A Report by

JUSTICE

Industrial Tribunals

Chairman of Committee

Bob Hepple

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JUSTICE

British Section of the International Commission of Jurists

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JUSTICE

Extracts from the Constitution

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Whereas JUSTICE was formed through a common endeavour of lawyers representing the three main political parties to uphold the principles of justice and the right to a fair trial, it is hereby agreed and declared by us, the Founder Members of the Council, that we will faithfully pursue the objects set out in the Constitution of the Society without regard to consideration of party or creed or the political character of governments whose actions may be under review.

We further declare it to be our intention that a fair representation of the main political parties be maintained on the Council in perpetuity and we enjoin our successors and all members of the Society to accept and fulfil this aim.

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to assist the International Commission of Jurists as and when requested in giving help to peoples to whom the Rule of Law is denied and in giving advice and encouragement to those who are seeking to secure the fundamental liberties of the individual;

to keep under review all aspects of the Rule of Law and to publish such material as will be of assistance to lawyers in strengthening it;

to co-operate with any national or international body which pursues the aforementioned objects.

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Elizabeth Mitchell	Part-time Chairman of Industrial Tribunals
John Sheriff	Retired personnel manager and consultant

TERMS OF REFERENCE

"To review the procedures, jurisdiction, constitution and expertise of the industrial tribunals and Employment Appeal Tribunal, and to make proposals for reform"

This report has been endorsed and approved for publication by the Council of JUSTICE

CONTENTS

ABBREVIATIONS

CAC	-	Central Arbitration Committee
CRE	-	Commission for Racial Equality
EA 1980	-	Employment Act 1980
EA 1982	-	Employment Act 1982
EAT	-	Employment Appeal Tribunal
EOC	-	Equal Opportunities Commission
EPCA 1978	-	Employment Protection (Consolidation) Act 1978
IT Rules	-	Industrial Tribunals (Rules of Procedure) Regulations, 1985

SUMMARY OF MAIN RECOMMENDATIONS

Procedure

1. Two strategies should be pursued in order to overcome the inequality of resources between the parties in industrial tribunal proceedings: (a) for the vast majority of cases, that of improving the investigative approach so as to reduce the need for representation while ensuring that both parties have a fair and impartial hearing; and (b) for a minority of cases, that of improving the adversarial system by providing legal aid for representation and establishing an upper-tier Industrial Court, with senior Chairmen and members, to hear such cases (paragraph 2.11).

2. In most unfair dismissal and redundancy payments proceedings (which constitute about 90% of the caseload) an investigative approach is most suitable, offering the optimum in terms of accessibility, informality and speed and the most efficient return on costs to both litigants and the public purse (paragraph 2.12).

3. However, there is a relatively small number of cases where an adversarial approach, backed by equal representation and access to resources, is likely to be more suitable to the just handling of the dispute. The criteria we suggest for identifying such cases are the following: (a) where a significant point of law arises; (b) where the case has important implications extending beyond the interests of the individual parties (e.g. arising from a wider industrial dispute or involving the interpretation of a collective agreement or disciplinary procedure); and (c) where the evidence is highly complex or specialised and raises difficult questions of evaluation (e.g. some cases of discrimination on grounds of race or sex) (paragraph 2.12). These criteria are used in the Report to identify those cases in which legal aid for representation should be made available (paragraphs 2.12 to 2.19) and which should be allocated to the proposed Industrial Court (paragraph 4.24).

4. The principal way in which the investigative approach can be improved is by a change in the Industrial Tribunal Rules so as to empower a Chairman of tribunals to direct preliminary investigation by an officer of the tribunal. The officer would be full-time, at the level of a legal officer in the Civil Service, and would receive special training. The officer's functions would, where necessary, be to take a full statement of the grounds of application from the applicant and of the grounds of defence from the respondent and to inspect and copy all necessary documentary evidence before the date of the tribunal hearing. The statements and documents would form a dossier sent to both sides and read by the tribunal before the hearing (paragraphs 2.22 to 2.27).

5. The tribunal officer would also ascertain how many witnesses were to be called and estimate the length of the hearing. In cases where the tribunal had made a finding of unfair dismissal and the applicant sought an order for reinstatement or re-engagement, the officer would investigate the practicability of the employer complying with such an order, and report to the tribunal (paragraphs 2.23 and 2.37).

6. The improvement of the investigative approach in this way will not remove the need for expert advice and assistance to the parties before the hearing, at the conciliation stage, and after the hearing in connection with remedies. In response to the Government's proposal to require the new Legal Aid Board "to consider the most cost-effective way of providing advice and assistance", we suggest that in the field of employment law this should be by way of specific funding of existing agencies such as the CABx, Law Centres and Tribunal Representation Units and by ensuring that such agencies exist in all towns where there is an Office of Industrial Tribunals (paragraphs 2.16, 2.29 and 2.30).

7. In cases fulfilling the criteria for hearing before the proposed Industrial Court (Recommendation 3 above) there would be legal aid for representation. We urge the Law Society and the General Council of the Bar in England and Wales to consider urgently the best way of ensuring adequate specialisation in this complex and expanding field of law, and informed client choice, so that the best representation by the legal profession can be provided (paragraph 2.19).

8. The proposed improvements in the investigative and adversarial approaches should enable the tribunal to deal speedily at a single hearing with most cases and to dismiss unmeritorious applications or defences without the need for a pre-hearing assessment or any other new sifting mechanism. We propose that the present Pre-Hearing Assessment and other suggestions for payment of an application fee or deposit by parties should be rejected because of its unjustified disparate impact on low-paid and unemployed applicants and on small businesses (paragraphs 2.31 to 2.36).

9. In cases before tribunals, where an investigative approach would be the norm, we envisage the following procedure at the hearing:

(a) The tribunal would read the dossier containing the full statements by the parties and the essential documents before the hearing, and would indicate to the parties at the beginning of the hearing what appeared to the tribunal to be the relevant issues of fact and law on which it would be helpful to have evidence by witnesses and oral submissions.

(b) The tribunal would elicit information from each of the parties and the witnesses by questioning them on matters which were disputed or not clear from the papers.

(c) The tribunal would then permit each party (or representative) to put other relevant questions.

(d) The parties (or representatives) would have an opportunity to make closing statements (paragraphs 2.39 to 2.41).

10. A majority of the Committee take the view that employees are not being unfairly deterred by the present grounds for awarding costs against those whose conduct has been 'frivolous, vexatious or otherwise unreasonable' and recommend that no change be made in the costs rules (paragraph 2.42).

