"

Between 1976 and 1980, 1,610 recognition issues were referred to ACAS, of which 1,362 were resolved, almost 82% of them on a voluntary basis. Recognition was granted in 573 cases (36%). ACAS itself, looking back on the operation of the statutory recognition procedures concluded that it was "extremely difficult to envisage a statutory procedure for compulsory trade union recognition which could operate smoothly" and tended to favour a voluntary approach.[68] The consensus of opinion is that the 1975 Act procedures were not a success. An article in *Employment Law Briefing* describes them as "ineffectual and unpopular" and recalls a "sigh of relief from both sides of industry, as well as from ACAS" when they were repealed.[69] An article in the Industrial Relations Service's *Employment Trends* identified some of the main problems associated with the 1975 system:[70]

- Inter union disputes where more than one union or employee organisation was seeking recognition
- Refusal by some employers to co-operate with the ACAS inquiry by withholding information, Grunwick being the most notorious instance
- Attempts by employers to influence the outcome
- Time-consuming procedures

**Trade Unions in the 1980s and 1990s**

The statutory recognition procedures of the 1975 Act were repealed by the *Employment Act 1980*. During the 1980s and 1990s trade union membership and influence declined, partly as a result of the Conservative Government's trade union legislation, but also because of wider structural changes in labour and product markets.[71] Total membership of trade unions declined from 13.29 million at the end of 1979 to 7.94 million at the end of 1996:[72]

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68 ACAS Annual Report 1980, para 8.151

69 *Employment Law Briefing*, Vol 5, No 1, Nov/Dec1997, "Statutory Recognition of Trade Unions"

70 *IRS Employment Trends 641*, October 1997, "Recognising the unions"

71 See, eg, William Brown et al, "The Effects of British Industrial Relations legislation 1979-97", *National Institute Economic Review 3/97*, July 1997

72 Information from Certification Officer, reproduced in *Labour Market Trends*, February 1997 and July 1998

| | Trade union membership (000s) |
|---|---|
| 1979 | 13,289 |
| 1980 | 12,947 |
| 1981 | 12,106 |
| 1982 | 11,593 |
| 1983 | 11,236 |
| 1984 | 10,994 |
| 1985 | 10,821 |
| 1986 | 10,539 |
| 1987 | 10,475 |
| 1988 | 10,376 |
| 1989 | 10,158 |
| 1990 | 9,947 |
| 1991 | 9,585 |
| 1992 | 9,048 |
| 1993 | 8,700 |
| 1994 | 8,278 |
| 1995 | 8,089 |
| 1996 | 7,935 |

In July 1995, the TUC published proposals for "rights to representation at work".[73] They argued that "growing job insecurity, excessive rewards for top executives and harsher management demands [had combined] to make people feel more vulnerable at work today" and cited an NOP poll showing that 93% of people agreed that there should be a right to have a union negotiate on pay if that was what employees wanted. Their three proposals were for:

- A universal right to representation contained in contracts of employment for all workers
- Consultation rights where ten per cent of employees were in union membership
- Trade union recognition - majority support of those voting in a ballot, or in some other means of surveying opinion in a bargaining unit, would bring an award of collective bargaining rights by a new "Representation Agency".

**1997 General Election**

Labour's manifesto for the 1997 General Election promised:

> The key elements of the trade union legislation of the 1980s will stay - on ballots, picketing and industrial action. People should be free to join or not to join a union. Where they do decide to join, and where a majority of the relevant

[73] TUC, *Your voice at work*, July 1995

> workforce votes in a ballot for the union to represent them, the union should be recognised. This promotes stable and orderly industrial relations. There will be full consultation on the most effective means of implementing this proposal.[74]

Their business manifesto, *Equipping Britain for the future*, was only slightly more revealing:

> Every employee should be free to join or not to join a trade union. We will not impose trade unions on employees or return to the closed shop. When they do decide to join, and where a majority of the relevant workforce votes in a ballot for the union to represent them, we believe the union should be recognised.
>
> Strikes in support of recognition claims today are trade disputes covered by the existing legal immunities. Our proposal offers a better way and removes any need for industrial action by a trade union in support of a claim for recognition. We believe that this is a step forward in promoting orderly industrial relations.[75]

The earlier policy document, *Building Prosperity - Flexibility, Efficiency and Fairness at Work*, published in June 1996, had indicated that the collective bargaining issues covered would be pay, hours, holidays and training:

> Where a majority of the relevant workforce vote to be represented by a trade union, there should be a legal obligation on employers to recognise a union for collective bargaining on the issues of pay, hours and holidays, and training. The bargaining agenda could be extended to other issues by mutual agreement.[76]

The issue came up during the election campaign, when employers' organisations raised fears about the proposals. On 18 March 1997, the *Financial Times* reported that the CBI had written to the Labour leadership saying that "compulsory recognition is wholly inconsistent with the UK's voluntary system of employee relations and cannot be a basis for effective workplace relationships".[77] The attempt at legal recognition in the 1970s had "produced no definitive improvements in the conduct of industrial relations". The Engineering Employers' Federation (EEF) wrote in similar terms saying that it would "be particularly alarmed if the criteria for determining statutory recognition were based on vague terms such as 'the relevant workforce' and employees were not required to have already become members of a trade union before they sought the introduction of collective bargaining arrangements".[78]

John Major, Kenneth Clarke and Michael Heseltine made Labour's trade union proposals the issue of the day on 24 March 1997 and Labour appeared to be in some disarray in attempting to respond to detailed questions. Eventually it emerged that disagreements over recognition

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74 *New Labour because Britain deserves better*, p 17
75 Labour Party, *Equipping Britain for the* future, p 11
76 Labour Party, *Building Prosperity - Flexibility, Efficiency and Fairness at Work*, June 1996
77 *Financial Times*, 18 March1997, "Labour union plan raises concern"
78 Ibid

would go initially to the Advisory Conciliation and Arbitration Service (ACAS) and then to the Central Arbitration Committee, which would in future be headed by a judge.[79] ACAS later made it clear that it was not keen to take on this role.[80]

Tony Blair, writing in the *Times*, said:

> The changes that we do propose would leave British law the most restrictive on trade unions in the Western world. The scenes from Grunwick, Wapping or the miners' strike could no more happen under our proposals than under the existing laws.
>
> As for union recognition, we have rejected the TUC proposals, which were for wider rights of representation. Instead, we propose that where a majority of the relevant workforce decide in a ballot that they wish to be represented by a union, they should have that option. At present they have to take, and can lawfully take, industrial action to secure recognition. We are proposing the more orderly route of a ballot. Of course, drafting questions will arise - for example, what will be the 'relevant workforce' - and these will be determined, after consultation, in government. But such definitional issues arise already, for example under equal pay legislation, where female workers have to compare themselves with the relevant employment. They also arise in determining the scope of ballots for industrial action.[81]

An article in the *Financial Times* on 7 April 1997 suggested that trade unions were exasperated by the Labour leadership's apparent backtracking on trade union recognition. It said that the original plan had been to pass union recognition legislation as part of a wider "fairness at work" measure in the first year of a Labour government, but that it was now unlikely to come into force until 1999 at the earliest. "Moreover, a deliberate ambiguity appears to have been written into Labour's election manifesto. It is now unclear whether all workers or just those who are paid up members of a union can vote in a recognition ballot."[82]

**TUC-CBI Joint Statement**

Once elected, Labour Ministers approached the “social partners" – the CBI and the TUC – and asked them to hold talks aimed at identifying areas of common ground which could be used as a basis for the proposed *Fairness at Work* White Paper. The TUC and the CBI sent a joint statement to Government on 4 December 1997, but many areas of disagreement remained. The CBI was still opposed in principle to statutory trade union recognition, while the TUC welcomed the Government’s manifesto commitment and submitted its own detailed proposals, drawn up in 1995, for how statutory recognition might be implemented.[83]

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79 *Times*, 26 March 1997, "Labour wants union role for judges"
80 *Financial Times*, 18 June 1997, "Acas resists moves to impose new legal role"
81 *Times*, 31 March 1997, "We won't look back to the 1970s"
82 *Financial Times*, 7 April 1997, "Backtracking embitters trade union old guard"
83 *Your Voice at Work: TUC proposals for rights to representation at work*, 1995

The main points of the joint statement were:

- The CBI and the TUC agreed that trade union recognition should be voluntary wherever possible. If the parties themselves could not agree, there should be a period for voluntary conciliation under the auspices of ACAS.

