ONLINE RESOURCES

INTRODUCTION TO EMPLOYMENT LAW

FUNDAMENTALS FOR HR AND BUSINESS STUDENTS

Kathy Daniels

6th Edition

CIPD

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Fundamentals for HR and business students

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To Robin, Jack and Anna

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PREFACE

It is nearly three years since the fifth edition of this book, and in that time there has been a significant number of changes in employment law. This book has been thoroughly revised to take account of all of those changes.

The book has been written specifically for non-lawyers. It presumes no prior knowledge of the subject and is particularly suitable, therefore, for those studying employment law as part of a non-law degree such as human resource management or business studies.

It covers the syllabus set by the Chartered Institute of Personnel and Development for the Level 3 and 5 qualifications, and is particularly useful for students studying at these levels. The book also covers the entire syllabus set by the Chartered Institute of Personnel and Development for its Level 7 qualification. Students studying at Level 7 with no prior knowledge of employment law might find it useful to read this book as an introduction before progressing to further reading.

To make the subject of employment law more accessible for such students, legal cases referenced in the book are explained in some detail, bringing the subject to life and giving a clear illustration of each legal point in question.

In addition to understanding the facts of employment law, it is also important that students take time to examine the impact of employment law on organisations. To stimulate such evaluation, the book has a number of specific features that are discussed in the section 'Walkthrough of textbook features and online resources' (starting on page xiv).

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WALKTHROUGH OF TEXTBOOK FEATURES AND ONLINE RESOURCES

Chapter objectives

At the beginning of each chapter a bulleted set of chapter objectives summarises what you can expect to learn from the chapter, helping you to track your progress.

Task

In each chapter, a number of questions and activities will get you to reflect on what you have just read and encourage you to explore important concepts and issues in greater depth.

Explore further

Explore further boxes contain suggestions for further reading and useful websites, encouraging you to delve further into areas of particular interest.

Key learning points

At the end of each chapter, a bulleted list of the key learning points summarises the chapter and pulls out the most important points for you to remember.

Case studies

A range of case studies give students the opportunity to apply the law in more detail, and are useful exam practice.

Examples to work through

At the end of each chapter are organisational scenarios, giving students the opportunity to apply the legislation they have learnt.

Online resources for tutors at www.koganpage.com/introEL6

PowerPoint slides – design your programme around these ready-made lectures.
Lecturer's guide – including guidance on the activities and questions in the text.
Additional case studies – these can be used as a classroom activity, for personal reflection and individual learning, or as the basis for assignments.
Multiple-choice questions – a series of questions for each chapter to test your understanding of the text.

Online resources for students at www.koganpage.com/introEL6

Annotated web links – access a wealth of useful information sources in order to develop your understanding of employment law issues.
Multiple-choice questions – a series of questions for each chapter to test your understanding of the text.
Summary of key points from each chapter.

01
The formation of employment law

CHAPTER OBJECTIVES

The objectives of this chapter are:

- to explore the purpose of employment law
- to highlight the differences between criminal and civil law
- to examine the sources of employment law
- to define and explain terms commonly used in employment law
- to determine the role of key institutions

1.1 An introduction to employment law

The law in the UK is very broad. In this book we focus solely on the law that relates to the employment of individuals. The purpose of employment law is to regulate the relationship between the employer and employee.

Employment law is one of the fastest-changing areas of the law in the UK. In the past 50 years there has been a steady increase in the introduction of legislation. In 1979 the Conservative Government came into power with a reforming agenda. Under Margaret Thatcher's leadership it took the view that the balance of power in the employment relationship had swung too far in favour of the employee.

The miners' strike in 1984/5 was a key example of this struggle for power. As a result of this concern over the balance of power, a series of new employment legislation was introduced in the 1980s and 1990s. One of the key elements of this was legislation that reduced the power of the trade unions and introduced new individual rights.

In 1997 the Labour Government returned to power. First, it opted into the Social Charter. The Social Charter is a declaration of member states of the European Union (EU) that brought in a level of basic rights (not just in relation to employment) as laid out in the 1957 Social Chapter (which is in the original Treaty of Rome). The basic rights include such things as a basic wage, the right to be consulted by employers and the right to join or not join a trade union. The signing of the charter led to the introduction of a series of changes in employment law. One of the first examples of this was the introduction of the National Minimum Wage in 1998.

It was also widely expected that the Labour Government would reverse much of the legislation introduced by the Conservative Government that curbed the powers of the trade unions. In fact, it did very little reversal, but did continue with the ongoing introduction of new legislation. There were specific themes to some of these introductions. For example the concern over the increasing difficulty for employees in balancing home–work life led to the introduction of a number of pieces of legislation known as 'family friendly' policies.

In May 2010 a Coalition Government, formed by the Conservative and Liberal Democrat parties, took office. This government took office at a time when the UK was starting to emerge from a deep recession. A key objective of this government was to return the country to economic growth. The government was concerned that the extensive legislation that there was in relation to employment and other areas of business was excessive and burdensome – particularly for small and medium-sized organisations.

In 2015 the Coalition Government was replaced by a Conservative Government. To gain an insight into what changes to employment law were needed the government commissioned Matthew Taylor (Chief Executive for the Royal Society of Arts) to chair a review of modern working practices. The report from this review was published in the summer of 2017 and is titled *Good Work: The Taylor Review of Modern Working Practices*. In response to this the government wrote the *Good Work Plan* which contains a number of changes to employment law. Some of these were introduced immediately, some in April 2020 and some were covered in the Employment Bill announced in the Queen's Speech of December 2019.

The pace of debate around the Employment Bill was slowed due to Covid-19, government energies being put into addressing the problems this brought. One important development, for employment law, was the introduction of the Job Retention Scheme (JRS). Due to various lockdowns many businesses were not able to trade, meaning that there was no work for their employees. Unless businesses had a lay-off clause in their contracts (allowing them to send employees home with no work to do, and no pay) they either had to dismiss employees due to redundancy or keep paying employees while they were not working. Most businesses do not have lay-off clauses, and to stave off mass redundancies the government needed to take action. The JRS meant that the government was paying 80 per cent of the salary, up to a maximum of £2,500 per month (tapering off when the JRS was first removed) of an employee unable to work during lockdown. This is an excellent example of how the law might need to be amended to fit an unusual situation, and shows the need for employment law to protect both the employee and the employer.

Another significant development has been the UK leaving the European Union on 31 December 2020. This did not bring about immediate change to employment law, because all legislation which had been introduced previously due to the UK being part of the EU remained at the point of Brexit. However, it does mean that the UK has more freedom to make changes to legislation, and we wait to see what changes might be introduced.

Explore further

Read the report from the Taylor review, *Good Work: The Taylor Review of Modern Working Practices*, and the corresponding *Good Work Plan,* which can be found on the government website.

Task

As you have read, employment law is ever changing. Ensure that you keep abreast of these changes as you study. The CIPD website is an excellent source of information, especially the 'Employment Law' section, which is specifically for CIPD members.

It is clear that employment law is affected by a number of external factors, and one of these is the political party that is in government. In looking at the development of employment law it is important to think about its purpose. Do we need employment law at all?

To answer that question we need to think about a situation where there is no law. Think for a moment of non-employment situations: if there is no law that says that murder is wrong do we become a dangerous society? If there is no law that puts a speed limit on the roads do fatalities increase?

The same reflections can be applied to employment law. If we have no law that stops employers from discriminating, or dismissing employees unfairly, does the workplace become a bad place to work? Do employees have no protection, and no job security? All societies need rules and agreed ways of working – that is what employment law brings to the workplace.

However, having breadth of employment law does not mean that employees will always be treated well. It certainly puts penalties in place if an employer does do something unlawful, but it does not necessarily mean that nothing unlawful will happen.

1.2 Criminal and civil law

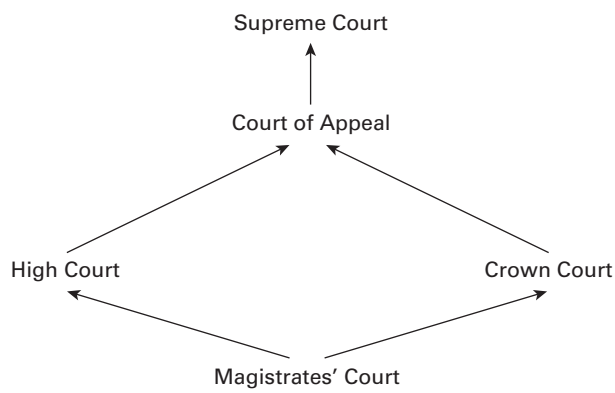
Employment law is primarily governed by civil law. However, there is some criminal law that relates to employment matters, and for that reason the issue of criminal law cannot be ignored.