Jurisdiction

11. The piecemeal approach to the allocation of jurisdictions to industrial tribunals has compounded the problems of waste, frustration and delay experienced by those with employment disputes. We propose a series of changes to rationalise the jurisdiction of tribunals, while generally preserving and limiting their scope to that of individual disputes between employer and employee (paragraphs 3.1 to 3.6).

12. The balance between the advantages and disadvantages of transferring jurisdiction in disputes arising out of the contract of employment, still broadly favours the compromise contained in section 131 of EPCA 1978. We recommend that an Order be made under that section enabling proceedings to be brought in an industrial tribunal for the recovery of damages or any other sum which (a) arises or is outstanding on the termination of an employee's employment; or (b) arises in circumstances which already give rise to other proceedings already or simultaneously brought before the tribunal; and (c) does not exceed the limit for the time being specified in the Taxes Acts as a termination payment which is exempt from income tax (currently £25,000); and (d) is not in respect of damages or a sum due in respect of personal injuries, or of a patent, a registered design, a trademark or copyright, or the breach of a covenant restraining competition by the employee on the termination of his or her employment, or the breach of an obligation, whether express or implied, that the employee will not disclose to another trade secrets or misuse confidential information acquired as a result of the employment, or which arises in connection with any strike, lock-out or other industrial action (paragraphs 3.7 to 3.11).

13. A majority of the Committee consider that industrial tribunals are not the most appropriate forum for disputes between members and their trade unions, and, accordingly they recommend that the existing jurisdiction in respect of unreasonable exclusion or expulsion from a trade union (under sections 4 and 5 of EA 1980) and related forms of relief should be transferred to the Certfication Officer and/or High Court (Court of Session in Scotland). No new jurisdiction in respect of contracts of membership should be conferred on industrial tribunals (paragraphs 3.12 to 3.15).

14. We recommend that (a) so far as practicable, every tribunal hearing a sex discrimination case should have at least one industrial member of the same sex as

the applicant, and every tribunal hearing a race discrimination case at least one industrial member from the same ethnic group as the applicant; (b) no person should sit as a Chairman or industrial member in discrimination cases without special training in discrimination law and the skills of fact-finding in such cases; (c) these Chairmen and members should specialise in such cases but would also sit in other types of case; and (d) if the jurisdiction of tribunals is extended to non-employment cases as has been proposed by the EOC. and CRE., the members should have special knowledge and experience in the field in question (e.g. education and housing) (paragraphs 3.16 to 3.23).

15. In cases where equal pay is claimed for work of equal value, the independent experts should be removed from the procedure and the public expenditure so saved should be allocated to the EOC. so that it can pay the costs of an expert for a party whom the EOC. has decided to support. The present powers of the tribunal to require information and documents to be given to the independent expert would then need to be exercisable on the application of each party's expert, and the tribunal would need to stipulate a strict timetable for the completion and exchange of expert reports (paragraphs 3.24 to 3.27).

16. A majority of the Committee believes that it would not be practicable to provide by legislation any new arbitration alternative to industrial tribunals. However, the Committee unanimously (a) recommends that the legislation should be amended so as to remove doubts about the validity of conciliated settlements which provide for arbitration without the matter being referred to an industrial tribunal for determination; and (b) proposes that contracting-out of the statutory procedure for unfair dismissal under EPCA, s.65, should be encouraged by modifying the provisions of that section so as (i) to transfer responsibility for approving such procedures to the Central Arbitration Committee (CAC); (ii) to allow either side to terminate the agreement by giving reasonable notice in writing (so as to encourage experimentation); and (iii) to enable individual employees covered by a contracted-out procedure to put the case into procedure where the trade union has refused or failed to do so (paragraphs 3.28 to 3.34).

17. The enforcement of tribunal awards should be improved in England and Wales by giving the tribunal (or proposed Industrial Court) powers to collect the award from the debtor. The debtor would have to pay the full award to the tribunal which would then pay the winning party, where appropriate after recoupment of unemployment benefit or social security benefit (paragraphs 3.35 to 3.37).

18. As a matter of urgency, an Order should be made under EPCA 1978, sched. 9, paragraph 6A (as inserted by EA 1982, sched. 3, paragraph 7) to provide that sums payable in pursuance of decisions of tribunals shall carry interest (paragraph 3.38).

Constitution and expertise

19. The Committee believe that the present tripartite structure of tribunals, with a legally qualified Chairman and industrial members with knowledge and experience of industry, is extremely valuable and should be retained and strengthened. We make several important proposals in this respect (paragraphs 4.1 to 4.16).

20. The Chairmen should do more to involve industrial members in decision-making for example (a) by ensuring that the reasons of the industrial members (especially if they differ from those of the Chairman) are properly presented; (b) in the case of reserved decisions, giving the industrial members an opportunity to approve the reasons in draft where this can be done without causing undue delay in promulgating the decision; and (c) in appropriate cases, allowing one of the industrial members to deliver the decision of the tribunal when it is orally announced (paragraph 4.6).

21. The recruitment of Chairmen should be improved (a) by giving preference to candidates with previous experience in employment law, industrial relations and tribunal work; (b) by encouraging suitably qualified practitioners to accept secondment for a period of say, five years, as full-time Chairmen, at an appropriate stage in their careers; and (c) developing a career structure by encouraging the appointment of suitably qualified Chairmen as Assistant Recorders and Recorders or to other judicial work, with the prospect of promotion, for example to the Circuit Bench (paragraph 4.7).

22. We recommend that positive action should be taken to promote the appointment of more women and persons from ethnic minorities as part-time and full-time Chairmen (paragraph 4.8).

23. There should be an alternative mode of selection as Chairmen from the ranks of law graduates, such as those who have worked as investigation officers in the tribunals (carrying out the functions in Recommendation 4 above) and have had other relevant specialised training and experience in employment law and industrial relations (paragraph 4.9).

24. The Committee welcomes the recent increase in training and specialisation of Chairmen and recommends that this should be extended by more funding through the Judicial Studies Board (paragraph 4.10).

25. The present method of nomination of industrial members by representative organisations has failed to produce a satisfactory spread of members in terms of sex, age, ethnic minority representation, age, industry, size of establishment and occupation. We recommend that the appointments process should be made more open, accessible and democratic by (a) requiring the appropriate government department to advertise widely, particularly among underrepresented groups such as women and ethnic minorities and young persons, inviting applications; (b)

vetting such applications in consultation with representative organisations; and (c) interviewing short-listed candidates by a regional tribunal appointments board including representatives of the tribunals and relevant organisations, and independent members (paragraphs 4.12 to 4.13).