- If voluntary conciliation failed, there should be an alternative "infrastructure" which would resolve the question. The TUC submitted proposals for a Representation Agency. The CBI did not make a specific proposal. The statement called the infrastructure the "Agency" for convenience.

- The CBI and the TUC agreed that the Agency should have the power not to proceed with applications for union recognition which involved inter-union disputes, where the union had unreasonably refused to take part in ACAS conciliation or where they appeared to be frivolous. Joint union applications should be possible.

- The CBI believed that a union claim should be accompanied by a demonstration of 30% support from employees to whom the claim related. The TUC did not agree with this.

- The TUC and the CBI agreed that a union should not be able to re-submit a comparable claim for recognition until at least three years after the previous application had failed.

- The CBI believed that small businesses should be exempt. The TUC disagreed.

- The CBI believed the bargaining unit should be defined according to existing business structures and that it should be for the employer to propose the bargaining unit. The TUC believed that business structures were but one of a range of factors (including the extent of shared interests and similar work, group awareness, the wishes of the workforce and the organisation and location of work) which should be taken into account. The TUC believed the Agency should make a ruling on each case on its merits.

- Once the bargaining unit had been determined, the Agency would have to assess the extent of support for collective bargaining. Both the CBI and the TUC believed that the balloting constituency should be all workers in the bargaining unit, regardless of union membership. However, the CBI believed that there should always be a ballot, whereas the TUC believed this was not necessary if the union already had majority membership. The CBI believed that a majority of relevant employees should support recognition, whereas the TUC believed a majority of those voting was all that should be required.

- The CBI believed that an employer should be able to apply for a ballot on de-recognition. He would have to demonstrate support from 30% of employees in the bargaining unit. Both TUC and CBI agreed that the three-year rule for re-balloting would apply to employers as well as employees.

- The CBI believed that the scope of a statutory recognition award should be limited to pay, hours and holidays. The TUC thought this was too simplistic. Both agreed that there would have to be remedies available if the award was not complied with.

Attempts to bridge the gap between the TUC and the CBI continued right up to the publication of the White Paper. Press reports suggested that the Prime Minister was leaning towards the CBI's position.[84] Shortly before publication of the White Paper it was reported that the TUC had offered to agree that 30% of the workforce should vote in favour of recognition, while Tony Blair was insisting on 40% support or a majority of those voting if the turnout reached 70%.[85] The TUC were also reported to have conceded that small firms with 10 or fewer employees need not be covered.[86] The CBI was, apparently, arguing that firms with fewer than 50 employees should be exempt.[87] In the event, the *Financial Times* declared the scoreline on the whole *Fairness at Work* White Paper to be "Unions 6, Employers 2":[88]

> After two decades in which the pendulum has swung firmly against them, there is no doubt that the unions are the winners in yesterday's proposals. Employees gain too, as new rights to maternal and parental leave flow in from European directives.
>
> But the employers have something to be happy with. The compromise over trade union recognition ballots - that 40 per cent of the workforce will have to vote in favour - is far closer to their desired threshold of 50 per cent than the unions wished. And crucially the government has underlined their existing right to offer individual contracts, so recognition will not bind individuals to collective agreements.
>
> The unions' big gains are that proof of membership by 50 per cent plus one of the workforce will entitle them to automatic recognition without a ballot - though not in companies employing less than 20 people, a figure which covers 5 million employees. And any union member, in small firm or large, will have the right to union representation during grievance or disciplinary procedures.
>
> That last, potentially, provides the unions with a toe-hold in any company in the land, and the Confederation of British Industry is right in its concern that, if it happens at all, it should apply only to disciplinary matters, not run of the mill

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84 *Guardian*, 9 December 1997, "TUC fears watering down of ballot plan"; *Financial Times*, 9 December 1997, "Union leaders fear Blair climbdown"; *Observer*, 14 December 1997, "Vested interests strike at heart of Labour pledge"

85 Press Association, "Union White Paper expected by end of month", 7 May 1998; *Times*, 5 May 1998, "Let firms stay free to decide on union recognition" by Ruth Lea, head of policy unit of Institute of Directors

86 *Guardian*, 21 April 1998, "TUC offers concession on union recognition"

87 *Times*, 5 May 1998, "A defining moment for our 'one nation'" by Bill Morris, General Secretary of the TGWU

88 *Financial Times*, 22 May 1998, "Unions and employers"

grievances. It could prove a powerful recruiting sergeant for the unions - although only if they demonstrate that they are effective for their members.

## 2. The Proposal

The White Paper announced:

> **4.10** The Government accepts the importance of voluntary choices, and believes that mutually-agreed arrangements for representation, whether involving trade unions or not, are the best ways for employers and employees to move forward. Where agreements are reached voluntarily, they are most likely to be successful and suited to the needs of the enterprise.
>
> **4.11** However, there will be occasions where employees want the benefit of representation at work, but are unable to secure agreement to it from their employer. The Government believes strongly that these will form a very small minority of cases, and that even then the prospects of voluntary agreement must be exhaustively examined. But as part of setting in place minimum standards, **the Government will bring forward legislation to provide for representation and recognition where a majority of the relevant workforce wants it.** The prime purpose of this is to offer greater protection and security at work for the vulnerable. The extent of trade union growth and organisation is dependent on trade unions being able to convince employers and employees of their value - how much help they can bring to the success of an enterprise for employers, and how much active support they can offer employees. Where trade unions are able to demonstrate value to employers they are more likely to be recognised, and where they are able to demonstrate value to employees they are more likely to win members.

The essential features of the proposal are:[89]

- there will be a legal procedure, with time limits attached to various stages;
- the procedure will encourage the parties to reach voluntary agreements wherever possible. If, exceptionally, this proves impossible, a restructured and reinforced Central Arbitration Committee (CAC) will decide any of the following issues on which the parties are unable to agree:

  - whether a trade union has reasonable support among the employees for whom it is seeking recognition. This will rule out frivolous applications;

  - what is the appropriate bargaining unit. Where there is disagreement over the bargaining unit proposed by the union, the CAC will apply criteria including the need for effective management, existing

[89] White Paper, para 4.18

bargaining arrangements and the desirability of avoiding fragmented units within an undertaking. Employers must and will be free to organise their business in the way they choose;

- whether a sufficient majority of employees support recognition: the CAC will award recognition where a ballot shows that a majority of those voting and at least 40% of those eligible to vote are in favour of recognition. This number will be reviewed after the legislation has been in place for a period of time so that it can be altered if it is shown to be unworkable;

- the procedure to be followed for negotiations between an employer and a trade union. Recognition will cover pay, hours and holidays. The Government invites views on whether it should also cover training. The parties would of course be free to reach voluntary agreements on the issues to be covered;

- there will be a similar procedure for derecognition. The Government invites views on exactly how this should work;

- new applications for recognition or derecognition will not be considered by the CAC until three years after the date on which a previous application was determined;

- the procedure will not apply to firms with 20 or fewer employees.

- A simpler procedure should apply where employees are actually already members of a trade union. Where over half the workforce are in union membership already, so that they have clearly demonstrated through membership their desire for the union to bargain for them, then recognition should be automatic without a ballot.

Annex 1 to the White Paper describes the proposed statutory procedure for trade union recognition in detail.

## 3. Reaction

Most employers' organisations remain opposed to the whole concept of statutory trade union recognition. However, they accept that it was a manifesto commitment and will be implemented. Given that, they have argued strongly for further changes, particularly the abandonment of an automatic right to recognition where over 50% of relevant employees are union members and an increase in the small firm exemption threshold to at least 50 employees. Trade unions, on the other hand, regard the requirement for 40% of eligible voters to vote in favour as unfair and continue to press for the inclusion of all firms, however small.

The CBI, IPD and BCC all argue against automatic recognition on 50% membership because they believe that many people join trade unions for reasons other than the desire

to be covered by collective bargaining. These include the desire for individual representation and for financial or legal services. The CBI propose raising the small firm threshold to 50 because "Members believe that direct relations between management and employees is the norm in businesses with far more than 20 employees". The BCC argue that firms with fewer than 50 employees "seldom have the resource or expertise to negotiate with professional trade union officials". The FSB believe the threshold should be at least 50 and preferably 100. Both the CBI and the IPD argue that the proposed timescales are too short: the IPD, for example, believes it is unrealistic to expect the CAC to determine the appropriate bargaining unit within seven days if the parties have failed to agree. The CBI, IPD, and BCC all oppose the inclusion of training in the bargaining agenda. The IPD says that, historically, this has led to restrictive practices, inhibiting access to occupations, multi-skilling, up-skilling and progress based on merit. The CBI oppose the idea of multi-union joint claims, arguing that unions might join together to secure recognition but that inter-union rivalry will emerge over time. They also believe that trade unions should be able to demonstrate 20% membership over the previous 12 months to hold a ballot. This would prevent opportunistic ballots on the back of single issues.