1.2.1 Criminal law

Criminal law focuses on the punishment of crimes, usually through proceedings brought by the Crown Prosecution Service. There is also the possibility of proceedings being brought by other bodies, such as the Health and Safety Executive. The punishment brought by criminal proceedings can be imprisonment or fines. In employment law the main cases of criminal law are brought through:

- The Trade Union and Labour Relations (Consolidation) Act 1992, some aspects of which relate to illegal activity during industrial action (we examine this in Chapter 10).
- The Data Protection Act 2018 – for improper use of confidential and personal data (we examine this in Chapter 11).
- The Health and Safety at Work Act 1974 – for criminal breaches of health and safety legislation (we examine these in Chapter 12).
- The Racial and Religious Hatred Act 2006, which makes it unlawful to incite racial hatred. Although the legislation relating to racial and religious discrimination (see Chapter 7) is likely to cover most situations in the workplace, there is the possibility that proceedings could be brought under this legislation as well.
- The Corporate Manslaughter and Corporate Homicide Act 2007, which allows companies and individual directors to be prosecuted if a fatality occurs as a result of serious breaches of health and safety responsibilities (see Chapter 12).

Figure 1.1 Structure of the criminal court system



Criminal proceedings are usually first brought in the Magistrates' Court. Serious offences can be referred directly to the Crown Court. Appeals on issues of fact go to the Crown Court, whereas appeals on issues of law go to the High Court. From here any further appeals go to the Court of Appeal and then on to the Supreme Court. This structure is shown in Figure 1.1.

Examples of criminal cases relating to employment law are:

- *HSE* v *Compass Engineering Ltd and Kaltenbach Ltd* (2011)
  A breach of the Health and Safety at Work Act (1974) led to the Health and Safety Executive bringing a case against Compass Engineering and Kaltenbach. An employee looked to check work coming along a moving line and was dragged through a 12.5-centimetre gap. This occurred because of insufficient guarding. Compass (the employer) was fined £45,000 plus £24,000 costs and Kaltenbach (who installed the machinery) was fined £30,000 plus £16,000 costs.
- *R* v *The Mansfield Justices ex parte Sharkey and others* (1984)
  IRLR 496 Nine striking miners, who were members of the Yorkshire National Union of Mineworkers, were arrested under the Public Order Act 1936. They were remanded on bail, with the condition that they did not visit any place for the purposes of picketing in relation to the existing employment dispute. They were allowed, however, to picket peacefully at their usual place of work.
- *R* v *Cotswold Geotechnical Holdings Ltd* (2011)
  Crown Court 020110037 This was the first prosecution of corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007. A young geologist was working with one of the directors of the company, taking soil samples from a trench that had been dug. The director left for the evening, leaving the geologist working alone. The sides of the trench collapsed, burying the geologist and killing him. The company was found to be negligent, in both the way that the trench had been dug and in leaving a young employee working there alone. It was fined £385,000.

Task

During your studies take note of any employment cases you read that relate to criminal law. It is unlikely that you will find a great number of such cases, because most employment cases will relate to civil law.

1.2.2 Civil law

Most employment law will fall under the remit of civil law. Civil law is concerned with resolving a dispute between two parties. Most employment disputes will be resolved in the Employment Tribunal, which deals only with civil cases. In resolving

the dispute a monetary award can be given to the wronged party (referred to as 'compensation' or 'damages'), and in some cases an injunction can be made. Civil law is based on the law of contract, of tort and of property.

Contract

In employment law a contract is made between the employer and the employees, consisting of a number of obligations on both sides of the agreement. If one of those obligations is breached in some way, there can be a dispute under the law of contract. For example:

- *Morrow* v *Safeway Stores plc* (2002) – IRLR 9
  Morrow was a bakery production manager and had been criticised on a number of occasions for not doing her job correctly. On one occasion her manager gave her a public 'dressing down' in front of colleagues and a customer. She resigned and successfully claimed constructive dismissal, arguing that the humiliating treatment was a breach of her contract, namely the implied term of mutual trust and confidence.

Tort

A tort is a wrong, such as the wrong of negligence. If an employee is injured at work through the negligence of the employer (the employer has provided inadequate equipment, for example), a claim would be made based on the law of tort. For instance:

- *Walker* v *Northumberland County Council* – (1995) IRLR 35
  In this case Walker was employed as a social worker by Northumberland County Council. Because of the stressful nature of his work, and the lack of support he received, he suffered a nervous breakdown. While he was absent from work due to this breakdown he agreed with his employers a series of measures to help him in his work. He returned to work, but the support agreed was withdrawn. Walker suffered a further breakdown. It was found that his employers had been negligent in not giving him the support that he needed to carry out his duties. (We examine this case in more detail in Chapter 12.)

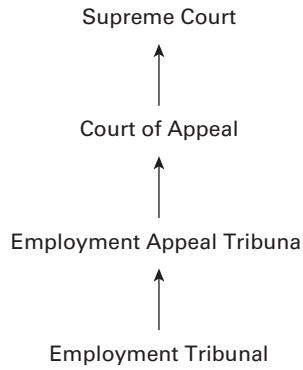
Property

If an employee uses inventions designed at work – under the employer's copyright – for personal gain, there can be a claim under the law of property. For example:

- *Reiss Engineering* v *Harris* (1985) – IRLR 23
  Harris was a sales manager working for a company that sold valves. Reiss Engineering did not have a research and design department, and had never designed a valve or improvements or modifications to a valve. Harris invented a new type of valve. Reiss Engineering claimed that the patent for the new valve should belong to them because, they claimed, Harris had invented it during the course of his normal duties. The court held that it had not been part of Harris's normal duties to invent anything, and hence the patent belonged to Harris. (We examine this case in more detail in Chapter 11.)

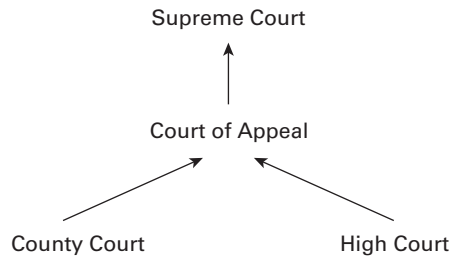
In employment law most cases are first heard in an Employment Tribunal. If there is an appeal, which must be based on a point of law, it is referred to the Employment Appeal Tribunal. Any further appeal is directed to the Court of Appeal and then to the Supreme Court. This system is shown in Figure 1.2.

Figure 1.2 Court system for employment-related claims



A civil law claim that is not related to employment is first brought in the County Court. Any appeal is then directed to the Court of Appeal and finally the Supreme Court. Not all employment-related issues must start in an Employment Tribunal. For example, certain cases of wrongful dismissal (see Chapter 9) can be brought in the County Court or the High Court, as well as in the Employment Tribunal (a wrongful dismissal claim with a value of £25,000 or more cannot be brought in the Employment Tribunal). This structure is shown in Figure 1.3.

Figure 1.3 Court structure for civil claims



An important difference between civil and criminal law is the level of proof needed to be successful in a case brought before the courts. In a criminal court the requirement is to show that the individual did as alleged 'beyond all reasonable doubt'. In a civil court there is a requirement to show that 'on the balance of probabilities' the individual did as alleged. This difference in level of proof shows why an employee can be fairly dismissed but found innocent in a criminal court with reference to the same events. For example, presume that an employee is accused of theft by an employer. There might not be enough proof to show that the employee was guilty beyond all reasonable doubt and therefore a criminal conviction fails. However, there is enough

evidence to show that the employee was the thief, on the balance of probabilities, and therefore the dismissal is fair.

1.3 Sources of law

Legislation is created in a number of different ways, as set out below.

1.3.1 Statute

Statutes are Acts of Parliament, and they are the main source of legislation. A recent example of a statute is the Parental Bereavement Leave and Pay Act 2018.

An Act of Parliament has to go through a lengthy process before it is finally accepted as statute. Typically, it starts as a Green Paper, which is a consultation document. This Green Paper will pass through a number of parliamentary committees, depending on the range of its content. When all comments have been received and considered, it is issued as a White Paper, which is a statement of the government's policy. This White Paper (known as a Bill) is then discussed and reviewed by the House of Commons, and then the House of Lords, before being finalised. It becomes a statute when it receives royal assent.

Some statutes are implemented immediately. However, it is more common for there to be a time lag between the royal assent and the enforcement of the content. This is usually for the practical reason that time is needed to implement the requirements. For example, the Parental Bereavement Leave and Pay Act 2018 received royal assent on 13 September 2018 but was not brought into force until 6 April 2020. Statute is created for a variety of reasons. Some are directly related to the political policies of the party in government – e.g. the National Minimum Wage Act 1998 was a result of a manifesto promise of the Labour Government to put in place a minimum basic wage (which was also driven by the signing of the Social Charter).

Some statute results from the need to address a growing area of legislation that has become difficult to manage. For example, the Equality Act 2010 replaced nine major pieces of discrimination legislation and more than 100 minor pieces of discrimination legislation, with the aim of making the whole area of discrimination legislation less complex.

Some statute results from concern regarding specific aspects of working life in the UK. For example, the Parental Bereavement Leave and Pay Act 2018 is also referred to as 'Jack's Law' because it resulted from the mother of Jack Herd, a 23-month child who died, campaigning for parents to be allowed time off when bereaved.