26. There should be a national 'core' curriculum for the training of lay members and experienced tutors should be used for this purpose (paragraph 4.16).

27. The Employment Appeal Tribunal (EAT) (or its replacement, the Industrial Court proposed in Recommendation 28) should be retained for the hearing of appeals on questions of law, and these appeals should include those from jurisdictions in which appeals from tribunals currently go to the High Court. The industrial members of EAT should receive regular information and training from EAT (paragraph 4.23).

28. We see a number of advantages in helping to achieve many of the main Recommendations in the Report by restructuring the EAT and industrial tribunals so as to create a single integrated system with an upper-tier Industrial Court, consisting of a President and senior Chairmen and members of tribunals, and a lower-tier of industrial tribunals. The Court would have original jurisdiction in those matters which, according to the criteria specified in Recommendation 4, are suitable for an adversarial approach and for the provision of legal aid for representation, and for complex disputes arising out of the extended jurisdiction over contracts of employment (Recommendation 12). The Court would also exercise the current appellate jurisdiction of the EAT. The parties could apply, or a Chairman could decide of his or her own motion, at any stage, to transfer a case to the Court and the Court could similarly transfer a case to the tribunal. There would be a general code of procedure and a single management system of Court and tribunal. The Committee unanimously supports the establishment of such a two-tier system. A majority of the Committee would allow an appeal, with leave, on a question of law, to the Court of Appeal (Court of Session, Inner House in Scotland) and House of Lords (paragraphs 4.24 to 4.27).

29. We recommend that the administration of the tribunals should be within a single government department and that the most appropriate department for this purpose would be the Lord Chancellor's Department (or, if we ever have one, a Ministry of Justice) and, in Scotland, the Scottish Courts Administration (paragraph 4.29).

CHAPTER ONE - INTRODUCTION

1.1 The industrial tribunals have been in operation for over 21 years. In that period they have changed from administrative tribunals, dealing with appeals against industrial training levies and selective employment tax, into quasi-labour courts, adjudicating in disputes between employers and employees under 13 different Acts of Parliament and a variety of statutory instruments. Some of their decisions have implications for industrial relations which go well beyond the immediate parties, and may have significant financial consequences for employers. Their case load is substantial. The number of applications registered in England and Wales rose from 13,555 in 1972 (the year in which the right not to be unfairly dismissed was introduced) to 43,066 in 1976 (when the qualifying period to claim unfair dismissal was six months). Although the number of applications fell to 34,586 in 1986-87, and is expected to fall even further in 1987-88 (following the raising of the qualifying period to two years), the tribunals seem destined to remain a central institution of employment law and of the system of civil justice. Under the present Government, they have been given a number of new jurisdictions (most recently under the Wages Act 1986). Policy statements issued by the TUC and Labour Party, and by the Alliance parties, prior to the 1987 General Election, suggested that under any alternative Administration they would have been given further tasks and a heavier case load.

1.2 The approach of successive governments to industrial tribunals has been piecemeal, adding one jurisdiction to another and making minor procedural reforms from time to time, with little thought for the overall function of the tribunals. The last attempt by an official inquiry to examine their role and future was in Chapter X of the Donovan Report on Trade Unions and Employers' Associations (1968). The Royal Commission proposed that the then industrial tribunals should be developed into 'labour tribunals' dealing with 'all disputes arising between employers and employees from their contracts of employment or from any statutory claims that they may have against each other in their capacity as employer and employee' (paragraph 570). The tribunals would determine disputes where there was no suitable voluntary machinery (paragraph 576). They would provide a 'procedure which is easily accessible, informal, speedy and inexpensive' (paragraph 572), and their members would be chosen for their expertise (paragraph 584).

1.3 In comparison with the ordinary courts, the industrial tribunals display several of the features which the Donovan Commission advocated.

(a) They are *more accessible* than the ordinary courts. Proceedings can be instituted by sending an application to the Central Office of the Industrial Tribunals. Usually, paper work is kept to a minimum, and home-made pleadings are tolerated.

(b) They are *less formal* than the ordinary courts. The tribunals have the power to conduct the hearing in such manner as they consider most suitable to the clarification of the issues before them and generally to the just handling of the proceedings. They are not bound by the strict rules of evidence, such as the rule against hearsay.

(c) They are *more expeditious* than the ordinary courts. The average time between presentation of an originating application and the hearing during the year 1986-87 is indicated in the following Table.

Percentage of cases reaching hearing within:

6 wks	*8 wks*	*10 wks*	*12 wks*	*16 wks*	*20 wks*	*26 wks*	*26 wks+*
7%	22%	40%	54%	72%	85%	93%	100%

This compares favourably with the average time of 24 to 36 weeks from issue of summons to arbitration hearing for small claims in the county courts, and the far longer delays before the hearing of defended cases in the county courts and High Court (Civil Justice Review, Consultation Paper No.6, 1987). Although the hearings in industrial tribunals have tended to get longer they average four hours compared to many days for the hearing of personal injury cases in the county court and High Court.

(d) They are *less expensive* than proceedings in the ordinary courts. No fee is payable to the tribunal. As a rule, costs are not awarded to the successful party unless in the tribunal's opinion the other party has in bringing or conducting the proceedings acted frivolously, vexatiously or otherwise unreasonably. Such awards are rare. The cost of the tribunals to the taxpayer is also substantially cheaper than that of the ordinary courts. In 1986, the average cost in terms of public expenditure of a tribunal hearing was £1,000 per completed case which is far less than a comparable county court action.

(e) The tribunals have special *expertise* in employment relations. Each tribunal consists of a Chairman and two industrial members. Tribunal Chairmen are barristers, advocates or solicitors of not less than seven years' standing and are appointed by the Lord Chancellor in England and Wales, and the Lord President of the Court of Session in Scotland. (The Office is described as 'Chairman' in the EPCA, sched. 9, and is used throughout this Report to denote persons of either sex.) The industrial members are appointed to panels by the Secretary of State for Employment after consultation with organisations representing employers and employees. In Great Britain, appeals (on questions of law only) from industrial tribunal decisions go to another expert body, the Employment Appeal Tribunal (EAT), which consists of a High Court or Court of Session Judge and lay members appointed in the same way as those who serve on industrial tribunals. From the EAT there may be a further appeal, with leave, on a question of law to the Court of Appeal or Court of Session and thence to the House of Lords. (In Northern Ireland there is no equivalent of the EAT and appeals go by way of case stated to the Court of Appeal for Northern Ireland.)