The TUC welcome most of the proposals on statutory recognition, but point out that a "Yes" vote from 40% of the eligible electorate is more than most MPs got at the last election. They also point out that over 5 million employees work in firms with fewer than 20 employees. Small firms are particularly prevalent in printing, construction, electrical contracting, agriculture, road haulage and the voluntary sector, and many are covered by national agreements. The nature of bargaining is different in small firms, but, the TUC say, there is no reason to deny their employees the right to be covered by union bargaining arrangements. Both the TUC and the Law Society believe that collective bargaining should cover not only training, but other issues such as occupational pensions.

## B. Dismissal of strikers

### 1. Background

There is no specific statutory provision giving an employer the right to dismiss employees who go on strike. Nor is there a statutory "right to strike". An individual who goes on strike is almost invariably in breach of his contract of employment, and, therefore, liable to dismissal under contract law.

Statute law first entered the equation in 1971 when the *Industrial Relations Act 1971* introduced a right to take a claim for unfair dismissal to an industrial tribunal. Section 26 of that Act excluded strikers from the right to claim unfair dismissal unless they could show that their employer had been selective in his dismissal or re-engagement of those on strike, and that those dismissed or not re-engaged had been selected because of their union membership or activities. Some modifications were made by the *Employment Protection Act 1975*, but the general principle that dismissal of strikers was only unfair if it was selective was retained. The *Employment Act 1990* made it possible for employers to dismiss unofficial strikers selectively without giving them a right to claim unfair dismissal.

The current provisions have been consolidated in sections 237 and 238 of the *Trade Union and Labour Relations (Consolidation) Act 1992* [TULRCA]. Section 237 removes altogether the right to claim unfair dismissal at an industrial tribunal from employees dismissed while on unofficial strike. Section 238 removes this right from employees dismissed while on official strike unless their employer selectively dismisses strikers or selectively re-engages them within three months of the last dismissal.

There have been a number of high profile cases - like those at Timex and Magnet - where employers did dismiss whole workforces and bring in replacement labour when faced with a strike.[90]

Trade unions that organise a strike will almost certainly commit a "tort" or "civil wrong" such as inducement of breach of contract or interference in performance of the terms of a contract. The remedies for torts are primarily damages and injunctions. Insofar as there is any "right to strike" in British law, it has been conferred by Acts of Parliament which granted trade unions and trade union officials immunity from liability for these torts. There is therefore a freedom to strike in cases for which immunity is granted rather than any individual or collective right to strike.

The Conservative trade union legislation severely reduced the scope of these immunities. Amongst other things, it removed immunity from secondary action and political strikes, and introduced complex procedural requirements involving secret postal ballots and seven-day strike notice which must be complied with if immunity is to be preserved in other cases. It is only strikes for which a trade union has immunity that are "lawful".

## 2. The Proposal

The White Paper said:

> **4.21** A further area where the Government believes there is a need to correct an anomaly is the provision which means that **employees taking industrial action risk dismissal for breaking their contracts**. Almost all industrial action is in breach of contract. If the industrial action is unofficial - that is, not endorsed by the trade union - then an employee dismissed for breach of contract cannot claim unfair dismissal. If the action is official, a claim can be made only if the employer has acted selectively - for example, by dismissing only some of those taking action.
>
> **4.22** The Government has no plans to change the position in relation to those dismissed for taking unofficial action. However, in relation to employees dismissed for taking part in lawfully organised official industrial action, the

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[90] See, eg, *People Management*, 2 April 1998, "Poles apart" for an account of the Magnet dispute and *Guardian*, 3 March 1993, "Timex jobs fight turns clock back to 1980s"

Government believes that the current regime is unsatisfactory and illogical. **The Government believes that in general employees dismissed for taking part in lawfully organised official industrial action should have the right to complain of unfair dismissal to a tribunal.** In any particular case the tribunal would not get involved in looking at the merits of the dispute; its role would be to decide whether the employer had acted fairly and reasonably taking into account all the circumstances of the case.

**4.23** The Government is considering how to implement this in a simple and workable fashion which avoids unnecessary burdens on the tribunal system or ACAS. **The Government therefore invites views on**:

- the tests which should be applied to determine whether dismissals in these circumstances are fair; and

- procedural aspects such as the possibility of grouped actions and whether compensation should be at a flat rate or calculated individually as for other unfair dismissals.

## 3. Reaction

Employers' organisations are generally opposed to this proposal, whereas trade unions support it.

The IPD stresses that employees taking industrial action are in fundamental breach of their employment contracts and aim to damage the business. They find it hard to see how a tribunal could make a judgement on fairness without examining the merits of the dispute. The CBI believe that "any legislation in this area must specify that the fairness of dismissal should be assessed solely against established criteria, and not in light of whether the industrial action itself was justified." They propose that employers should be able to put employees on notice of, say, 28 days, that further participation in a strike will lead to dismissal.

The TUC argues that dismissal of an employee for taking part in lawful industrial action should be automatically unfair and should result in automatic reinstatement or compensation. They believe that the burden of proof should be on the employer to show that the reason for dismissal was something other than taking part in lawful industrial action. The Law Society agrees that there may be conduct during a strike which merits dismissal (eg damage to the employer's property), but believe that employers sometimes just take the opportunity of a strike to get rid of the ringleaders. They argue that this should be automatically unfair.

## C. Discrimination against trade union members

### 1. Background

Under the *Trade Union and Labour Relations (Consolidation) Act 1992* [TULRCA], it is unlawful to refuse a person employment "because he is, or is not, a member of a trade union".[91] It is also unlawful to take action short of dismissal against an employee on "grounds related to union membership or activities"[92] or to dismiss an employee on "grounds related to union membership or activities".[93] The fact that it is not unlawful to refuse someone employment on the grounds of trade union activities has protected the activities of organisations like the Economic League which maintained a "blacklist" of union activists.

TULRCA also permits action short of dismissal against trade union members if the employer's purpose in taking such action was "to further a change in his relationship with all or any class of his employees".[94] This provision was introduced by the Conservative Government in 1993 following a Court of Appeal ruling in "Wilson and Palmer" that restricting pay rises to people who transferred from collective bargaining to personal contracts discriminated against trade union members (see below). Eventually, the House of Lords ruled that such discrimination was discrimination by "omission" rather than by "action" and was therefore permissible.

**"Wilson and Palmer"**

Mr Palmer worked in a manual engineering grade for Associated British Ports (ABP) in Southampton. He was also a member of the National Union of Rail, Maritime and Transport Workers (RMT) which was recognised by ABP for the purposes of collective bargaining. In February 1991, ABP offered its manual grades personal contracts, under which pay and conditions were individually determined, in place of the process of collective bargaining. Workers who accepted the offer were granted significantly higher pay increases than those who decided to stay with collective bargaining. Mr Palmer refused the personal contract and was, therefore, paid less than his colleagues. He complained to an industrial tribunal that ABP had discriminated against him as an individual on grounds of his trade union membership contrary to section 146 (1) (a) of TULRCA.

The industrial tribunal upheld Mr Palmer's claim. The Employment Appeal Tribunal (EAT) overturned the industrial tribunal ruling; but the Court of Appeal reversed the EAT ruling and supported Mr Palmer.

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91 section 137
92 section 146
93 section 152
94 section 148(3)

The Court of Appeal cited the case of *Discount Tobacco and Confectionary Ltd v Armitage* [1990 IRLR 15] in which Mrs Armitage, a union member, was dismissed after she consulted a union official about the terms of her employment contract and the official wrote a letter to her employer on her behalf. In this case, the EAT found that the union official's activities were an important "incident of union membership" and that there was no "genuine distinction between membership of a union on the one hand and making use of the essential services of the union, on the other". The CA, in the Palmer case, endorsed this ruling as "unquestionably correct". ABP could not, therefore, argue that they were not penalising union membership merely the use of its negotiating services.