1.3.2 Codes of practice

Codes of practice are not law, but if they are broken the court would expect to see a good reason for such a breach. They are, therefore, important and should always be followed unless there is good reason not to do so. The most commonly quoted example of a code of practice, although not relevant to employment law, is the Highway Code.

Employment codes are issued by a number of bodies such as Acas (see section 1.5.1). An important code of practice (that we will look at in some detail in Chapter 8) is the Acas Code of Practice: Disciplinary and Grievance Procedures. If an employer does not follow this procedure when dismissing an employee, the dismissal will not be automatically unfair but the employer might struggle to persuade an Employment Tribunal that a fair process has been followed, and any compensation that is awarded can be increased by up to 25 per cent.

Task

Look at the Acas website and read one of the codes of practice that are there. Become familiar with the style and content of codes of practice.

1.3.3 Common law

This is also known as case law and is law that is derived from judges' decisions, rather than being created by Parliament. Case law is law based on precedents following from judgments in previous cases. A precedent set by a court can be 'binding' or 'persuasive'.

It is 'binding' if it is set by the Court of Appeal or the Supreme Court. This means that any court hearing a case based on similar principles has to make its judgment in accordance with the principle that has already been set. This only changes if an appeal is made against a decision that results in a change in the decision, or if future statute alters the principle that has been set.

It is 'persuasive' if the judgment comes from the ruling of a lower level of court (e.g. the Employment Appeal Tribunal). In such a situation due respect must be given to a previous judgment but, if there is good reason, the principle of the ruling does not have to be followed.

Most cases give judgments specific to the person before them. For example, I could take a case to the Employment Tribunal saying that my contract of employment expressly stated that I should be paid my full holiday entitlement on leaving the company. The company did not pay that holiday pay. There is no dispute over the calculation of the holiday pay: the only issue is whether the money should have been paid. The tribunal reads my contract, agrees that the money is owed and orders that it should be paid. That judgment affects me alone. However, a case could be brought to the Court of Appeal where there is a disagreement over the legal definition of holiday pay (as defined in the Working Time Regulations 1998). In determining what the correct definition of holiday pay is, the Court of Appeal is determining how the law should be interpreted – and is setting a precedent that is then binding on any subsequent cases relating to the definition of holiday pay. This is case law.

Case law is interpreted by the most senior court in the relevant legal system, so if a decision is overturned by an appeal court that decision forms case law and not the decisions of previous courts. For example, if one of the parties thinks that the decision made in an Employment Tribunal is wrong, it can appeal to the Employment Appeal Tribunal (EAT). The EAT reviews the decision made by the Employment Tribunal and either supports it or changes it. If the EAT changes it, the EAT's interpretation takes precedence over the Employment Tribunal, and the case law is based on the EAT's decision.

If one party is unhappy with the reversal of the decision made by the EAT, he/she can appeal to the Court of Appeal. Any decision made by the Court of Appeal overrules the EAT. Ultimately, a decision of the Supreme Court overrules all previous decisions and this is the final appeal court in the UK.

Note that case law cannot contradict statute.

1.4 The role of Europe

The UK carried out a referendum on 23 June 2016 on the future of its membership of the EU, and the majority vote was for the UK to leave. The UK left the EU on 31 December 2020 following a year's transition period.

The European Union (Withdrawal) Act 2018, meant that all existing EU law was copied across into domestic UK law the day that the UK left the EU. The day after Brexit, employment law did not change. However, the difference is that the UK can make changes if it wants to do so. For example the Working Time Regulations 1998 were introduced because of the EU Working Time Directive. There is a limit on the working week of 48 hours (although employees can opt out from this limitation, as we will see in Chapter 5). While the UK was part of the EU it could not change the 48-hour limit. Now it can make changes if it decides to do so.

Although the UK has left the European Union we still see reference to various EU sources of law, because they have not been repealed. It is useful, therefore, to understand the different sources of law in the EU:

- **Treaties** are the primary source of all European law. A treaty is a framework within which a member state can implement legislation. The first treaty was the Treaty of Rome (1957), which created the European Economic Community (as it was then named). Subsequent treaties include the Maastricht Treaty (1992) and the Treaty of Amsterdam (1997).
- **Regulations** automatically become part of the national laws of the member state by virtue of treaties previously entered into. There might be a requirement for the member state to pass legislation to incorporate them. Examples of regulations are the Working Time Regulations 1998 and the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.
- **Directives** lay down objectives that the member state is 'directed' to implement by making them part of national law. The member state decides exactly how it will achieve this. There is usually a time period given in which to carry out the implementation, and there have been occasions on which

an extension to this time period has been negotiated. If the member state does not implement the Directive in the given time period, it can be forced to pay damages to any individual who has suffered loss as a result of the non-implementation. Examples of Directives are the Working Time Directive 1993 and the Information and Consultation Directive 2002.

- **Decisions** relate to specific member states, individuals or organisations. They are binding.

Within the European Community, the European Commission and the European Parliament introduce new legislation. The Court of Justice of the European Union has an important role in defining and interpreting EC law. The final court of appeal in a member state can refer a case to the Court of Justice for an interpretation of a specific aspect of European law. The Court of Justice makes the ruling and then returns it to the courts in the member state for that ruling to be acted upon.

As the UK has now left the European Union it is no longer possible for appeals on new matters to be made to the Court of Justice. The Court of Justice can finish hearing appeals made before the UK left the EU, and there are four years for any claims to be made relating to infringements of EU law during the transition period. However, from 1 January 2021 the final appeal court in the UK is the Supreme Court.

1.5 Key institutions

There are a number of institutions within the UK that have a direct impact on the creation and workings of employment law. These include the following.

1.5.1 Acas

Acas (Advisory, Conciliation and Arbitration Service) is a service funded by the government but independent of any government control. Acas is run by a council of 12 members from business, unions and the independent sector. It has about 800 employees working from 11 regional offices and a head office in London. It has been in existence since 1974.

Acas is a service for both the employer and the employee. Its duty is to remain impartial and to try to help both sides find solutions to their difficulties. Specifically, the functions include:

- **Advice** – any person can phone Acas for advice about an employment-related matter. For example an employer might phone to ask for information about recent developments in employment law, or an employee might phone asking for advice in taking a claim to the Employment Tribunal.
- **Conciliation** – the process of bringing both sides of a dispute together and helping them to find a solution to their difficulties. Acas might perform this role before any conflict has actually occurred, or when it has already commenced. Acas has statutory powers to offer conciliation when talks to resolve disputes break down. In particular, Acas tries to help both parties

in an employment dispute to resolve the dispute before the case reaches the Employment Tribunal. All cases lodged with the Employment Tribunal are copied to Acas, and it will contact both parties and try to help them to reach an agreement. Acas also runs the Early Conciliation service, which almost all potential claimants to the Employment Tribunal must engage with before they can proceed in making a claim. We explore this service in some detail in Chapter 2.

- **Arbitration** – the process of bringing in an independent body (e.g. Acas) and letting it evaluate the situation and determine a solution. Although there is not always a legal requirement to implement the recommended solution, there is a moral obligation. This process can only work if both sides agree to be bound by the process of arbitration. Acas also works through the process of mediation. In mediation the mediator will suggest solutions to the problem, but the parties are not bound to accept any of the solutions.
- **Training** – Acas runs a significant number of training sessions, aimed at both employers and employee representatives. As well as running national training events, Acas will work specifically with an organisation to provide tailored training sessions or consultancy advice.
- **Research** – Acas is involved in various areas of research relating to employment issues. This research is aimed at helping employers to run organisations more efficiently.

Task

Look through the Acas website and make sure you are familiar with the range of services that it provides. You might find it particularly interesting to read its annual report.

1.5.2 The Central Arbitration Committee (CAC)

The CAC is an independent body with statutory powers whose specific role is to determine the outcome of applications relating to the statutory recognition or derecognition of trade unions for collective bargaining purposes (see Chapter 10). The CAC is also responsible for determining the outcome of disputes between employers and employees over the disclosure of information for collective bargaining purposes and in dealing with complaints relating to the establishment of works councils in the UK. All of these issues are looked at in more detail in Chapter 10.

The committee consists of a chairperson, 10 deputy chairpersons, 16 members representing workers and 16 members representing employers. The Secretary of State for Trade and Industry appoints the committee after consulting with Acas.

1.5.3 The Equality and Human Rights Commission

The Equality and Human Rights Commission was set up in October 2007 as a result of the Equality Act 2006, and replaced three former organisations:

- the EOC (Equal Opportunities Commission)
- the CRE (Commission for Racial Equality)
- the DRC (Disability Rights Commission)

The three former organisations had all worked to combat discrimination but, with the growing range of discrimination legislation (explored in Chapters 6 and 7), it was perceived that there was a need for one organisation that covered all aspects of discrimination. It was also considered that one organisation would be able to have greater impact than three separate organisations.

The role of the key institution relating to health and safety (the Health and Safety Executive) is detailed in Chapter 12. It is important to note that both the employer and the employee can seek advice and support from all the bodies outlined in this chapter. They operate without bias and are not permitted to promote the interests of one side of the employment relationship.