1.4 Despite these many advantages over the ordinary courts, the tribunals have been the subject of much criticism. Some of this criticism has been misinformed or has been directed against the substantive employment legislation rather than the tribunals themselves. For example, some employers, mainly those with a small number of employees, complain that the legislation is unduly burdensome. Employees complain that the legislative test of unfair dimissal is unjustly biased in favour of employers, that the remedies which can be granted are inadequate and that a growing number of people at work are excluded from statutory protection because they are not 'employees' with the necessary qualifying period of service. These questions of the scope and content of substantive employment law fall outside our terms of reference. We do, however, point out that the clarification and consolidation of employment law would help to reduce legalism (paragraph 2.3).

1.5 We have found it convenient to group the major criticisms, and our proposals for reform, around the following main issues.

(a) Should the adversarial system, as it operates in the tribunal context be retained or modified or changed into an investigative or inquisitorial system, and if so, how? (Chapter Two)

(b) Should the jurisdiction of the tribunals be extended so as to make them general 'labour tribunals' dealing with all individual disputes between employers and employees and all disputes between individual members and their trade unions? Should any matters currently dealt with by tribunals be dealt with elsewhere (e.g. by arbitration) or assigned to specialist divisions (e.g. for discrimination cases)? How can the enforcement of awards be strengthened? (Chapter Three)

(c) How can the constitution of tribunals and expertise of chairmen and members of industrial tribunals and the EAT, be improved? Should the EAT and industrial tribunals be amalgamated into a two tier system of Court and tribunal? (Chapter Four)

1.6 In considering these and a series of related questions we have been greatly helped by the findings of a number of recent research studies of industrial tribunals. In particular we wish to acknowledge the assistance we have derived

from the study by Linda Dickens and her associates at Warwick University of unfair dismissal and the industrial tribunal system (1985), and three reports by Alice Leonard (1986, 1987a, 1987b) on sex discrimination cases. A select bibliography including these and other works on which we have relied is appended. We have also drawn on the considerable experience of members of the Committee, in their various capacities as Chairmen, members, legal and lay representatives, and we have consulted a number of persons connected with the administration of tribunals, ACAS and the EAT. To all of these we express our indebtedness for their freely given help.

CHAPTER TWO - PROCEDURE

Legalism

2.1 The procedures of industrial tribunals have frequently been criticised for not being as accessible, informal, speedy and inexpensive as had been hoped. Linked to such criticisms is the general charge that there has been a growth of undue 'legalism'. This expression is capable of a number of meanings.

2.2 First, 'legalism' may refer to the way in which the tribunals interpret and apply employment legislation. The Chairman and industrial members of the tribunal have an equal say on questions of law as well as fact, so it was plainly intended that the legislation should be interpreted in a way which makes industrial commonsense, in the light of the experience of the members. This is all the more so in the case of the Employment Appeal Tribunal where appeals are limited to questions of law. However, employment legislation is complex and often obscure. It has been drafted within the framework of expansive and uncertain common law conceptions. For example, the right to complain of unfair dismissal turns upon the definition of 'dismissal' which is explicitly based on the termination of the contract. The question whether there has been an actual termination by the employer or a constructive one by the employee must be decided in the language and according to the rules of the law of contract. This has led to a controversial legal discourse on matters such as the implied terms of the contract of employment, what constitutes a breach of those terms sufficient to entitle the employee to terminate the contract without notice, and whether repudiation requires acceptance before there is a termination. In recent years the Court of Appeal has discouraged the growth of a body of case law and precedent on questions such as whether there is a constructive dismissal and whether a dismissal is unfair, treating these as questions of fact for the tribunal as a kind of 'industrial jury'. However, the potential for 'legalism' remains because of the complex structure and language of the legislation. For example, Lord Denning has been proved correct in his prediction that the Equal Pay (Equal Value Amendment) Regulations 1983 were drafted so that 'no ordinary lawyer would be able to understand them. The industrial tribunals would have the greatest difficulty and the Court of Appeal would probably be divided in opinion' (H.L. Deb, vol. 445, cols. 901-902). Another example of legal complexity is the Transfer of Undertakings (Protection of Employment) Regulations 1981.

2.3 It has been pointed out (Munday, 1981) that once the tribunals were established as part of the legal system it was inevitable that they would have to interpret the highly complex statute law in a legal fashion. We shall argue (below

paragraphs 2.7 to 2.10) that the adversarial system places the party who is not legally represented at a disadvantage when legal issues arise. The point to be made here is that Parliament could help greatly to reduce the burden of 'legalism' by clarifying and consolidating employment law in a comprehensible form.

2.4 A second meaning of 'legalism' relates to the degree of formality in the physical arrangements and court room atmosphere. The parties and their representatives sit facing the tribunal from behind tables, and the members of the tribunal sit behind a table on a slightly raised dias. The witness sits apart at a small table usually to one side of the tribunal bench. This arrangement has some advantages in helping the orderly conduct of proceedings. Witnesses are required to swear an oath or to affirm in order to impress upon them the seriousness of testifying. The court-like atmosphere is unnecessarily heightened when, as happens in some Regions, the tribunal expects those present to stand up as the tribunal enters or leaves the room. Some applicants and respondents, attending for the first time, are unnerved and find this little different from a court room. The most important factor, however, is not the physical arrangements but the way in which the Chairman conducts the hearings and the behaviour of the representatives of the parties. The most persistent criticisms are of those Chairmen who make the assumption that the parties and lay representatives understand legal jargon, or who do not curb those representatives (particularly, but not exclusively, lawyers) who attempt to weigh down the tribunal with case law and precedents. The Warwick study (Dickens, 1985, p.199) found that while over 80% of tribunal members thought that 'tribunal hearings are relaxed and informal', only 60% of respondent employers and 55% of applicants shared that view. Forty-five per cent of applicants and 14% of respondents thought that there was 'too much legal jargon'. Some applicants and respondents would prefer an "around the table" discussion. However, the adversarial system of examining and cross-examining witnesses on oath (see below paragraph 2.5) is a major obstacle to this kind of informality.