The Wilson case was similar. Mr Wilson was employed by Associated Newspapers as a journalist on the Daily Mail and was, in fact, the father of the NUJ chapel. The NUJ was recognised for collective bargaining but, in 1989, Associated Newspapers decided to derecognise it from 1990. The company offered new personal contracts and a company handbook which stated that, while journalists were free to join a union, they could not take part in its activities during working hours. People who accepted the new contract by 1 April 1990 were given a 4.5% pay rise; but those who - like Mr Wilson - refused, were not. An industrial tribunal upheld Mr Wilson's complaint of unlawful discrimination under s.146 (1) (a) of TULRCA. The EAT overturned it but the CA, again, reversed the EAT decision and supported Mr Wilson. The Court said that there was nothing wrong with derecognising trade unions but offering individuals sweeteners to give up the right to representation did amount to unlawful discrimination against those who did not take up the offer.[95]

The Government acted with what many considered unseemly haste to "clarify" the law so that similar cases would not be decided in the same way. An amendment to the *Trade Union Reform and Employment Rights Bill 1992/3* [TURERA] introduced in the Lords after Committee and Report stages had been completed, provided that where an employer's "purpose" (in discriminating against trade union members) is to change his relationship with a group of employees (eg, by altering collective bargaining arrangements), this purpose and not the incidental purpose of deterring trade union membership, shall be paramount.[96]

The House of Lords, in its judicial capacity, eventually overturned the Court of Appeal decision in any case. Their argument revolved around the definition of the word "action" in section 146. They said that not paying an increase to an employee was not an "action" taken by an employer but an "omission".[97]

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[95] 1.*Wilson v Associated Newspapers Ltd* 2. *Palmer and another v Associated British Ports* IRLR [1993] 336 CA

[96] HL Deb 24 May 1993, cc 21-67 and HC Deb 15 June 1993, cc 738-832

[97] *Times* Law Report, 31 March 1995, "Selective pay freeze lawful"

## 2. The Proposal

The White Paper said:

> **4.24** The Government is also concerned that the law **currently allows for some discrimination against those involved in trade union activities**. The House of Lords ruled in "Wilson and Palmer"… that the law allowed an employer to discriminate by omission against an employee on grounds of trade union membership, non-membership or activities.
>
> **4.25** The Government believes that such discrimination is contrary to its commitment to ensuring individuals are free to choose whether or not to join a trade union. In addition, when a company has recognised a trade union it is important that trade union representatives are active in promoting effective dialogue with employees. The current law may deter employees from being involved in such activity. **The Government therefore proposes to make it unlawful to discriminate by omission on grounds of trade union membership, non-membership or activities**. The law already provides protection against discrimination in recruitment on the basis of trade union membership. **The Government also proposes to prohibit blacklisting of trade union members.**

## 3. Reaction

Few respondents oppose the reversal of "Wilson and Palmer". The CBI and the IPD believe it important that employers should still be able to agree more favourable terms with individuals than those agreed by collective bargaining without this amounting to discrimination against trade unionists. On this, paragraph (viii) of Annex 1 to the White Paper says:

> The terms of agreements resulting from collective bargaining are normally incorporated into individual employees' contracts either explicitly or by custom and practice and thus set the minimum terms and conditions for all employees in the bargaining unit. Under the existing law an employer and employee can agree different terms if they wish. Since the current law allows flexibility and works well, the Government sees no reason to change it.

The TUC and the Law Society point out that changes to the law would also need to repeal TURERA's amendment to section 148 of TULRCA.

There is a general welcome for the proposal to outlaw blacklisting of trade union members, though the FSB does not think this occurs in small businesses. Both the TUC and the Law Society argue that section 137 of TULRCA should be extended to cover trade union activities as well as membership and the TUC suggests that discrimination on grounds of previous trade union membership or activity should be specifically outlawed.

# D. Strike Ballots

## 1. Background

It was the *Trade Union Act 1984* which introduced secret pre-strike ballots. To protect their immunity, trade unions could only start industrial action if the action had been approved by a simple majority in a ballot held not more than four weeks before. The *Employment Act 1988* required separate pre-strike ballots at each place of work or bargaining unit. It also gave the Secretary of State the power to issue Codes of Practice on pre-strike ballots.[98] The *Employment Act 1990* extended the law on strike ballots to self-employed trade union members. The *Trade Union Reform and Employment Rights Act 1993* provided that all industrial action ballots should be fully postal; that unions should give employers at least seven days' notice of their intention to ballot on industrial action; that unions should notify employers of the ballot result; that ballots involving 50 or more members should be subject to independent scrutiny; and that unions should provide employers with at least seven days' notice of industrial action. Before the 1997 General Election, the Conservative Government issued a White Paper proposing yet more conditions which a union would have to meet to comply with the law on strike ballots.[99] These included extending from seven to fourteen days the period of notice which a trade union must give in order to enjoy statutory immunity; raising the threshold required for a strike ballot to confer immunity from a majority of those voting to a majority of those entitled to vote; and requiring trade unions to seek support for industrial action to continue through a new ballot two or three months after the start of the action and at regular intervals thereafter.

In some respects, the requirement to hold ballots helped trade unions in that a vote in favour of strike action strengthened their hand in negotiations.[100] However, the complex requirements imposed, in particular by the 1993 Act, have made it increasingly difficult for unions to call lawful strikes and given employers the opportunity to take out injunctions halting strike action because of a procedural technicality. A recent survey by *Labour Research* of legal action by employers against trade unions found that all of the nine cases brought to court in the last 12 months involved alleged breaches of the law on industrial action ballots.[101] Balloting irregularities accounted for 45% of all employers' legal actions against trade unions since 1983. In the Central Foundation School case, an injunction was granted because action by members of the NUT started 29 days after the declaration of the ballot result instead of 28 days. And in the South West Trains case, an injunction was granted because RMT had inadvertently sent out ballot papers to 20 individuals who were no longer working for the company.

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98 A Code of Practice was issued in 1990, and revised in 1991 and 1995 to take account of changes in subsequent legislation

99 *Industrial Action and Trade Unions*, Cm 3470, November 1996

100 See, eg, Jane Elgar and Bob Simpson, *Industrial action ballots and the law*, Institute of Employment Rights, 1996

101 *Labour Research*, October 1998, "Ballot laws cause legal attacks"

One provision of TURERA[102] was that the notice of intention to hold a ballot should contain information "describing (so that he can readily ascertain them) the employees of the employer who it is reasonable for the union to believe… will be entitled to vote in the ballot". When the Bill was going through Parliament, the Labour Opposition was concerned that this might compel unions to name individuals. The Conservative Minister, Patrick McLoughlin, said that he could think "of no circumstances in which names and addresses will be required".[103] However, in a subsequent court case - *Blackpool & Fylde College v National Association of Teachers in Further and Higher Education*, the High Court ruled that a trade union may have to name individuals to remain within the law.[104] The current Code of Practice says that:

> … In some cases, however, if the employer would otherwise be left in doubt, more specific information (possibly including names and workplace locations) may be needed.[105]

## 2. The Proposal

The White Paper said:

> **4.26 The law and Code of Practice on industrial action ballots and notice also need reform.** Present provisions are unnecessarily complex and rigid. This makes it difficult for trade unions and their members to understand their rights and responsibilities. Complexity leads to disputes. One study suggests that three quarters of the legal actions brought by employers against trade unions concern the ballot and notice provisions. This is damaging to business efficiency, as well as to trade unions. **The Government therefore intends to simplify the law and Code and welcomes views on how this should be done.**
>
> **4.27** A particular difficulty is the legal requirement on trade unions in certain circumstances to give to employers the names of those they will ballot. Trade unions are reluctant to do so because some members may not wish their trade union to disclose their names to the employer. The Government agrees that trade unions should not be forced to disclose their members' names. **It therefore intends to amend the law to make clear that while the trade union's notice to the employer should still identify as accurately as reasonably practicable the group or category of employees concerned, it need not give names.**

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[102] now section 226A of TULRCA
[103] SC Deb (F) 15 December 1992, cc 247-248
[104] 24 February 1994, High Court
[105] para 22

### 3. Reaction

In general, employers' organisations do not agree that the law on industrial action ballots needs reform, while trade unions and others welcome the proposed simplification.

The CBI, BCC and IPD all argue that employers cannot check the validity of a ballot without knowing the names of those who are being balloted. The CBI adds that nothing must be done which would prejudice an employer's right to know which of his employees is on strike. Apart from anything else, they need to know so that they can deduct pay.

ACAS, the Law Society and the TUC agree that the present rules are excessively technical and require reform. ACAS offers to revise the Code. The TUC quotes examples of particularly frustrating provisions of the Code: paragraph 48 requires unions to get ballot papers to members who are sick or away on holiday and paragraph 49 implies that they should maintain a completely up to date list of members names and addresses. They say:

> The detailed obligations on unions provide enormous scope for employers to challenge any proposed industrial action. The test applied to applications for injunctions means that action can be halted on an allegation that there has been some infringement of the law, which is subsequently proved to be unfounded. This exacerbates disputes.