1.6 Explanation of common terms

There are some standard terms used in employment law that it is important to understand (you can also refer to the Glossary at the end of this book, which defines a wide range of terms used in employment law):

- An *Act* is always cited in a standard way – that is, the name of the Act followed by the date the Act was passed. For example the Equality Act 2010. Capital letters should be used for each word – so it should be Equality Act 2010 not equality act 2010.
- The person who brings a case to a tribunal is called the *claimant*.
- The employer who defends a case in the tribunal is called the *respondent*.
- The person who brings a case to the appeal court is called the *appellant*.
- A case is always described as one party *versus* the other party, and the date it was heard in the court follows in parentheses (round brackets). For example *Delaney* v *Staples* (1992).
- If a case is brought by the state it is listed as *R* v *A N Other* (2003), where *R* stands for 'Regina' (the Queen, as head of state).
- *Ex parte* literally means 'from a party' – meaning that only one party is making the initial application. So in the case *R* v *Secretary of State ex parte Equal Opportunities Commission* (1994), the challenge was coming from a party called the Equal Opportunities Commission.

When cases are cited in literature, only a brief description of the facts is usually given. To read the full report you must refer to the given source. For example *Delaney* v *Staples* (1992) IRLR 191 means that the full script can be found in the *Industrial*

Relations Law Reports available on Lexisweb. A case followed by 'ICR' is reported in the *Industrial Case Reports* available from the Incorporated Council of Law Reporting website. These reports can be accessed online, and printed versions can be found in many university libraries.

Task

It is important that throughout your studies you keep abreast of the changes and developments in employment law. This can be achieved by reading such publications as the CIPD magazine *People Management*, reading quality newspapers and browsing websites already listed for specific employment institutions. Decide now what will be your main sources of reference and be sure to make regular referrals to them.

KEY LEARNING POINTS

1. Employment law is a rapidly changing area of law and the direction of changes is affected by the government of the UK.
2. Employment law is primarily governed by civil law, although there are situations in which criminal law might be applied. Civil law is based on the law of contract, tort and property.
3. Legislation is created by statute, common (case) law and the influence of codes of practice.

Examples to work through

1. How has the *Good Work Plan* changed the approach to employment law in the UK? Give some examples, and assess whether this has made employment law more 'fit for purpose'.
2. Identify one change in employment law made due to the political stance of the government at the time. How much does the political stance influence the development of employment law?
3. Evaluate the value of Acas for both the employer and the employee.

Useful websites

A list of useful websites is provided at the end of the book. It is important to note that some legislation and legal terms are different in Scotland from those in England and Wales. A number of the websites direct Scottish students to particularly relevant information, such as the Scottish Parliament and Scottish Law Online websites.

In addition, the following specific websites are referred to in this chapter:

Advisory, Conciliation and Arbitration Service (Acas), www.acas.org.uk
Central Arbitration Committee (CAC), www.gov.uk/government/organisations/central-arbitration-committee
Chartered Institute of Personnel and Development, www.cipd.co.uk
Confederation of British Industry, www.cbi.org.uk
Department for Business, Energy and Industrial Strategy, www.gov.uk/government/organisations/department-for-business-energy-and-industrial-strategy (this replaced the Department for Business Innovation and Skills)
Department for Education, www.gov.uk/government/organisations/department-for-education
Equality and Human Rights Commission, www.equalityhumanrights.com
Incorporated Council of Law Reporting *Industrial Case Reports,* www.iclr.co.uk
Industrial Relations Law Reports, lexisweb.co.uk/sources/industrial-relations-law-reports
The *Good Work Plan,* www.gov.uk/government/publications/good-work-plan
The Taylor review: *Good Work: The Taylor Review of Modern Working Practices,* www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices
Trades Union Congress, www.tuc.org.uk

It is important to note that some legislation and legal terms are different in Scotland from those in England and Wales. A number of the websites direct Scottish students to particularly relevant information. In addition, it might be helpful to access the following specific websites:

Scottish Law Online, www.scottishlaw.org.uk
Scottish Parliament, www.parliament.scot

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02
The Employment Tribunals and the Employment Appeal Tribunal

CHAPTER OBJECTIVES

The objectives of this chapter are:

- to analyse the history of the Employment Tribunals
- to explain the operation of the Employment Tribunals
- to explore recent changes to the Employment Tribunals
- to outline the impact of the Employment Appeal Tribunal

2.1 The history of the Employment Tribunals

The Employment Tribunals were created by the Industrial Training Act 1964 (and at this stage were named 'industrial tribunals'). They were initially created to hear appeals relating to the assessment of training levies under this 1964 Act. Over the next three years their brief was extended to include such things as the determination of the

right to a redundancy payment and issues surrounding the lack of, or inaccuracy of, a written statement of terms and conditions of employment.

In the mid-1960s the government became concerned about the number of unofficial strikes, wage inflation and the general existence of restrictive practices in industry. It commissioned Lord Donovan to lead an investigation into these issues. As a result of the investigation, the Donovan Report was published in 1968 and gave a comprehensive overview of industrial relations at the time.

As part of the recommendations in the report, Donovan saw the need for an industrial tribunal system to which employees could bring their grievances. He described this system as needing to be easily accessible, informal, speedy and inexpensive.

At first the industrial tribunal system was just this. However, over the years the workload of the tribunals has increased significantly, and many believe the system has moved far from the ideal that Donovan initially described.

It is easy to see some of the key reasons that the workload increased so dramatically. When the Donovan Report was published, there was no legislation relating to unfair dismissal (introduced in 1971), sex discrimination (1975) or race discrimination (1976). Today, more than half of the claims to the Employment Tribunals relate to these areas of legislation. In total, the Employment Tribunals have jurisdiction to hear cases relating to over 80 pieces of legislation, the most common being unfair dismissal.

Despite this increasing workload it was still hoped that the Employment Tribunals system could meet Donovan's ideal. The idea was that an employee who felt he/she had been badly treated by an employer should have the means to get an independent judgment on the issue, quickly and without cost. How are those criteria being met today?

2.1.1 Easily accessible

The Donovan Report suggested that there should be Employment Tribunals operating in all major industrial centres, making them easily accessible. In 1971 Employment Tribunals were heard in 84 locations. Today there are 34 centres at which Employment Tribunals are heard. There is also the ability to hear cases almost anywhere if people have particular needs (e.g. disability) that make it difficult to attend a permanent centre. It is difficult, therefore, to give a specific number of centres, but the system is certainly still very accessible to those who want to use it.

Accessibility can also refer to the ease of registering a claim with the Employment Tribunals. The system is open to everyone, and the actual process of registering a claim is relatively straightforward (as we see in section 2.2). Forms to apply to the Employment Tribunals (ET1) are readily available at places such as Citizens' Advice and it is possible to complete the ET1 online at the 'Make a Claim' section of the Employment Tribunal website.

2.1.2 Informal

This may be the area that now least meets the original Donovan ideal. There are definitely ways in which the Employment Tribunals system is much less formal than other court systems. There are no wigs and gowns, and the hearing rooms are less imposing than many courtrooms. In higher courts the parties are expected to present

their case, and challenge the case of the opposite side. An unrepresented claimant who is struggling to explain his/her case in the Employment Tribunal is usually given some assistance by the Employment Judge to make sure that all facts are communicated (but the judge will not give any advice on how to put a case).

However, it is widely accepted that the Employment Tribunals have moved away from the picture of the potentially wronged employee presenting his/her grievance in a simple manner, with the employer responding to the accusations. It is now very common for one or both parties to be represented by solicitors or barristers, and the simple arguments are often weighed down by substantial legal arguments. This has impacted on the aspect of informality – but is probably inevitable, given the growing amount of legislation relating to employment issues.

2.1.3 Speedy

The original Donovan ideal was a very quick resolution to the grievance. This allowed the employee and employer to put the issue behind them and continue with a good working relationship or, if the employee had left the employer, allowed the employee to resolve the issue and move on to find new employment.

All the Employment Tribunals have targets to hear claims speedily. However, the actual timing between the claim being lodged and the hearing taking place will vary depending on how many days the case is listed for, and also depending on where in the country the claim is to be heard (some centres are busier than others). The large number of claims that were seen a few years ago certainly slowed down the process. When fees were introduced the number of claims dropped and the process speeded up. Once fees were removed the number of claims increased and the process slowed down. Covid-19 also had a significant impact on the speed of claims being heard, because the tribunals were unable to hear cases for several weeks. The tribunals can now be heard remotely, as well as face to face, which has helped to start the process of clearing the backlog.

2.1.4 Inexpensive

This is a contentious issue. On 29 July 2013 fees were introduced to bring a claim to the Employment Tribunal. The fees were set at two levels (depending on the complexity of the case). The fees were paid in two stages, and in total were £390 for a straightforward claim (e.g. unlawful deduction from wages) and £1,200 for a more complex claim (e.g. unfair dismissal). There were also fees for other services, such as making a claim to the Employment Appeals Tribunal. There was a fee remission process for those who struggled to pay and met the criteria to have the fee waived.