Adversarial and investigative procedures

2.5 The industrial tribunals at present operate a mixture of adversarial and investigative procedures. By 'adversarial' is meant a system under which it is for the parties, and not the tribunal, to choose the issues on which they want the tribunal's decision and to produce the evidence to support their contentions. This gives the parties considerable control over the pre-hearing procedure, the amount of documentary evidence and the calling of witnesses, as well as the pace of the litigation and the length of the hearing. It involves an order of business at the hearing in which there is examination, cross-examination and re-examination of each party's witnesses, with the tribunal questioning witnesses only in order to clarify the testimony. By contrast, an 'investigative' (sometimes called 'inqusitorial') procedure gives the tribunal substantial control over these matters. The tribunal can initiate inquiries, clarify the issues and participate actively in the hearing.

2.6 Elements of the investigative approach can be found in the procedures of the ordinary courts, although they generally follow an adversarial system. A distinction between industrial tribunals and the courts is that the tribunals have greater flexibility and the freedom, within certain limits, to follow an investigative procedure. The central question for our Committee has been whether the present balance between the two approaches is suitable for all types of case which come before the tribunals. In practice one finds wide variations, from an informal investigative approach at one end of the scale to a formal adversarial approach, little different from an ordinary court, at the other end. In the range between, the mixture of adversarial and investigative approaches seems to depend upon factors such as the personality of the Chairman, whether the parties are both represented and, if so, whether this is by lawyers, the complexity of the factual and legal issues, and the extent of preparation before the hearing by the parties. One of the most serious criticisms we have heard is that the tribunals tend to be haphazard and inconsistent in their choice of adversarial and investigative methods. Moreover, where the tribunal does adopt an active investigative approach, it is inhibited by two factors. The first is the danger, where one of the parties is represented and the other is not, of appearing to favour the unrepresented party. The second is that the tribunal usually has inadequate information on which to base its inquiries and to question the witnesses. The allegations in the originating application and notice of appearance are usually sketchy, and the tribunal will not have seen any witness statements.

Unequal representation and resources

2.7 The adversarial system works best where both parties are well represented and have equal access to resources. If the relationship between them is conflictual and they want a high degree of control over the proceedings and to engage in partisan advocacy, they will tend to resist an investigative approach. On the other hand, the unrepresented or unequally represented party who has less then equal access to resources, will be more willing to entrust the control of the proceedings to the tribunal. Where one party is a powerful 'repeat player', with previous experience of the tribunal system, and the other is a one-off litigant an investigative approach is more likely to achieve a result that seems to be just. In the case of individual disputes arising out of the employment relationship, the employee is usually in an inferior position to the employer. A corporate employer will normally have a personnel department and possibly an in-house lawyer, and they may have considerable experience of tribunal proceedings. The employer is more likely than the employee to be able to deal with communications from the tribunal office and the other side. The employer will usually find it easier to call witnesses and to

produce documentary evidence. Where an external legal representative is thought to be desirable, it is the employer who is more likely to be able afford this.

2.8 The Warwick study showed that although applicants experience a greater need for representation than do employers and attribute more importance to it as a factor influencing the outcome of their cases, they are less likely than employers to have access to it. The study found that the applicant was at the wrong end of unequal representation in about one-third of hearings of unfair dismissal (Dickens, 1985, pp.92, 105). It was also pointed out (p.92) that legal skills are particularly expensive to buy and that this is a cost more easily borne by the employer who may claim it as an allowable expense for tax purposes, than by an out-of-work applicant. A small sample of solicitors in the City of London whom we interviewed indicated that the current legal costs of bringing a simple unfair dismissal case to a hearing are between £2,000 to £3,000 excluding VAT. Of this, some £400 to £500 may be attributable to Counsel's brief for a one-day hearing. The costs reflect some 13 to 26 hours chargeable time for preparing a simple case for presentation. Outside the City, legal costs are lower. For example, we were informed that a solicitor in Manchester might charge a dismissed employee £40 per hour, spending about 5 hours preparing a straight forward case, and, in addition a day's hearing would cost £250 to £500 (including counsel's fee of £100 to £300). Even this level of costs places the party without means at a considerable disadvantage, bearing in mind that these costs cannot be recovered by the successful party, save in the rare event of an award of costs against the other party for frivolous, vexatious or otherwise unreasonable conduct. Although the Donovan Commission envisaged that legal aid would be available to the employee where the employer chose to be represented by a solicitor or counsel, successive governments have declined to extend the legal aid scheme for representation before industrial tribunals. Help can be obtained from a solicitor in the preparation of a tribunal case under the Legal Advice and Assistance ("green form") scheme, but this is free only for a minority of the population whose disposable capital falls below £825 and whose disposable income is less than £56 p.w. (for those without dependents). Others have to pay a contribution on a sliding scale or may be ineligible. Where advice is given under this scheme it is initially up to a limit of £50, which is extendable but usually not above £150 in tribunal cases.

2.9 This prompts the question whether legal or other forms of representation makes any difference to the outcome of a case. The Warwick study found that less than one-third of unfair dismissal cases result in a finding against the employer, and that those who represented themselves had the lowest success rate. Use of interlocutory steps and calling of witnesses was associated with legal representation and their non-use by applicants often resulted from ignorance (p.105). Leonard's study of all tribunal hearings in sex discrimination cases over a three-year period (1980–82) revealed that where both employer and employee had legal representation, the applicant success rate was 46%, but where the employer was legally represented and the employee self-represented, the applicant success rate fell to 23% (Leonard 1986). In both sex discrimination and race discrimination cases, employers are almost twice as likely as employees to have legal representation (Kumar, 1986; Leonard, 1986). The IPM Survey (1986) found that for some employers legal representation was only a possible last resort in complex cases, but for others it was fast becoming regular and was being encouraged by Chairmen in some regions.

2.10 The importance attached to representation has a number of side-effects which have fuelled the criticisms of tribunals. One of these is that since so many cases settle and the time of a representative costs money, there is an incentive for representatives to leave preparation of the case until a late stage. Evidence tends to be gathered at the last minute and bundles of documents are rarely agreed with the other side in advance of the hearing. This results in a waste of tribunal time and resources as well as harming the interests of the parties.

Strategies for reform

2.11 There are two possible strategies which could be pursued in order to overcome this inherent inequality between the parties in individual employment disputes.

(1) Improve the adversarial system by providing full legal aid for representation and generally modifying the procedure so as to give both parties equal access to resources.

(2) Improve the investigative system so as to reduce the need for representation, while ensuring that both parties have an opportunity to present their cases and that the tribunals remain demonstrably fair and impartial.