## E. Right to be accompanied in grievance and disciplinary procedures

### 1. Background

There never has been a statutory right to be accompanied in either grievance or disciplinary procedures. Indeed, there is no explicit statutory requirement that firms should have such procedures. However, Codes of Practice have recommended that employees should have such a right and there is a statutory right to a statement of any disciplinary rules which do apply.

The *Employment Rights Act 1996* requires employers to issue new employees with a note of "any disciplinary rules applicable to the employee". This must specify a person to whom the employee can apply if dissatisfied with a disciplinary decision relating to him and a person to whom he can apply if he has a grievance about his employment. Firms employing fewer than 20 people are exempt from this requirement though they do have to specify a person to whom grievances can be addressed.[106] This statutory requirement can be traced back to the *Contracts of Employment Act 1972*. Employment tribunals place great store by the use of fair procedures in dismissals, and a dismissal is likely to be found unfair if proper procedures have not been followed. A recent DTI research project, on the

[106] section 3, ERA

influence of workplace disciplinary procedures on the incidence and outcome of cases brought to industrial tribunals claiming unfair dismissal, found that in cases where the employer lost, the reason usually related to procedural shortcomings, and in successful defences, a fair procedure had generally been followed.[107] The Employment Appeal Tribunal has ruled that "it is an implied term of the contract of employment that the employer will reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have".[108]

The *Industrial Relations Act 1971* required the Secretary of State to draw up a Code of Practice containing practical guidance which would be helpful for promoting good industrial relations. The Code (like subsequent Codes) imposed no legal obligations but could be taken into account in tribunal proceedings. The 1972 code suggested that employers should provide written grievance and disciplinary procedures. Grievances should first be discussed with an immediate superior, but "the employee should be accompanied at the next stage of the discussion with management by his employee representative if he so wishes".[109] Disciplinary procedures should "give the employee the opportunity to state his case and the right to be accompanied by his employee representative".[110]

When the 1971 Act was repealed, ACAS, which was established under the *Employment Protection Act 1975*, took over responsibility for drawing up Codes of good industrial relations practice. Their first Code of Practice on Disciplinary Practice and Procedures in Employment came into operation in June 1977 and replaced paragraphs 130-133 of the Industrial Relations Code. It recommended that disciplinary procedures should "give individuals the right to be accompanied by a trade union representative or by a fellow employee of their choice".[111] The 1977 Code was recently replaced by a revised Code of Practice on *Disciplinary practice and procedures in employment*, which came into effect on 5 February 1998. This retains the same formula as the 1977 Code:

> 10. Disciplinary procedures should:
> (…)
> (g) give individuals the right to be accompanied by a trade union representative or by a fellow employee of their choice.

The TUC report, *Your voice at work*, published in July 1995, proposed that all employees should be entitled to call on help from an independent adviser in dealing with their employer:

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[107] Jill Earnshaw et al, *Industrial tribunals, workplace disciplinary procedures and employment practice*, DTI Employment Relations Research Series No. 2, 1998

[108] *W A Goold (Pearmark) Ltd v McConnell*, 1995, IRLR 516

[109] paragraph 125 (ii)

[110] paragraph 132 (ii)

[111] paragraph 10 (g)

> The individual right to representation at work would cover any matter related to his or her employment relationship, though not, of course, so as to vary established collective bargaining arrangements. This would include, for example, disciplinary and grievance procedures, the non-enforcement of other statutory rights, dismissals, staff appraisals, performance related pay and contracts of employment.

## 2. The Proposal

The White Paper said:

> **4.28** The Government is concerned that individual employees, whether or not they are trade union members and whether or not their trade union is recognised, should be able if need be to defend or advance their interests at work effectively. Most employers treat people fairly, but a minority do not. The law should protect employees from intimidation, and assist those who might have difficulties in representing themselves.
>
> **4.29** The ACAS Code of Practice on Disciplinary Practice and Procedures in Employment recommends that employees should have the right to be accompanied by a trade union representative or fellow employee of their choice in disciplinary procedures. The Government believes this recommendation should be made a statutory right. **It therefore proposes to create a legal right for employees to be accompanied by a fellow employee or trade union representative of their choice during grievance and disciplinary procedures.** This would not imply any duty on trade unions or other employees to accompany a colleague if they did not wish to do so. However, anyone who did accompany another employee would be protected against dismissal or other action for doing so.

## 3. Reaction

Most employers' organisations accept that employees should have a right to be accompanied during disciplinary proceedings, but do not think this should apply to grievance procedures. Trade unions and others, while welcoming the proposal, argue that employees should have a right to be represented, rather than just accompanied.

The CBI argues that legislation should just give force to the ACAS Code of Practice which is followed by most employers already. They point out that grievances can encompass a wide range of matters from complaints about the coffee to performance appraisal. The IPD is concerned that a right to be accompanied in grievance procedures would be "a backdoor route to recognition and is inconsistent with the proposal to require majority support for recognition rights to be awarded".

The TUC argues that trade union representatives involved in this work should have the right to time off and training. They also propose that dismissals should be null and void in cases where representation has been refused. The Law Society supports the proposal and, like the TUC, argues that "accompany" should encompass "represent". They raise

various points of detail like the representative's access to documents such as witness statements.

## F. Abolition of Trade Union Commissioners

### 1. Background

The post of Commissioner for the Rights of Trade Union Members (CRTUM) was created by the *Employment Act 1988*. The Act gave the CRTUM the power to grant assistance (including financial assistance) to trade union members who wanted to bring court proceedings against their union for breach of certain statutory duties. These were principally duties connected with authorising or endorsing industrial action, elections to union office, the use of union funds and property and the inspection of accounting records. The powers of the CRTUM were extended by the *Employment Act 1990* to cover certain complaints about breaches of trade union rulebooks. The 1990 Act also allowed the Commissioner's name to appear alongside that of the trade union member in the title of any court case assisted by the Commissioner.

The post of Commissioner for Protection against Unlawful Industrial Action (CPAUIA) was created by the *Trade Union Reform and Employment Rights Act 1993*. The Act gave individual members of the public a "Citizen's right" to bring proceedings to halt unlawful industrial action which would deprive them of goods or services. The CPAUIA has the power to assist individuals in exercising this right.

The first CRTUM was Mrs Gill Rowlands who was appointed in December 1988. She also took on the role of the CPAUIA in August 1993. She retired in May 1996 when she was replaced in both roles by Mr Gerry Corless.[112]

To begin with, there were very few applications to the CRTUM, and those that there were were often outside her scope. In 1989/90 (her first full year), Mrs Rowlands received 29 formal applications for assistance, nine of which were out of scope.[113] In 1996/97, 74 formal applications were received. During that year, 30 applications were found to be outside the CRTUM's scope and only seven applications were actually granted assistance.[114] The CPAUIA has received even less custom. In 1996/97, two formal applications for assistance were received and one was granted.[115]

A study by the Industrial Relations Service in 1996 implied that the CRTUM was more successful than the CPAUIA:

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[112] DTI press release, *Industrial Relations Appointments*, 9 May 1996
[113] CRTUM's Annual Report 1989/1990
[114] CRTUM's Annual Report 1996/1997
[115] CPAUIA's Annual Report 1996/1997

> While the unions and the Labour Party argue that the commissioner is a product of the Government's anti-union dogma, the experience to date of the way in which the commissioner has taken up the complaints of individual members, the priority attached to seeking a resolution in the first instance through the unions' internal structures, and the small number of applications which are granted material assistance, suggest that whatever the Government's initial intentions, the commissioner has, in practice, been primarily concerned with addressing cases on their legal merits and ensuring unions comply with their statutory requirements and their obligations under the rulebook.[116]

The most common complaint received by the CRTUM is that a trade union has not dealt with an individual member's grievance effectively. This is outside the scope of the CRTUM's powers.