From the very introduction of the fees, the trade union Unison challenged them in the courts. The first challenge came to the High Court in October 2013, with Unison putting forward a number of arguments primarily that:

1. The fees made it excessively difficult, if not impossible, to exercise rights set out in EU law to bring a claim.
2. The fees made it excessively difficult, if not impossible, to bring a claim because they had been set so high (the fees were higher than those charged to bring similar levels of legal claims).

3 In introducing the fees the government breached the Public Sector Equality Duty.

4 The fees were indirectly discriminatory. The argument here was that equal pay claims attract the higher level of fee. It is most likely that women will bring equal pay claims and, on average, women are paid less than men. Hence it was argued that this amounted to indirect sex discrimination.

There followed a number of additional court hearings, until the issue reached the Supreme Court in March 2017. The Supreme Court concluded that the fees restricted access to the courts, because of the level at which they had been set, and therefore breached a constitutional right. They noted the significant drop there had been in claims since the fees had been introduced (around 80 per cent) and they considered evidence that the remission scheme was not working. They also considered whether the introduction of the fees was actually encouraging employers to break the rules relating to employment.

Having considered all these points they ruled that the fees were unlawful. As a result, they were removed on 26 July 2017. The government paid back the fees that claimants had paid over the four years that they were in place. It is possible that the government will introduce a new approach to fees at some time in the future, maybe with much lower fees. However, at the time of writing there are no definite plans.

Although the removal of the fees does mean that bringing a claim to the Employment Tribunal is now free, there are other costs that can be incurred. If a claimant chooses to represent him-/herself, and many do, there are obviously no legal costs. If the claimant chooses to seek legal representation, legal aid is not available, and so the claimant must meet those costs. If the claimant is a member of a trade union, that union will typically represent the claimant, presuming that they do not feel the case is totally unfounded. In some cases the claimant might get representation or support from one of the bodies described in Chapter 1 – such as the Equality and Human Rights Commission.

In many courts the unsuccessful party has to meet all or part of the costs of the opposing side. In the Employment Tribunal this is unusual, although the Tribunal must consider whether costs should be awarded if a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing or conducting of the proceedings. Costs can be awarded up to £20,000.

We can see, therefore, that there are ways in which the 'Donovan ideal' is far away from the reality of today. However, the Employment Tribunals are still a court at the lowest rung of the court hierarchy, and there is still a desire to ensure that the claimant is able to bring his/her case and present it in a simple format.

Explore further

How relevant do you think the 'Donovan ideal' is for today's world of employment? Are the issues of accessibility, informality, speed and expense of primary importance?

Any students particularly interested in this should read the original Donovan Report, available online on the JSTOR digital library

2.2 Early conciliation

The process of early conciliation was introduced on 6 April 2014 as a result of the Enterprise and Regulatory Reform Act 2013. It became compulsory from 6 May 2014.

Unless the claim is for one of the following reasons, a claimant cannot make a claim to the Employment Tribunal without first engaging in the Early Conciliation process:

- The claim is against the Security Service, Secret Intelligence Service or GCHQ.
- Another person who the claimant is making the claim with already has an Early Conciliation Number.
- The claim is against an insolvent employer.
- The claim involves multiple claimants.
- There is an application for interim relief.

The process of Early Conciliation starts by the claimant making contact with the service (run by Acas) either online or by telephone. At this stage all the claimant needs to do is give his/her name and contact details and the name and contact details of the employer he/she is making a claim against. He/she is then contacted within two working days by an Early Support Conciliation Officer who will explain the process and ask for more details about the claim. At this stage the potential claimant can state that he/she does not want to go any further with the Early Conciliation process and it comes to an end. The claimant is issued with an Early Conciliation Number and can then proceed to make a claim to the Employment Tribunal. It is clear, therefore, that there is no obligation to actually pursue conciliation.

If the claimant does want to proceed the claim is passed to a Conciliation Officer. This officer will contact the employer and will have six weeks to try to facilitate a settlement between the two parties. If the employer does not want to engage in conciliation the process comes to an end and the claimant is issued with an Early Conciliation Number.

If a settlement is agreed then the claim goes no further. If no settlement is agreed, or if the employer refuses to engage with Early Conciliation, the claimant is issued with an Early Conciliation Number and can proceed with a claim to the Employment Tribunal.

It is important to note that, although the process is usually triggered by the claimant, the employer can also trigger the process. If the employer had identified that there was a dispute that was likely to lead to an Employment Tribunal claim it can trigger the process in exactly the same way as the claimant.

As we will see in section 2.3.1, a claim to the Employment Tribunal must be brought within a specified timescale (typically three months). When the Early Conciliation process is triggered the clock that is ticking away relating to this timescale is stopped. It does not start again until the process has ended and has been unsuccessful. If, when the process has ended, there is less than one month left to bring a claim to the Employment Tribunal this will always be extended so that the potential claimant has at least one month to bring a claim.

The Early Conciliation process is free.

Explore further

Go to the Acas website to read more about the Acas Early Conciliation process.

2.3 The process of the Employment Tribunals

A full Employment Tribunal consists of an Employment Judge and two lay members. The Employment Judge is a fully qualified lawyer who either works full-time as an Employment Judge or practises law part-time. The lay members are appointed by the Secretary of State for Trade and Industry. They have extensive experience and knowledge of employment issues. In each Employment Tribunal one lay member will come from an 'employee' background (e.g. a trade union official) and one from an 'employer' background (e.g. an HR manager). The three members of the Employment Tribunal have an equal vote in deciding the outcome of each case.

Increasingly, the Employment Tribunal consists of just an Employment Judge. Unfair dismissal claims account for nearly half of all claims to the Employment Tribunal, and judges typically sit alone to hear these cases.

The Employment Tribunal only has jurisdiction to hear claims arising from employment in the UK. However, employees working overseas for a UK company might be covered by the Employment Tribunal process, depending on the nature of their contract:

- *Pervez* v *Macquarie Bank Ltd (London Branch) and Macquarie Group Limited* (2010) UKEAT/0246/10/CEA
  Pervez worked for a Hong Kong-based company and was seconded to work in London for an associated company. The secondment was not successful and he was told that the assignment would be terminated. Under the terms of his contract, he was required to resign if there were no other suitable roles available. There were none, but he refused to resign and hence he was dismissed. He brought various claims, including unfair dismissal.

  The Employment Tribunal found that it had no jurisdiction to hear the claim because the employer did not carry on business in England or Wales and the dismissal took place overseas. However, the EAT held that the phrase 'carry on business' had been assessed too narrowly. It ruled that the employer carried on business in England by seconding the claimant to work in London, and hence there was jurisdiction to hear the claim.

2.3.1 Bringing a claim to the Employment Tribunals

A claimant makes a claim to the Employment Tribunals by completing the claim form known as an ET1. Typically, this form must be lodged at the Employment Tribunals within three months minus one day of the alleged incident occurring.

For example, if the claimant is an employee who has been dismissed, the claim form must reach the Employment Tribunals within three months minus one day of the date of dismissal. If the claimant is alleging that an act of sex discrimination has occurred, the claim form must reach the Employment Tribunals within three months minus one day of the last date of the alleged act of discrimination.

There are certain claims where the three-month rule is extended. These include:

- unfair dismissal for unofficial industrial action (six months from date of dismissal)
- redundancy payment (six months from relevant date)
- equal pay (six months from termination of employment)

If the claim form is presented after this date, and the claimant can show a justifiable reason for the delay, the claim can be referred to a preliminary hearing of the Employment Tribunal to consider whether the reason is indeed justifiable and whether the case should go forward to a full hearing.

The Employment Tribunal does not readily extend the deadline; good reason has to be shown. An ignorance of employment rights or of the relevant time limits would rarely be seen as good reason. Potentially good reasons are that the claimant was too ill or distressed to make a claim, or that internal procedures within the organisation needed to be completed.

It is not possible to have clear rules on when a claim presented out of time could still be accepted, because the details of each claim will vary. The following cases illustrate this issue:

- *Avon County Council* v *Haywood-Hicks* (1978) ICR 646
  In this case the claimant was a polytechnic manager. He had been dismissed and he claimed it had been an unfair dismissal. His claim form was received by the Employment Tribunal six weeks after the three-month period had elapsed. He claimed that he was not aware of the existence of Employment Tribunals, and the possibility of bringing a claim, until he read an article in a newspaper. The Employment Tribunal ruled that he ought to have investigated his rights and ought to have claimed in time. They ruled that the idea that a well-educated and intelligent man had no idea of his rights 'offended their notion of common sense'. The time limit was therefore not extended in this case.
- *Shultz* v *Esso Petroleum Ltd* (1999) IRLR 488
  The claimant became depressed during the last six weeks of the three-month period for making a claim and claimed he was too depressed to instruct solicitors. The Employment Tribunal and the Employment Appeal Tribunal both found in favour of the respondent. However, the Court of Appeal held that it had not been practicable for the claimant to lodge a claim. The Court of Appeal stressed that the issue of practicability was paramount.

There are occasions when an employee is waiting for an internal appeals process to be completed before making a decision whether or not to make a claim to the Employment Tribunal. If the employer is slow at arranging an appeals hearing, and the process is not completed within three months of a dismissal, an Employment Tribunal might be prepared to extend the period for the claim to be made.