2.12 In our view these strategies are not mutually exclusive. In the vast majority of disputes before industrial tribunals an investigative approach will be most suitable. It will be operationally efficient, offering the best return on costs to both the litigants and the public purse. It will yield the optimum in terms of accessibility, informality and speed. In this category one is likely to find most unfair dismissal and redundancy payments cases, which together constituted about 90% of the tribunals' case load in 1986. There are, however, a certain number of cases where an adversarial approach, backed by equal representation and access to resources, is likely to be more suitable to the just handling of the dispute. These disputes include the following:

(1) Where a significant point of law arises; or

(2) Where the case has important implications extending beyond the interests of the individual parties (e.g. arising from a wider industrial dispute or involving the interpretation of a collective agreement or disciplinary procedure); or

(3) Where the evidence is highly complex or specialised and raises difficult questions of evaluation (e.g. some cases of dicrimination on grounds of race or sex).

2.13 In Chapter 4 we make proposals for a two-tier Court and Tribunal. One of the advantages of this arrangement will be to draw a fairly clear line between those cases in which the basic approach will be adversarial and those in which it will be primarily investigative. Although all proceedings will start in the same way, business will be classified according to the most suitable method of proceeding. Those satisfying the criteria listed above (paragraph 2.12) will be allocated (in the way described in paragraph 4.25) to the upper-tier Court and those which do not will remain in the Tribunal. Legal aid will be available in the Court but not in the Tribunal.

2.14 However, even if our proposals for a two-tier structure are not accepted, we believe that the concept of classification of cases for investigative and adversarial approaches ought to be adopted. This has implications for legal aid considered below. We shall then make proposals for improving the investigative system at each stage of the proceedings.

Advice before hearing

2.15 The applicant may seek advice from his or her trade union, or by engaging a solicitor, or by using the services of voluntary and other agencies such as Citizens' Advice Bureaux, Law Centres or Tribunal Assistance Units, or a friend or relative. There is also the Free Representation Unit, staffed by Bar students, barristers and law students. In cases of alleged racial discrimination help may be obtained from the Commission for Racial Equality (CRE) and in cases of alleged sex discrimination from the Equal Opportunities Commission (EOC). The Warwick Study (Dickens, 1985, p.48) indicated that in unfair dismissal cases at the pre-hearing (conciliation) stage 17% of applicants were helped by trade unions, 21% by lawyers and 5% by 'others'. The majority (57%) were unrepresented. As already mentioned (paragraph 2.8) 'green form' legal advice is available for legal assistance but only within narrow financial limits. The absence of satisfactory provision of advice is a matter of grave concern, and is part of a wider problem of the provision of legal and other advisory services. It serves to emphasise the inadequacy of the adversarial approach in industrial tribunals.

2.16 We note that the Government intends to take powers to enable the new Legal Aid Board to make alternative arrangements for particular categories of work where this would be a more efficient way of providing the service (Lord Chancellor's Department, 1987b, paragraph 25). The need for "alternative arrangements" in respect of employment law is obvious. The most cost-effective way of providing this advice and assistance, in our view, would be through existing voluntary and other agencies, such as the CABx, Law Centres and Tribunal Representation Units, and in discrimination cases the CRE and EOC. We propose that there should be an extension of public funding of these agencies for employment law cases. It is essential that such agencies should exist in all towns where there is an Office of Industrial Tribunals.

Legal aid for representation

2.17 The Warwick study of unfair dismissal cases (Dickens, 1985, p.45) found that at the hearing 23% of applicants had legal representation, 22% trade union representation, 2% CAB/Law Centre/Representation Unit representation, and 7% were represented by others, such as friends and relatives. The remainder (45%) were self-represented. Respondent employers had legal representation in 41% of cases, internal company representation in 52%, employers' association representation in 5% and "other" representation in 3%.

2.18 In our view, a general extension of legal aid for representation in industrial tribunals is open to several objections. First, it would not lead to an improvement in the quality of representation unless it were limited to representatives who could prove their expertise in this specialised field. Secondly, it touches only the fringes of the problem. It would benefit only a minority of the population who fall within the legal aid capital and income limits. Married women would be at a particular disadvantage because family income determines eligibility. Even if legal assistance by way of representation were brought under the green form scheme, as in the case of Mental Health Review Tribunals, with higher capital and income limits than for advice (paragraph 2.8), many needy claimants would be excluded, and only a small number of employers, who are individual proprietors, would be eligible.

2.19 Accordingly, we propose the following:

(1) Legal aid for representation should be made available only if the case satisfies the criteria for classification as being suitable for an adversarial approach (paragraph 2.12). These criteria are similar to (but slightly narrower than) those proposed by the Council on Tribunals, and endorsed by the Benson Royal Commission on Legal Services, as criteria for eligibility for legal aid. If the proposals in Chapter Four are accepted then these will always be cases in the upper-tier Court and not in the Tribunal.

(2) The Law Society and the General Council of the Bar in England and Wales should consider urgently the best way of ensuring adequate specialisation in this complex and expanding field of law, and also of making client choice better informed, so that the best representation by the legal profession can be provided. (We note that in Scotland, the Industrial Law Group of the Law Society has, for the past ten years,

provided solicitors with just the kind of training and specialisation which we have in mind.)

(3) In cases of alleged racial and sex discrimination we envisage that the CRE and EOC respectively should be asked to decide whether or not they will support a case, before legal aid for representation is granted. However, since those agencies fund cases on a selective basis, legal aid should not be refused simply on the ground that the CRE or EOC has decided not to support the case.

Aims of the investigative procedure

2.20 The procedure before tribunals needs to be as straightforward and economical as possible for the litigant. In order to achieve this, we would adopt the same broad working aims as the Lord Chancellor's Department has suggested for small claims in the county court (1986, paragraph 86), namely:

(a) To require as little written preparation as possible. This includes restricting to the necessary minimum the pre-hearing exchanges between the parties designed to achieve amplification of the opposite case.

(b) To dispose of the case, if possible, with a single attendance at the [tribunal] by the parties.

2.21 However, as pointed out earlier (paragraph 2.6) it is essential for the tribunal to be in possession of sufficient information before the hearing to enable the Chairman and members to conduct an efficient examination of the parties and their witnesses. To this end we propose a method of preliminary inquiry by investigation officers attached to the tribunal.

Preliminary investigation

2.22 In order to maximise the information available to the tribunal and, at the same time remove the disadvantages suffered by the unrepresented litigant, three options might be considered.