The present CPAUIA has said that most complaints he receives concern either unofficial industrial action or perfectly lawful industrial action. As he is only empowered to assist cases involving potentially unlawful official action, he assists very few cases:

> There are now very few, if any, instances of unions becoming involved in unlawfully organised industrial action and I believe that my office is an effective deterrent to those who may be tempted to do so.[117]

The IRS felt that:

> The minuscule number of applications for assistance may, in part, be an indication of a lack of awareness of the office's role, but it also seems to confirm the view of its critics that its existence is both unnecessary and unwarranted.[118]

The Certification Officer is another independent officer appointed by the Secretary of State to carry out functions concerned with trade unions. His post was established by the *Employment Protection Act 1975*, although several of his functions date back long before that. For example, one of his statutory duties is the maintenance of a list of trade unions. The register of trade unions dates back to the *Trade Union Act 1871* and it was the Chief Registrar of Friendly Societies who originally maintained it. Other functions of the Certification Officer include:

- Determining the independence of trade unions
- Ensuring that trade unions keep proper accounting records
- Dealing with complaints by members that a trade union has failed to comply with provisions on holding secret postal ballots for electing members of its principal executive committee

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[116] *IRS Employment Trends 608,* May 1996, "Trade unions on trial"
[117] CPAUIA Annual Report 1996/1997
[118] *IRS Employment Trends 608,* May 1996, "Trade unions on trial"

- Ensuring that trade unions comply with the statutory provisions on political funds and on mergers

The current Certification Officer is Mr Ted Whybrew.

### 2. The Proposal

The White Paper said:

> **4.30** The previous Government created two organisations to help people bring legal action against trade unions. The Commissioner for the Rights of Trade Union Members (CRTUM) pays legal costs or obtains legal advice for members bringing cases against their trade unions. The Commissioner for Protection Against Unlawful Industrial Action (CPAUIA) does the same for people seeking to stop a trade union organising industrial action unlawfully. These offices are held by the same person, supported by five staff.
>
> **4.31** The Government has no wish to protect poorly run trade unions, just as it will not protect poor employers. But these arrangements are inefficient and unnecessary. CRTUM has assisted only nine applicants each year on average. CPAUIA has assisted only one, which did not lead to a court case. And, as in any civil case, the Government wants people to consider the alternatives to going to court. **The Government therefore intends to abolish CRTUM and CPAUIA and give new powers to the Certification Officer** to hear complaints involving most aspects of the law where CRTUM is currently empowered to provide assistance. This will enable trade union members to secure their rights more easily and effectively.

### 3. Reaction

There is little opposition to the abolition of these posts, in view of the small number of cases with which they deal. The TUC seeks clarification on precisely which functions will be transferred to the Certification Officer. They do not believe his powers should be extended into the sphere of industrial action, but should remain confined to matters arising out of trade union membership. The Law Society asks whether the "Citizen's right" law protecting the public against unlawful industrial action is to be repealed as well as the office of CPAUIA.

## IV Family Friendly Policies

The need to implement the EC *Directive on Parental Leave* has encouraged the Government to review the whole framework of employment rights for parents. The White Paper announced some definite proposals designed to create a coherent package, but the final details will be contained in regulations on which there will be further consultation. The White Paper explained:

**5.11** To ensure that it is easier for parents to balance work and family life, the Government will introduce a series of new measures as it implements the **Parental Leave Directive:**

- three months' parental leave for men and women when they have a baby or adopt a child, plus protection from dismissal for exercising this right; and

- time off for urgent family reasons to help employees look after a sick child or deal with a crisis at home.

**5.12** The Government will implement this Directive by December 1999. Before doing so, it needs to consider how to achieve a coherent package of rights, including existing rights, for parents which supports competitiveness.

**5.13** First, the new rights need to be properly integrated with existing employment rights for pregnant women. These have developed piecemeal and their complexity and potential for abuse have been criticised by employers, employees, the judiciary and the House of Commons Employment Committee. The Government will therefore review existing maternity provisions alongside the new rights to achieve a coherent package that is easier to understand and operate. The Government then intends to legislate to create a framework of basic rights, supported by regulations on the details. The Government will consult on the regulations. However, before the framework and the regulations can be finalised a number of issues have to be resolved and the Government wishes to consult.

# A. Parental Leave

## 1. Background

There is no statutory provision for parental leave in the UK at present, but, now that we have signed the Social Chapter, we will have to introduce such a right as one of the Directives already adopted under its procedures covers parental leave.

The European Commission originally brought forward proposals for a *Directive on Parental Leave and Leave for Family Reasons* in 1983.[119] The Conservative Government always opposed the proposals and was able to veto them as they had been brought forward under Article 100 of the Treaty of Rome, which requires unanimity. In September 1994, the Council decided to re-present the proposals under the Social Policy Agreement (the "Social Chapter") which excluded the UK. In February 1995, the Commission initiated discussions with the European social partners on "the reconciliation of professional and family life". For the first time, the social partners decided to use new procedures available under the Social Chapter, to draw up an agreement themselves. The European Trade Union Congress

[119] EC Doc 11118/83, COM (83) 686, as amended by EC Doc 10681/84, COM (84) 631

(ETUC), the Union of Industries of the European Community (UNICE) and the European Centre for Public Enterprises (CEEP) signed the *Framework Agreement on Parental Leave* on 14 December 1995, and the *Directive on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC* was adopted at the Social Affairs Council on 3 June 1996.[120]

The main points of the framework agreement are:

- all employees (men and women) are entitled to an individual, non-transferable right to a minimum of three months parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, until a given age of up to eight years to be defined by the Member States and/or Social Partners [Clause 2 (1) and (2)]

- detailed qualifying conditions and terms are to be set by legislation or collective agreements in the Member States. For example, eligibility could be restricted to those with a minimum length of service of up to one year; arrangements could be made for part-time or other flexible forms of leave; employers could be permitted to postpone parental leave for operational reasons (eg where a replacement cannot be found at short notice or where several workers apply for leave at the same time). In addition, special arrangements may be made "to meet the operational and organizational requirements of small undertakings" [Clause 2 (3)]

- there is no requirement that the leave be paid and all matters relating to social security are left to Member States to decide [Clause 2 (8)]

- Member States and/or Social Partners are required to introduce measures "to entitle workers to time off... on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable" [Clause 3]

The Labour Government came to power in May 1997 committed to "signing up" to the Social Chapter. This involved accepting the measures which had already been adopted under its procedures, including the *Parental Leave Directive*. The Government "signed" the Social Chapter at the Amsterdam Summit on 16 and 17 June 1997. The Amsterdam Treaty will not come into effect until all Member States have ratified it. This is unlikely to be before Spring 1999. However, it was agreed that the UK would participate in Social Chapter discussions straight away and that the existing Directives would be extended to the UK by the use of Directives made under Article 100 of the EC Treaty itself. A proposed Directive to extend the *Parental Leave Directive* to the UK was published in

[120] Dir 96/34/EC

October 1997.[121] It was adopted at the Social Affairs Council on 15 December 1997 and the UK will have two years to implement it.[122] In other words, we will have to introduce a right to parental leave by 15 December 1999.

In October 1997 the Department of Trade and Industry submitted an Explanatory Memorandum on the proposed Directive extending the *Parental Leave Directive* to the UK. This included a Compliance Cost Assessment which looked at both the benefits and the costs of the proposals. The aim of the Directive is to achieve a better balance between work and family life. The Assessment identifies benefits to families, businesses and the economy. On families, it says:

> The benefits of providing an entitlement to urgent time off and parental leave are widespread, as they benefit not just the people in work but also their families and especially children.
>
> Significantly, the right to time off for pressing family reasons is of benefit not just to those who take advantage of the provisions, but to all workers who will feel more secure with the knowledge that they can take time off should the need arise. This is important as it removes a barrier to employment for some people who fear that they may need to take days off. The removal of this barrier would be beneficial to single parents (in that they might have less fear of losing their job, though there could still be the fear of loss of income). Women returners may not restrict themselves to working part time. Establishing these entitlements could therefore contribute to the Government's aim of encouraging movement from inactivity into work, and thereby reducing social exclusion.

Amongst the benefits to business identified by the Assessment are: less unauthorised absenteeism, lower staff turnover, a wider choice of potential employees and improved staff relations.

The main element of costs to employers will be the cost of keeping the job open for an employee taking leave for family reasons or parental leave. If a one year qualifying period applies then the total annual costs of parental leave are estimated to be about £35 million. The calculation assumes there will be 2.8 million newly entitled employees, of whom 67,000 will use the entitlement each year. There will be 305 hours absence per user at a cost of £515 per user.