2.3.2 Responding to a claim in the Employment Tribunal

The relevant regional office of the Employment Tribunal receives the claim to the tribunal and a copy is sent to the respondent. The respondent is also sent a form known as an ET3 to complete and return to the Employment Tribunal within 28 days. Note that this is 28 days from the date that the form is sent, not the date that it is received. As well as confirming details of the claimant and the respondent, the ET3 requires the respondent to outline its defence of the claim. In accordance with the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, if the respondent wants to request an extension to the time limit to make a response, he/she must do so within 28 days of receiving the claim form.

When the 28-day period has elapsed, the case will be listed for a hearing in the Employment Tribunal. If the respondent does not respond within the 28-day period, the case will still be listed, and the respondent has lost his/her right to take any further part in the proceedings. A copy of the completed ET3 is sent to the claimant by the Employment Tribunal.

The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 prescribe that all claims and responses must be made on the ET1 and ET3 forms. The Employment Tribunals will reject any submissions that are not on these forms.

Explore further

To find out more about the process of making and responding to a claim go to the UK Government's Employment Tribunals website. As well as explaining the process this is where individuals can make a claim, so this allows you to see the start of the process.

2.4 Preliminary hearing

There are circumstances in which a claim can be listed for some form of review prior to a full hearing. This is known as a preliminary hearing. The purpose of the preliminary hearing is to address points that need resolving before a full hearing can take place. So, for example, the hearing might consider whether an individual bringing a claim of disability discrimination is disabled, or whether someone who is alleging unfair dismissal is an employee (because non-employees cannot bring this claim).

In addition, the hearing might address arguments that the claim has no reasonable prospect of success. The Employment Judge running the hearing can strike out a claim, and can order a deposit to be paid by a claimant who wants to proceed with a claim that seems unlikely to succeed, or to be paid by a respondent who seems to be trying to defend the indefensible. The deposit cannot be more than £1,000, and it can be requested in relation to part of a claim. For example, if a claimant was bringing claims of unfair dismissal and race discrimination and the judge considered

that the unfair dismissal claim had reasonable prospects of success whereas the race discrimination claim was unfounded, it could order a deposit to be paid just in relation to the discrimination claim. The claimant could then decide to just proceed with the unfair dismissal claim, or proceed with both and pay the deposit. The deposit is refunded if the party then goes on to win their case.

2.4.1 Settlement prior to the hearing

As already noted, copies of all ET1 and ET3 forms are sent to Acas, who have a statutory duty to try to facilitate a settlement. They will do this even though a settlement might have already been attempted through the Early Conciliation process.

It is usual for the conciliation to involve a payment of some financial sum, although reinstatement or re-engagement can occur in some cases. When both sides have agreed a settlement that is reached through Acas, it is confirmed on a form COT3 and the case is then withdrawn from the Employment Tribunal. The signing of the COT3 prohibits either side from pursuing any issue relating to the case.

Outside of the Acas process a settlement agreement can be reached. (Note: prior to 29 July 2013 these agreements were referred to as compromise agreements; the change in name is meant to make the purpose of the agreements clearer – this change was made as a result of the Enterprise and Regulatory Reform Act 2013). These agreements have the same status as a COT3 (i.e. the parties cannot take the claim any further) but are not negotiated through Acas. A settlement agreement must be in writing and can only be reached when the claimant has received advice from a relevant, independent adviser. An independent adviser is a qualified lawyer, a certified adviser from an independent trade union or a worker at an advice centre who has been certified as an adviser for this purpose.

The Enterprise and Regulatory Reform Act 2013 also introduced the concept of 'confidential pre-termination negotiations'. This allows an employer to discuss a possible settlement with an employee prior to a termination of employment, without it being referred to as evidence should the situation subsequently result in an unfair dismissal claim. It could only be referred to if there had been 'improper behaviour' by one of the parties during the negotiations of the settlement.

Acas has produced a Code of Practice on Settlement Agreements and in this it defines 'improper behaviour' as the following (the list is said not to be inclusive):

- harassment, bullying and intimidation, including through the use of offensive words or aggressive behaviour
- physical assault or the threat of assault
- all forms of victimisation
- discrimination
- putting undue pressure on a party (for example not allowing sufficient time to consider the terms)
- an employer saying that the employee will be dismissed if the settlement agreement is not accepted, if no form of disciplinary process has begun
- an employee threatening to damage the employer's public reputation if the organisation does not accept the agreement (unless there is a whistleblowing issue)

The Acas Code recommends that the employee is allowed a 'cooling off' period of at least 10 calendar days to consider a settlement agreement and to seek legal advice.

Explore further

The Acas Code of Practice on Settlement Agreements can be accessed on the Acas website. Read through this to gain more understanding of the process of reaching a settlement agreement.

2.5 Judicial mediation

Another way in which a claim can be settled before it is heard in the Employment Tribunal is through judicial mediation. An ET1 and ET3 are submitted in the usual way, and an Employment Judge decides, having read the documents, that it seems that the case could be resolved through mediation rather than through a full hearing. Judicial mediation is suggested to the two parties, and if they agree the regional Employment Judge makes the final decision as to whether the case is suitable for the process.

The two parties then come together with an Employment Judge who has been specifically trained in mediation. The judge facilitates the two parties in reaching a settlement, but does not give an opinion on the merits of the case. If the mediation is successful the claim goes no further. If it is not successful the claim is listed for a full hearing, in front of a different judge.

2.5.1 Withdrawing a claim

In addition, the claimant can withdraw his/her claim at any stage. The claimant simply has to inform the Employment Tribunal that there is no intention to pursue the claim further and does not have to give a reason for this decision. If the claimant does withdraw the claim there is no requirement to pay any amount to reflect the work that the Tribunal might already have done in preparing for the case.

2.6 The operation of the Employment Tribunals

Before the case is listed an Employment Judge will have reviewed the file and estimated how long the case will take to hear. A case might be listed for one day (or part day), but it is quite possible for a hearing to be listed for several days, especially if there are a group of claimants bringing a case against a respondent. Unless there are good reasons, all hearings are open to the public. Exceptions to this include

situations where national security might be at risk or where a juvenile is involved in some way.

The Employment Tribunal will also send directions to the two parties. These typically set dates for the parties to prepare witness statements and documents, and to exchange them (we will look at this in more detail when we consider the preparation required for a tribunal hearing). If the parties do not comply with the directions they could be excluded from the hearing, or an 'unless order' can be given:

- *Riniker* v *City and Islington College Corporation* (2010) ET/0495/08/CEA
  Following a claim of unfair dismissal, the Employment Judge reviewed the case and issued the usual directions to both parties to disclose documents, exchange witness statements and for Riniker to prepare a schedule of loss. Riniker did not meet the requirements of the directions on a number of occasions.

  The Employment Judge then issued an 'unless order'. An 'unless order' requires a party to comply with specific directions by a certain date, and if the party does not do this the claim can then be struck out. Riniker still did not comply, but on the deadline day of the 'unless order' she wrote to the Employment Tribunal complaining about the 'unless order' and seeking to vary it. This request was reviewed by an Employment Judge, who considered the complaints. They were dismissed and hence her claim was struck out for non-compliance with the 'unless order'. The EAT later ruled that the judge had been entitled to issue the 'unless order', and hence dismissed Riniker's appeal.

At the hearing, once all the evidence has been presented, and all witnesses have been heard and cross-examined, the Employment Tribunal retires to reach a verdict. The verdict has to be a majority view, not necessarily a unanimous view. The Employment Judge's vote on the decision is not given more weight than the lay members. The Employment Tribunal can give its judgment in summary form (i.e. identifying just the key facts and concluding with the judgment) or give extended reasons.

Extended reasons give a thorough summary of the facts of the case, an explanation of the reasons behind the decision of the Employment Tribunal and a summary of the merits of the case. A party requiring extended reasons must request them within 14 days of the summary reasons being given. It is not unusual for summary reasons to be given before the parties leave the tribunal building. This will depend on the time available and the complexity of the case.

A decision will always be confirmed in writing to both parties. If the decision and reasons have been given orally then the reasons will only be given in writing if they are requested by one of the parties.

The decision of the Employment Tribunal is not only who has 'won' the case, but also what remedies are to be made. The remedies will vary according to the type of claim brought. For example, if the claim brought is for an unlawful deduction of wages, and the Employment Tribunal finds that there has been an unlawful deduction, the remedy will be to pay the money that has been unlawfully deducted.

If there is time after the judgment has been given, the Employment Tribunal can go on to consider the remedy. However, if there is no time, or if the Employment Tribunal wants the parties to provide it with documents that they do not have available, a separate remedy hearing will be arranged.