(1) Each party could be required to send to the tribunal at least seven days before the hearing written statements by all the witnesses whom it is proposed to call and also copies of all documentary evidence. This information would also have to be exchanged with the other side. The disadvanatges of this are that (a) the unrepresented party would still be severely handicapped unless adequate resources were made available to advice agencies etc. to ensure that all parties had access to assistance in preparation of their cases; (b) the written statements may contain much irrelevant evidence and may fail to deal with material issues; and (c) the tribunal would have only indirect control over the pace of the litigation: parties could obstruct progress by failing to send in their statements on time and there might be frequent requests for adjournements, with consquent waste of public funds, when it appeared that statements could not be produced in time or were inadequate.

(2) The tribunal itself could examine the parties and their witnesses on the day of the hearing before allowing cross-examination. This would achieve the aims of keeping pre-hearing written matter to a minimum and of requiring attendance on only the hearing date, but it would greatly extend the length of the hearing. It would be inefficient because a three-person tribunal would have to extract basic information from each witness. This is a task which might be expected to average about one to two hours per witness, so that most hearings would tend to become longer and there would be more frequent adjournments.

(3) A Chairman of tribunals could read the originating application and notice of appearance and if the Chairman was of the opinion that further information was required, could direct a preliminary investigation by an officer of the tribunal. This officer would see the parties from whom information was required before the date of the hearing and take from them a full statement of the grounds of the application and of the defence, as the case may be. The officer would also inspect and copy all the documents which appeared to be necessary to the just resolution of the dispute. These statements and documents would form a dossier which would be sent to both sides and would be read by the tribunal before the hearing.

2.23 In our view, the third of these options is the most cost efficient and just.

(a) The officers would be full-time and salaried. The officer would be under the administrative direction of the Secretary of Tribunals and subject to the judicial control of the Regional Chairman of Tribunals. We expect that these officers would be at about the level of legal officers in the civil service (an entry grade currently at £10,000 to £14,000 p.a.). They would receive special training.

(b) There would be consequent savings in tribunal time, by greatly shortening the length of hearings, which are likely to offset the cost of these officers. The parties would be saved the costs of representation, so reducing the burdens of tribunal litigation. Where representatives were used, it is likely that they would present more detailed originating applications and notices of appearance in order to anticipate the officer's inquiries.

(c) The officers would need to have the power to apply to a Chairman of tribunals for orders, where a party failed or refused to co-operate, for the production of documents and the supply of information. The most appropriate sanction, where such an order was disobeyed or disregarded would be (as under the present IT Rule 4(4) where particulars etc. are not supplied) to dismiss the application, or to strike out the defence, as the case may be, and where, appropriate to direct that the party be debarred from proceeding or defending.

(d) Time limits would need to be prescribed for this stage of preliminary inquiry. The experience with independent experts under the equal value regulations suggests that the prescribed limits are easily exceeded where the tribunal fails to exercise strict control. It would be essential for the Chairman of tribunals to be kept informed of any expected delays. With an adequately staffed service we envisage that written statements could normally be obtained within 14 days of the filing of the notice of appearance.

(e) These tribunal officers could fulfil another useful investigative role in cases where an applicant seeks reinstatement or re-engagement after the tribunal has made a finding of unfair dismissal. At present, only about 3 or 4% of tribunal awards are for these remedies and the position is similar in respect of conciliated settlements. One of the reasons for this low level of awards (despite the fact that in 1976 the legislation was amended to make this the primary remedy) is that when the respondent submits that it is not practicable to comply with an order for reinstatement or re-engagement, the tribunals are unable or unwilling to investigate this objection in any depth. It is usually at the end of the day and the applicant is out of touch with the employer and usually has not prepared a case on this issue. The tribunal then tends to accept the respondent's contention and proceeds to award compensation instead of re-employment. We propose that the tribunal should adjourn the hearing, where objection is taken by the respondent, and direct the tribunal officer to investigate the practicability of reinstatement or re-engagement and to report to the tribunal at a reconvened hearing.

2.24 We have considered whether these tasks should be fulfilled by ACAS conciliation officers, rather than by investigation officers attached to the tribunals. There is no doubt that the conciliation officers could do the job, since they already have to collect a certain amount of information to help them understand a case when engaging in conciliation. The ACAS Council has taken the view, however, that conciliation officers should not be asked to undertake any kind of preliminary investigation. The reason is that ACAS' prime duty is to provide conciliation so that cases can be resolved without going to an industrial tribunal. This is a task which they have fulfilled with considerable success. In 1986, they achieved conciliated settlements in 51% of all the 49,414 completed cases. A further 23% of applications were withdrawn before a tribunal hearing. The ACAS Council believes that if the conciliation officers undertook any investigatory role this would adversely affect their ability to conciliate. This is because information given to the conciliation officers during the confidential conciliation process might not be forthcoming if the parties knew that this information might later be disclosed to the tribunal. Moreover, ACAS believes that its independent and impartial position might be compromised by an investigatory role.

2.25 In view of this opposition by ACAS to assuming an investigatory role, we consider that the only realistic alternative is to attach the officers to the tribunals. Since their task will be one of investigation only, and not to express any opinion on the merits or demerits of the case, they will be seen to be impartial. However, there is no doubt that the parties may attempt to draw them into conciliation. The duty of the tribunal officer will then be to put the parties in touch with the conciliation officer.

2.26 A consequence of this system of preliminary investigation by a tribunal officer, and the subsequent exchange of the parties' statements and documents before the hearing, will be to remove the need in most cases for orders by the tribunal for further and better particulars. Orders of this kind tend to increase formality and to put the unrepresented party at a disadvantage. The power (at present in IT Rule 4(1)) to make such orders could be retained, but rarely exercised.

2.27 Accordingly, we propose that officers should be attached to the staff in every Regional Office of the Industrial Tribunals. They should have the task of taking written statements from the parties of the grounds of application and of the defence, at the direction of a Chairman of tribunals, and of collecting from the parties any documentary evidence, which appeared to be necessary for the just resolution of the proceedings. So far as practicable, this should be done within fourteen days of the filing of the notice of appearance. The statements and documents should form a dossier, to be sent to the other side by the Tribunal office at least seven days before the hearing, and should be read by the Tribunal prior to the hearing.