## 2. The Proposal

The White Paper seeks views on many of the issues which are left open by the Directive:

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[121] COM(97)457

[122] HC Deb 17 December 1997, c 178W. *Council Directive 97/75/EC of 15 December 1997 amending and extending to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC*

> **5.15** The Parental Leave Directive is flexible about how such leave should be taken:
>
> - in a single block or as an annual allowance;
> - full or part-time;
> - at any time up to the child's eighth birthday or a lower age, or with some required to be taken at the time of birth or adoption;
> - under individual arrangements agreed between the employer and the employee.
>
> **5.16** As far as possible employers and employees should be encouraged to make whatever arrangements best suit their own circumstances. However, legislation is needed to deal with special cases, such as what happens if an employee changes jobs before taking his or her full parental leave allowance. **In order for the Government to ensure that a proper legislative framework is created, it would welcome views on the options set out here**

The Government has more concrete proposals in areas where they hope to align provisions on maternity and parental leave. For example, they propose that:

- The qualifying period for both parental leave and extended maternity leave should be one year.[123]
- Contracts of employment should continue during the whole period of parental and maternity leave unless expressly terminated by either party by dismissal or resignation.[124]
- People returning from parental leave should have the right to their old job, or a suitable alternative with equivalent terms and conditions if this is not practical.[125]
- Dismissal or victimisation of employees who exercise their rights to parental leave and time off for urgent family reasons should be automatically unfair, as it is now in respect of those exercising their right to maternity leave.[126]

The Government welcomes the Directive's requirement that adoptive parents should also be entitled to three months' parental leave. However, it "does not… intend that adoptive

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[123] para 5.19
[124] para 5.21
[125] para 5.22
[126] para 5.29

mothers should have the same maternity rights as birth mothers".[127] The White Paper specifically seeks views on the particular problems of small firms:

> **5.24 Small firms** often have particular problems. For example, small firms may find it easier to cope with employees taking leave in a series of short absences rather than as a block.
>
> **5.25** Current legislation already recognises the difficulties very small firms may face in holding a job open for a long time. In limited circumstances, they may be able to show that they cannot realistically take a woman back after the longer period of maternity absence. European requirements do not allow any exemption from the provisions relating to maternity or parental leave, but they do provide for special provision to be made in relation to small firms.
>
> **5.26** The Government wants to ensure sufficient flexibility in implementing the Directive to meet the needs of all employers, large and small. **It seeks views on the particular difficulties small firms might face in complying with the rights proposed in this chapter, and on how these might be alleviated.**

## 3. Reaction

Employers' organisations, in particular, are concerned about the practical details of implementing this proposal. The CBI points out that it will be a major change for many employers and further consultation will certainly be required. They argue that the right to parental leave should not be retrospective and should only apply to those who give birth or adopt with one year's qualifying service after the date of implementation. Retrospection could lead to a "bunching" of claims by workers with children approaching the cut-off age. They, in common with a number of other respondents (including the IPD), believe that the right should only apply until the child reaches the statutory school age of five. The CBI propose that multiple births should be treated as one child; that "three months" should be defined as "12 weeks"; and that parents should not be able to exercise the right regardless of its impact on the employer. They also want to ensure that employers are not involved in establishing entitlement to leave. There will be difficult issues to decide such as who is "a parent" (would step-parents be included, for example), who has caring responsibilities, and how much leave is outstanding when someone changes jobs. They suggest that the Government should act as the "gatekeeper" to the right, perhaps by issuing vouchers when a birth or adoption is registered.

The BCC say that "the burdens the Parental Leave Directive will impose on smaller businesses cannot be overstated". Cover will have to be arranged for up to three months, the workload of other staff will increase and there will be particular difficulties if several staff want the leave at the same time. They suggest that employees should be required to give 10 weeks' notice of long periods of leave. (The CBI suggest six months notice, unless agreed otherwise.) The Law Society proposes that a record of parental leave taken

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[127] para 5.23

might be kept on the P45 and that employees should give notice equal to the period of leave sought or two weeks, whichever is longer.

The TUC welcomes the Government's positive approach to parental leave, but argues that the qualifying period should be shorter than one year and that the entitlement should last until the child's eighth birthday. It also believes some of the leave should be paid. It raises the question of whether same sex partners will both be eligible. NACAB says that many employers ignore their existing legal responsibilities on maternity leave and that it will be important to publicise and enforce the new rights. They, too, believe the leave should be paid if people are to be able to take advantage of it.

The Law Society recognises the particular problems of small firms and proposes a special Government scheme to give small firms easier access to temporary replacement workers. The FSB believes that childcare or career breaks funded by the State are the answer.

## B. Leave for urgent family reasons

### 1. Background

There is no statutory right to urgent leave for family reasons at present, though most firms do give compassionate leave on a discretionary basis. A survey by the Industrial Relations Service in 1996 examined replies from 65 organisations (many in the public sector).[128] All gave time off for bereavement, 60% giving between 3 and 5 days' paid leave. 63% gave time off for family sickness. The EC *Parental Leave Directive*, described above, requires Member States to introduce measures "to entitle workers to time off... on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable".

The DTI's Explanatory Memorandum on the EC Directive (mentioned in the section on Parental leave, above) estimated that 6.7 million workers would be entitled to urgent time off; that 1.7 million would use their entitlement each year; that there would be 13.2 hours of absence per user and that the cost per user would be £11.20. The total annual cost was estimated at £19 million.

### 2. The Proposal

The White Paper says:

> **5.27** The Parental Leave Directive provides a right for employees to take time off work for **urgent family reasons** in cases of sickness or accident.
>
> **5.28** Currently, there is no statutory right to take time off to deal with a family emergency. This is generally left to employers' discretion. The Government

[128] *IRS Employment Trends 606,* April 1996, "Special leave for personal reasons - a survey"

> believes that it is right for employees to feel secure that necessary time off will be allowed, although employers cannot be expected to provide frequent or long-term time off. Legislation already provides rights to reasonable time off for specified reasons, for example to arrange training if the employee is being made redundant, or to carry out public duties. Industrial tribunals also take into account the needs of the business in deciding whether an employer has reasonably refused time off. In the same way, **the Government proposes to provide a right to reasonable time off for family emergencies, which will apply to all employees regardless of length of service.**

### 3. Reaction

The CBI fear that a statutory right to time off for urgent family reasons could be open to abuse. It might be seen as an entitlement, to be taken each year, regardless of circumstances. They propose a maximum entitlement of three days per year. The Law Society, on the other hand, argue that it is better not to set a limit as this may come to be regarded as the norm. The IPD, BCC and CBI all point to the difficulties in defining "urgent" and "family". The IPD suggests that a code of guidance will have to be drawn up for both this right and the right to parental leave. They believe the definition should not encompass matters which could have been foreseen so that leave could have been taken out of annual entitlement.

The TUC suggests that workers should be entitled to one week's urgent family leave per year on full pay. It should be available to cover temporary breakdowns in childcare or eldercare arrangements as well as other emergencies.

## C. Maternity leave

### 1. Background

The statutory provisions on maternity rights have developed in a rather haphazard way. In 1948, the National Insurance scheme introduced a maternity allowance for women contributors who gave up work to have a baby. It was originally paid for 13 weeks, but this was increased to 18 weeks in 1953.[129] The *Employment Protection Act 1975* introduced a right to return for up to 29 weeks after confinement for women who had been employed for two years with the same employer. It also introduced six weeks' maternity pay, re-imbursed from the Maternity Fund to which all employers contributed, for women with this right. Maternity pay under the employment protection legislation was 90% of normal weekly earnings less the amount of the maternity allowance. In 1987, maternity allowance and maternity pay were merged to form Statutory Maternity Pay (SMP). This is paid by employers but their costs are recovered by deduction from their tax and national insurance contributions. In October 1994, substantial changes were made to implement the EC

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[129] *National Insurance Act 1953*

*Directive on the Protection at Work of Pregnant Women or Women who have recently given Birth.*[130]

Amongst other things, the Directive required that:

- all women, regardless of length of service or hours of work, should be entitled to 14 weeks' maternity leave. Two weeks of this leave must be compulsory

- women must be paid an "adequate allowance", equal at least to sick pay, during their maternity leave; but it is possible to restrict payment of the allowance to women with at least one year's service

The Directive had to be implemented in the UK by 19 October 1994 and this was achieved primarily by sections 23-25 of the *Trade Union Reform and Employment Rights Act 1993,* which covered maternity leave and by the *Maternity Allowance and Statutory Maternity Pay Regulations 1994 SI No 1230* and the *Social Security Maternity Benefits and Statutory Sick Pay (Amendment) Regulations 1994 SI No 1367* which dealt with maternity pay.