In cases such as unfair dismissal (when employment has ended) there are three remedy options available to the Employment Tribunal:

- **Reinstatement** – the employee returns to the job he/she had. This is a rare remedy because the relationship between the employee and the previous management is usually too badly damaged for a working relationship to be resumed. In addition, it is quite possible that the employee has gone on to find new employment while waiting for the hearing.
- **Re-engagement** – the employee returns to the company but in a different role. Again, this is rare because of the damage that has been done to the employment relationship.
- **Compensation** – the company is ordered to pay an amount of money to the employee. This is the most common remedy. Compensation consists of two elements: the basic award and the compensatory award. The basic award is calculated with reference to age and length of service (we will look at this in detail in Chapter 8). The compensatory award is determined by the Employment Tribunal, who considers issues such as the salary that the claimant has lost. Compensatory awards for unfair dismissal are currently (2021) capped at £89,493 or the employee's annual salary, whichever is lower. The alternative cap of the employee's annual salary was introduced to make claimants more realistic in settlement discussions.

Task

Find out what preparations each party needs to make before a hearing. Looking at the Employment Tribunals section of the government website will help in doing this.

2.7 Preparation for an Employment Tribunal hearing

As already noted, the claimant is required to submit an ET1 form. This starts the claim process. The ET1 is sent to the Employment Tribunal, not directly to the employer. The Employment Tribunal then sends a copy of the ET1 to the employer, along with a blank ET3 to be completed. As already noted, the ET3 must be completed and returned to the Employment Tribunal within 28 days.

The ET3 requires the employer to complete factual details such as the salary of the employee and the start date of employment. It also requires the employer to summarise the main points relating to the situation and the defence that is being put forward. An Employment Tribunal will not look favourably on an employer who presents a case in the actual hearing that differs from that which is summarised on

the ET3, and can stop an employer adding in significantly new material at the hearing because it will not have been presented within 28 days. When the ET3 has been returned to the Employment Tribunal, the papers will be reviewed by an Employment Judge and a decision will be made as to whether the case should go directly to a full hearing or whether there is a need for a preliminary hearing.

Once the review of the papers has taken place, the Employment Tribunal will write to the parties, giving the date of the hearing and directions. The directions are likely to require:

- All witness statements to be written and exchanged with the other party within a specific timeframe. This is usually 14 days prior to the hearing. Witness statements also have to be sent to the Employment Tribunal within this timeframe. All witness statements should be included. The Employment Tribunal is entitled to refuse to hear any witness whose statement has not been submitted as required.

  (The taking of witness statements is an important process. It is important to ensure that only witnesses who have something relevant to say are included. For example, in a claim of unfair dismissal, those involved in the investigation, decision to dismiss and any appeal are clearly key. However, a line manager who can comment on something that happened a few years back that did not lead to the dismissal is not relevant. Witness statements should include all the evidence that the witness is going to give. Although some supplementary questions can be asked of the witness, this should be brief and should not be part of the substantial evidence.)
- A bundle of documents to be collated. One bundle is required, hence the employer and claimant have to co-operate over its collation. It is usual for the employer to take responsibility for putting the bundle together, because the employer usually has more resources available. The employer and claimant will usually contact each other with a list of documents that they propose to include. The documents should be presented in a folder or other format where the papers are kept in order, with all pages of the bundle numbered. There should be an index at the front of the bundle, and papers should be in chronological order.
- A schedule of loss to be produced by the claimant. This is a calculation of the compensation that the claimant is wanting as a result of the claim, showing each element of the amount. If the claimant goes on to win the case this will be reviewed by the Employment Tribunal in a remedy hearing.

Each paragraph of the witness statement should be numbered, because this makes it easy to locate specific facts during cross-examination. It is also usual to refer to specific documents in the bundle while working through the statement. The witness should sign the statement.

On the day of the hearing the two parties arrive at the tribunal centre and sign in with the duty clerk. They will then be asked to wait in the appropriate waiting room. The clerk assigned to the case will come to the parties to check who is present, to determine whether the witnesses want to swear on the Bible or other holy book, or affirm, and to collect any papers that the parties have brought with them (although

there should not really be any, as they should all have been submitted prior to the hearing).

When the tribunal is ready, the clerk will collect the parties and they will be taken into the tribunal room. The Employment Judge will then start with some introductions and deal with any preliminary issues. The hearing then commences. Each party takes it in turn to present their evidence. Each witness goes to the witness stand, affirms or swears on a holy book. It is usual for the tribunal to have read the witness statement prior to the hearing, but if they have not read it, or if they think it would be useful, they can ask a witness to read the statement. Each witness will be cross-examined by the other party, then the tribunal will ask any questions and then the witness's representative will be able to ask any final questions.

Once both sides have presented all of their evidence, each side will be given an opportunity to sum up their key points. In this summing-up the party should direct the Employment Tribunal to the key points of the case and to any relevant law. If the party is not represented by a lawyer and is representing her-/himself, the Employment Tribunal will not expect the party to refer to any law. The Employment Tribunal then adjourns and considers its decision.

Attend the local Employment Tribunal. Hearings typically start at 10 am, so arrive at least 15 minutes before. Explain to the clerk the purpose of your visit and ask advice for a suitable hearing to watch. Try to attend the full hearing and (if the decision is given that day) stay to hear the decision.

2.8 The role of the Employment Appeal Tribunal

If a party is dissatisfied with the outcome of a claim to the Employment Tribunal there are two options – to ask the tribunal to review the decision (a process referred to as reconsideration) or to make an appeal to the Employment Appeal Tribunal (EAT). A reconsideration can only be requested if there are specific points to be addressed – it cannot be requested just because the decision is not liked. An application for a reconsideration must be made within 14 days of the judgment being received:

- *Adeqbuji* v *Meteor Parking* (2010) UKEAT/1570/09
  Adeqbuji's claim to the Employment Tribunal was dismissed, but then fresh evidence came to light that could have changed the outcome. The EAT ruled that it was restricted to hearing appeals on points of law and that it could not hear the appeal. Rather, it recommended that Adeqbuji should apply to the tribunal for a reconsideration, given the new evidence.

Both the claimant and the respondent have the right to appeal against the decision of the Employment Tribunal. An appeal is referred to the EAT.

An appeal can only be made on a point of law or on a claim that the finding of the Employment Tribunal is 'perverse'. In addition, there can be an appeal if the decision has been subject to some fundamental flaw, such as when one member of the Employment Tribunal has been found to be known to one of the parties, or a member of the Employment Tribunal behaved in a way that clearly demonstrated bias, or if the Employment Tribunal refused to hear a witness, to allow cross-examination or to take note of a piece of relevant evidence.

An appeal must be lodged within 42 days of the date that the extended reasons were sent to the appellant. The appeal is lodged by serving a notice of appeal along with a copy of the tribunal's decision and a copy of the extended reasons.

All appeals are listed for a preliminary hearing/directions (PHD). The main purpose of the PHD is to determine whether there are adequate grounds for appeal and, if there are, to give directions to both parties on preparation for the full appeal hearing.

In claiming that a finding was perverse, the appellant must show that the conclusion reached by the Employment Tribunal was one that no reasonable tribunal could have reached. This is very difficult to present successfully. For example:

- *Williams and others* v *Whitbread Beer Co Ltd* (1996) CA 22
  Williams was attending a works-related course and after a course session went to the hotel bar. He had a number of drinks and became loud and abusive to a fellow employee. When his manager told him to 'tone it down' he became loud and abusive towards his manager. Whitbread held a disciplinary hearing and Williams was summarily dismissed for gross misconduct.

  The Employment Tribunal found that the dismissal was not within the band of reasonable responses of a reasonable company, and hence concluded that the dismissal was unfair. Whitbread appealed and the appeal was upheld because the EAT concluded that a reasonable Employment Tribunal could have concluded that dismissal was a fair response.

  The Court of Appeal overturned the EAT's decision, stating that the role of the EAT was to determine whether the tribunal had reached a conclusion that no reasonable tribunal could have reached. They ruled that the tribunal's conclusion was reasonable, and even if it was not the conclusion the EAT would have reached, there was no evidence of 'perversity' and hence the decision of the Employment Tribunal had to stand.

An example of an appeal on a point of law can be found in:

- *Truslove and another* v *Scottish Ambulance Service* (2014) UKEATS/0053/13
  The employees argued that they were not getting the rest breaks allowed in the Working Time Regulations 1998 when required to be on call during the night. They were required to be in accommodation within a three-mile radius of the ambulance station so that they could respond to a call within three minutes. The question was whether being under these restrictions when on call meant that the employees were working as defined in the Working Time Regulations 1998 – any time when the individual is working, at the employer's disposal and carrying out the employer's activities or duties.

  The Employment Tribunal found that the claimants were not working because they were not confined to one location. However, the EAT found that

this was the wrong interpretation of the law. The individuals were required to be at a place defined by the employer and could not be at home. They were, therefore, not able to enjoy the quality of rest that they were entitled to receive under the Working Time Regulations 1998.

Acas does offer conciliation services to cover certain categories of EAT cases. The type of cases where conciliation may be appropriate includes cases where:

- the employment relationship is ongoing
- a case might be referred back to the Employment Tribunal
- an appeal relates to monetary awards

Explore further

Many of the cases we will study in this book have been referred to appeal – some to a higher level of appeal than the Employment Appeal Tribunal.

Look at a number of these cases and note the reasons that the appeals were made. What are the most common reasons that you encounter? Do you think there is any way in which the procedure of the Employment Tribunals ought to be changed in order to reduce the number of cases that go to appeal?

2.9 The number of claims to the Employment Tribunal

The number of claims to the Employment Tribunal has been of concern to successive governments. The concerns have partly been about the cost of running the tribunal service, but also about the amount of time that employers have been spending in defending claims. The Coalition Government, in particular, saw the fear of a tribunal claim being one of the reasons that small and medium-sized businesses were not prepared to make tough management decisions. Why has the number of claims grown so much?:

- Every time new legislation is introduced, there are new claims that can be brought to the Employment Tribunal. For example, in October 2006 legislation making discrimination on the grounds of age unlawful was introduced. In 2020, 2,060 claims relating to age discrimination were made – claims that could not have been made prior to October 2006.

  Initiatives to reduce claims had not worked, or had actually resulted in more claims. For example the Employment Act 2002 included statutory procedures to be followed when handling disciplinary or grievance situations in the workplace – these were introduced in 2004. One of the primary purposes of these two procedures was to push the resolution of differences

in employment back into the workplace. The idea was that this would then reduce the number of claims to the Employment Tribunal because issues would be resolved without being escalated to this level.

In February 2007 the Gibbons Report was published on research into the efficiency of the statutory procedures. The report concluded that the procedures had resulted in increased claims and that any advantages they might have brought had been outweighed by the problems.

Part of the reason for the increased claims was the need for the courts to develop case law to clarify aspects of the legislation – for example determining what constitutes raising a grievance. Another reason is that any failure to follow the dismissals and disciplinary procedure resulted in an automatically unfair dismissal – and employees brought claims on this basis that they could not have brought previously.

The conclusions of the Gibbons Report were that the statutory procedures should be abolished. This happened in April 2009.

- It is certainly true that individuals are more aware of their rights. They might not be certain exactly what those rights are, but they know enough to be prompted to go and find out more. It is more likely, therefore, that individuals will think about the possibility of bringing a claim.

2.9.1 Solutions to the problem

The government has addressed the increased number of claims in a variety of ways, as set out below.

Introducing fees

The introduction of fees, as already explained, had a dramatic impact on the number of claims brought to the Employment Tribunal. Overall, the number of claims dropped by around 80 per cent. However, once fees were removed there was a significant increase in cases. In the second quarter of 2018 the number of cases brought to the tribunal was 130 per cent higher than the number of cases in the corresponding quarter in 2017 (when fees were still in place). It certainly seems that fees deter claims, but if they are deterring legitimate claims (as it was feared they were) then they are not solving the problem.

Early conciliation

As we have already noted, a potential claimant has to engage with the Early Conciliation process before bringing a claim to the Employment Tribunal. The aim of this is to resolve problems at an earlier stage, so that they never become an issue before the tribunal.

Although there have also been other, more minor, changes to the Employment Tribunal system it does seem that these two solutions have had a significant effect.

Previous to these two changes there had been other attempts to reduce the number of claims, which were less successful, as follows.

2.9.2 The Acas Arbitration Scheme

The Employment Rights (Dispute Resolution) Act 1998 introduced a new scheme to try to reduce the pressure on the Employment Tribunal system. It is known as the Acas Arbitration Scheme. The scheme was launched in May 2001 and it was hoped that it would take the strain off the Employment Tribunal system. In reality it had little impact – handling very few cases each year. However, it was an important step and requires examination.

The Acas Arbitration Scheme only addresses unfair dismissal cases and claims made in relation to requests for flexible working. Although that limits its jurisdiction, we must remember that nearly half of all claims to the Employment Tribunals do relate to unfair dismissal.

The main advantage of the scheme is that it hears claims quickly, it is informal and it is speedy – maybe going back to the Donovan ideal we examined in sections 2.1.2 and 2.1.3.

The initial lodging of the claim is still to the Employment Tribunals through submitting an ET1. If both parties agree, the claim may then be taken out of the Employment Tribunal process and directed to the Acas arbitration process. At that stage an Acas arbitrator (not an Acas member of staff but an independent person appointed by Acas who is deemed to have specialist relevant knowledge) is appointed to the case. The Acas arbitrator then arranges a time for the hearing as quickly as possible, with a target of being heard within a period of two months.

The hearings are conducted informally and as locally as possible to the parties. There is no cross-examination of witnesses (witness statements may be presented, but the witnesses are not questioned), no formal pleadings and the proceedings are confidential. The two parties simply explain their side of the case to the Acas arbitrator, bringing his/her attention to any relevant documents. Each party is also allowed the opportunity to comment on the other party's written submission. The Acas arbitrator then questions both parties and also seeks views on any remedy that might be awarded. Both parties are then invited to make closing statements. The Acas arbitrator determines the outcome. The decision is not given at the hearing, but is communicated to both parties in writing after the hearing.

The decision of the arbitrator is final – there is no route of appeal unless there is a challenge on the grounds of substantive jurisdiction or on grounds of serious irregularity.

Why has the system been so little used?

The limited focus of jurisdiction can be a problem. It is not unusual for a claim to relate to more than one area of legislation. For example, there could be a claim for unfair dismissal and unlawful deduction of wages. If such a claim went through the Acas arbitration route, only the part relating to unfair dismissal could be heard. The matter relating to unlawful deduction of wages would have to be referred to the Employment Tribunal, meaning that the parties would have to attend two hearings. This is unlikely to be popular with claimants or respondents.

In addition, if there are any disputes relating to the claim – e.g. was the claimant actually dismissed?, was the claim to the Employment Tribunal made in time? – the Acas arbitrator cannot hear the claim. Again, it is not unusual for these types of issues to accompany a claim for unfair dismissal.

The potential to appeal is very limited. Although this means the claim is finalised more quickly, people might be apprehensive about committing themselves to a scheme in which there is no appeal – especially as there is an alternative (i.e. the Employment Tribunal) where there is the right of appeal.

The hearings are in private and hence representatives are not able to assess how effective the process is and decide if they want to use this route. In reality, this is a small issue because there have been so few hearings. However, a representative has a responsibility to give the best advice possible to his/her client. So he/she might find it difficult to recommend a process he/she has never seen in operation and knows relatively little about.

The Acas arbitrator is not required to be legally qualified. Although the Acas arbitrator will be thoroughly trained, and will have been selected for his/her depth of knowledge and experience, some claimants or respondents might feel uncomfortable that no formal legal qualification is required.

Task

Relate the Acas Arbitration Scheme back to the 'Donovan ideal'. On the basis of that analysis, do you think the scheme is well designed?

What would you alter to make the scheme more attractive?

2.10 The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and 2016

As already noted, there have also been some less significant changes to the Employment Tribunal system. These were included in the 2001, 2004 and 2013 versions of the Employment Tribunals (Constitution and Rules of Procedure) Regulations, as well as the more recent 2016 version.

The key points to note from the 2013 regulations, in addition to those already explained in this chapter, are:

- An Employment Judge will carry out an initial review of all ET1 and ET3 forms. If the judge considers that either the claim or response has no reasonable prospect of success the parties will be informed. If neither party objects, the case will be struck out.
- The tribunal will use written representations if they are received at least seven days prior to a hearing.
- All or part of a hearing can be conducted using electronic communication as long as the public and the parties to the hearing can see and hear what the tribunal can see and hear.

The 2016 regulations primarily addressed postponements. Although this is not reducing the number of claims, it is reducing the time that a claim can take to progress through the system. Since April 2016 both the claimant and the respondent have been limited to making two postponement requests. Any further request, or any request that is made less than seven days before the hearing (or at the hearing itself) will only be granted in exceptional circumstances. If a postponement is granted in these situations a tribunal has to consider awarding costs against the party that requested the postponement.

KEY LEARNING POINTS

1. The Employment Tribunal system was originally intended to be easily accessible, informal, speedy and inexpensive.
2. The Employment Tribunals have jurisdiction to hear cases relating to over 80 pieces of legislation, the most common being unfair dismissal.
3. Fees, which were introduced to bring a claim to the Employment Tribunal, have now been removed.
4. The Early Conciliation process must be engaged with in most cases, before proceeding to bring a claim to the Employment Tribunal.
5. A claimant lodging an ET1 at the tribunal starts the process of a claim to a tribunal. The respondent must reply to this claim within 28 days of the ET1 being sent out, using an ET3.
6. The Employment Appeal Tribunal reviews cases when there is dispute over a point of law, or the judgment of the Employment Tribunals is viewed as 'perverse'.

CASE STUDY

On 20 January 2021 you dismissed Marjorie for gross misconduct. For a number of weeks you had been suspicious that an employee was stealing from the organisation, and following a series of investigations you worked out that Marjorie was the individual who was responsible.

You dismissed Marjorie three weeks before her wedding. After the wedding she was due to go on honeymoon for three weeks. You had heard that she was taken ill with malaria about two weeks after she returned from her honeymoon, but you have heard nothing more from her since.

Today you have received a copy of the ET1 that she has submitted to the Employment Tribunal. It was received at the tribunal on 24 April 2021. She had written a letter to the Employment Tribunal