Briefly, all women are now entitled to fourteen weeks maternity leave. In addition, women who have been continuously employed by their employer for at least two years are entitled to a period of maternity absence (or extended maternity leave) lasting from the end of their maternity leave till the end of the 28th week after the baby is born. Maternity leave cannot start earlier than the 11th week before the expected week of childbirth, so the maximum statutory leave period (i.e. "leave" plus "absence") is 40 weeks (11 weeks before, the week of childbirth and 28 weeks after). In order to benefit from the right to maternity leave and the right to return to work after maternity absence, the employee must give her employer proper advance notification of her intentions. Notification of the expected date of birth, of the intended start date for maternity leave and of any intention to return after maternity absence should be given at least 21 days before the leave begins. Notification of the intended date of return after maternity absence should be given at least 21 days before that date.

A woman who has worked for her employer for 26 weeks at the 15th week before the expected week of childbirth and who earns more than the lower earnings limit for national insurance contributions (currently £64 a week) would qualify for SMP of 90% of earnings for the first six weeks and a flat rate benefit (currently £57.70 a week) for the next 12 weeks' absence. The total period for which SMP is payable is, therefore, 18 weeks.[131]

The rules on maternity pay and leave have often been criticised as confusing and unnecessarily complex. The fact that many women are now entitled to 18 weeks' maternity

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[130] Dir 92/85/EEC

[131] Further details are in the DTI Guide, *Maternity Rights*, PL 958 (REV1)

pay but only 14 weeks' leave is the most obvious anomaly. The Employment Committee, in a report on *Mothers in Employment*, in 1995, found:

> 41. The present system is already difficult for women and employers to understand and use. The dual system of 14 weeks' maternity leave and 18 weeks' maternity pay is likely to be even worse, adding to bureaucracy, increasing employers' costs, reducing the accessibility of the system and in doing so, damaging women's participation in the labour market. The complexity will serve to create additional administration and significant costs for employers. **We recommend that the Government should overhaul and simplify the system of maternity pay and maternity leave, to make it accessible and understandable to employers and employees alike.**[132]

The Committee went on to recommend that the maternity pay and leave periods should be standardised at eighteen weeks:

> 47. We note that many mothers cannot take advantage of the extended leave entitlement and because the additional leave is unpaid some women may be tempted to return to work too early. We endorse the point made by the Health Committee in the last Parliament, that "maternity leave is significantly a matter of public health - it should not be overlooked that the health of the unborn or newborn child is also at stake." **Existing leave arrangements can have a serious effect on the health of new mothers and their babies. For this reason, as well as to standardise the existing maternity pay and leave periods, we recommend that all mothers be entitled to at least eighteen weeks' leave.**

The Labour Opposition moved an amendment to the *Trade Union Reform and Employment Rights Bill 1992/93* which would have increased the period of maternity leave to 18 weeks, but the Conservative Government Minister, Patrick McLoughlin, argued against it:

> That would increase employers' costs considerably and place an additional burden on them. That would damage women's employment costs. The figure of 14 weeks' leave has been accepted by all European Community member states under the terms of the pregnant workers' directive as a reasonable minimum statutory leave entitlement.[133]

One of the many legal complexities of the maternity leave provisions is the question of whether or not a woman's contract of employment continues while she is on extended maternity leave. Section 71 of he ERA makes it clear that all contractual terms, except remuneration, continue while she is on the 14 weeks' maternity leave. This means, for example, that holiday entitlement and length of service accrue and that she retains entitlement to benefits such as the use of a company car. But the same statutory

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[132] HC 227-I, 1994-95

[133] SC Deb (F), 12 January 1993, c 361

protection does not apply to maternity absence - the extended leave period for women with two or more years' service. There have been conflicting court cases on the status of the contract of employment during this period. If the contract continues, a woman who failed to give the proper notice of her return would still be able to return as she would still be employed. Similarly, a woman would be able to remain absent on sick leave after the end of her maternity absence period. Two cases on these issues are to be heard in the House of Lords.[134]

There are some 1.4 million women employees with between one and two years' service for their employer and about 2.3 million women employees with less than one year's service.[135] The first group would benefit from a reduction in the qualifying period for extended maternity absence from two to one year. The second group would then benefit from an extension in maternity leave from 14 to 18 weeks.

## 2. The Proposal

The White Paper proposed:

> **5.14** Women have a right to 14 weeks' **maternity leave** but 18 weeks' pay. This is confusing to both employers and employees. Many employers see benefits in aligning the two periods. **The Government proposes to extend maternity leave to 18 weeks. (…)**
>
> **5.17** Employees have to **give notice of maternity leave**. The current requirements are complex and can be simplified. The Government would welcome views on how this should be achieved and what statutory provision is required for the new rights to parental leave.
>
> **5.18** At present women qualify for 14 weeks' maternity leave from day one of their employment, for paid leave if they have worked for 6 months and for extended maternity leave after two years' work for the same employer. The Parental Leave Directive allows for a qualifying period of up to a year for the right to parental leave.
>
> **5.19** The Government believes that these **qualifying periods** should be aligned as far as practicable. **It therefore proposes that the right to extended maternity leave and parental leave should both apply after one year.**
>
> **5.20 Contracts of employment** continue during the 14 weeks of statutory maternity leave. The law does not specify what then happens to the contracts of women who take longer periods. This has led to confusion and litigation. The Parental Leave Directive requires that the status of the contract during parental leave is set out clearly in legislation.

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[134] *Kwik Save v Greaves* and *Crees v Royal London Mutual Insurance*. See *People Management*, 13 August 1998, "Family fortunes"

[135] HC Deb 23 June 1998, c 474W

**5.21** Because of the uncertainty over the state of the contract during extended maternity leave, problems can arise when a woman is made redundant while on leave. There are particular difficulties if she cannot return to work on the day she intended to because she is sick. These uncertainties would be significantly reduced if it were clear that the contract of employment continued during the absence. There would be some costs to employers: for example, a woman in this position would continue to accrue service for the purposes of leave and seniority. However, provided it was not discriminatory, the contract could specify what terms applied during absence from work. **The Government therefore proposes that legislation should provide for the contract of employment to continue during the whole period of maternity or parental leave, unless it is expressly terminated by either party, by dismissal or resignation.**

## 3. Reaction

Most organisations (including the CBI, IPD, FSB, Law Society, TUC and Equal Opportunities Commission (EOC)) support the standardisation of maternity pay and leave periods at 18 weeks. The BCC, however, argue that it should be standardised at 14 weeks. The BCC stresses that small firms are already very concerned at the burdens imposed by the current law on maternity rights and that they "think twice about employing women of childbearing age". They oppose the reduction in the qualifying period to one year and argue that the current 21 day notice period for maternity leave should be increased to 10 weeks. However, they do not object to the continuation of the contract of employment during the whole period of maternity leave. The IPD, on the other hand, is concerned that the continuation of the contract combined with the reduction to one year could impose heavy costs on small employers. The Law Society accept that the contract should continue during the whole leave period but seeks clarification on which provisions (in addition to those requiring the woman to work and the employer to pay her) should be suspended

The TUC welcomes all the proposals on maternity rights and suggests further improvements. They propose, for example, that all women, irrespective of earnings, should qualify for SMP; that the onus should be on employers to inform women of any notices they must supply in relation to the date of their return; and that there should be an obligation on employers to respond positively to requests to return to work part-time or flexibly unless this is not reasonably practical. The EOC also welcomes the proposals, but would go further. They suggest that SMP should be paid for the whole period of statutory maternity leave; and that ten days statutory paternity leave should be introduced paid at the same rate as SMP.

# V Glossary

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| ACAS | Advisory, Conciliation and Arbitration Service |
| BCC | British Chambers of Commerce |
| CABx | Citizens Advice Bureaux |
| CAC | Central Arbitration Committee |
| CBI | Confederation of British Industries |
| CEEP | European Centre for Public Enterprises |
| CIR | Commission on Industrial Relations |
| CPAUIA | Commissioner for Protection Against Unlawful Industrial Action |
| CRTUM | Commissioner for the Rights of Trade Union Members |
| EOC | Equal Opportunities Commission |
| ERA | *Employment Rights Act 1996* |
| ETUC | European Trade Union Congress |
| FSB | Federation of Small Businesses |
| IOD | Institute of Directors |
| IPD | Institute of Personnel and Development |
| NACAB | National Association of Citizens Advice Bureaux |
| NIRC | National Industrial Relations Court |
| NMW | National Minimum Wage |
| SMP | Statutory Maternity Pay |
| TUC | Trades Union Congress |
| TULRCA | *Trade Union and Labour Relations (Consolidation) Act 1992* |
| TURERA | *Trade Union Reform and Employment Rights Act 1993* |
| UNICE | Union of Industries of the European Community |