Conciliation

2.28 The adversarial system inhibits the tribunal from taking an active role in promoting settlements. The Donovan Commission (paragraph 584) had envisaged that the tribunal would hold round-table meetings with the parties in private before any formal hearing in order to seek an amicable settlement, but subsequent legislation has left the task of conciliation entirely to ACAS. The Warwick study of unfair dismissal cases found that the parties generally perceived ACAS as

impartial and helpful. However, the study pointed out that ACAS does not give advice on the merits of proposed settlements. This led the authors of the study to conclude that "the inequality of the employer/employee relationship and the relative disadvantage of the unfair dismissal applicant is perpetuated, not ameliorated, by the neutral stance required of ACAS in conciliation" (Dickens, 1985, p.180). Another study, by Graham and Lewis (1985) of conciliation in cases of sex discrimination (where the success rate is notably lower than in unfair dismissal cases) found that a substantial proportion of applicants did not find ACAS particularly helpful because they did not understand the role of the conciliator.

2.29 These findings lead us to the conclusion that, even with the development of a more investigative procedure, it is essential that the parties should have access to sound independent advice at the conciliation stage. The ACAS role emphasises that settlements are the responsibility of the parties. ACAS believes that it would be less successful as a filter if it were to attempt to bring about specific ends by conciliation or to scrutinise the merits of agreed settlements. Accordingly, we would renew the proposal in paragraph 2.16 for an extension of public funding of advice agencies so that they can advise at the conciliation stage.

2.30 In order to avoid bringing the parties to the tribunal on more than one occasion we do not believe that there should normally be a separate round-table discussion before the hearing to promote a settlement. Where one or both parties are unrepresented at the hearing stage there is the danger that they will be talked into a settlement which is manifestly against their interests. In this connection it should be remembered that the terms of settlement not infrequently include matters other than those which are the subject matter of the dispute before the tribunal (e.g. contractual claims, damages for personal injuries etc.). The tribunals should, where appropriate, adjourn the hearing so as to enable an unrepresented party to seek independent advice before accepting the offer of settlement.

Sifting mechanisms

2.31 From time to time there are complaints by employers that too many unmeritorious claims reach a tribunal hearing. One reason for such complaints may be the lack of adequate advice to applicants who have a genuine grievance but do not understand that employment legislation is narrowly confined to certain rights and not to grievances at work in general. Claims of this kind, which fall outside the jurisdiction of the tribunals, can usually be resolved by a "Rule 1 letter" from the Secretary of Tribunals to the applicant informing him or her that the application will not be registered unless the applicant states a wish in writing to proceed. This "vetting" process is also helpful in drawing attention to deficiencies in the application (e.g. the respondent may not be properly identified, or the grounds on which relief is sought may not be specified). If not disposed of at this stage, the matter can be set down for a preliminary hearing on the question of jurisdiction. Our proposals for a more investigative approach would not make any changes to present practice in this regard. If a Chairman of tribunals, either before or after the tribunal officer has interviewed the parties, is of the opinion that a jurisdictional question arises (e.g. the complaint has been presented out of time, or the applicant is not an eligible employee) he could direct the matter be set down for hearing on the preliminary point by a full tribunal. The written statements and documents collected by the tribunal officer would then be confined to this point.

2.32 Another weeding-out mechanism is the power, which may be exercised by a Chairman of tribunals on his or her own motion, to strike out an originating application or notice of appearance, or anything contained therein, which is "scandalous, frivolous or vexatious" (IT Rule 12(2) (d)). This can be done without convening a full tribunal hearing. It is used sparingly in practice, partly because of the desire of Chairmen of tribunals not to usurp the role of the industrial members. We consider that it is right, where there is any substantial conflict of evidence or evaluation of facts, that the issue should be determined by a tribunal which includes the industrial members.

2.33 A further method of screening, introduced in October 1980, is the pre-hearing assessment. This may be ordered on the application of a party or by a Chairman of tribunals on his or her own motion. A fully constituted tribunal considers the contents of the originating application and the notice of appearance, any representations in writing and oral arguments advanced by the parties. If the tribunal considers that the originating application or any contentions of a party have no reasonable prospects of success, the party concerned may be warned that if he or she persists with the case or the contention it could result in an award of costs being made against him or her at the full hearing.

2.34 This procedure has not been a success, and has rightly been criticised by the Council on Tribunals. Research (Wallace and Clifton, 1985) has shown that the main defects of the PHA procedure are the following.

(a) The choice of cases for PHAs is relatively arbitrary varying from region to region;

(b) the PHA is of no use where there is a lack of evidence or a dispute of fact which can only be determined by a full hearing;

(c) the PHA involves the parties in the inconvenience and cost of an additional attendance at the tribunal;

(d) if the tribunal does not issue a warning as to costs at the PHA, the cost is more likely than usual to go to hearing because of the false hope of success which the party may infer;

(e) PHAs delay the early stages of conciliation and frequently lengthen its duration;

(f) PHAs encourage a less flexible attitude to a settlement before a hearing, particularly if the applicant did not receive a costs warning.

Accordingly we propose that the pre-hearing assessment procedure should be repealed.

2.35 The Government has proposed that in order to deter unmeritorious complaints there should be a refundable application fee (e.g. of £25). This proposal has met strong opposition from many organisations on both sides of industry and from advice agencies and others. It would unfairly discriminate against poorer applicants and would not deter vexatious litigants. We strongly oppose the proposal for any kind of application fee.

2.36 Our proposals for preliminary investigation (paragraph 2.23) will make it possible to conduct a more effective screening process. Once the tribunal has read the dossier of the parties' statements and documents it will be able to deal with an unmeritorious application or defence speedily at the hearing itself. We expand on this below in connection with the conduct of the hearing. A further possibility would be for a Chairman of tribunals having read the dossier to express an opinion before the hearing that the application or defence has no reasonable prospect of success. Should such an opinion bar the party from proceeding? Or should the party be allowed to proceed only on payment of a deposit or other security for costs which may be awarded at the full hearing if the tribunal finds that the party's conduct was frivolous, vexatious or otherwise unreasonable? The objection to a complete bar is that the full tribunal would not have had an opportunity to see and hear the witnesses and, even on the papers, one or both the members may have taken a different view. The objection to a deposit is that, like an application fee, it may have a disparate impact on unemployed applicants and others on social security. One alternative would be to give the Chairman of tribunals power to direct, if he or she is of the opinion that the application or the contentions of a party have no reasonable prospect of success, that the parties should attend without bringing their witnesses. If, at the hearing, the tribunal having read the dossier and heard oral statements by the parties, agreed with the Chairman's initial opinion the application could be dismissed or the defence rejected, as the case may be, without the need to question the witnesses. If not, then the hearing would be adjourned so as to allow the witnesses to attend for examination. We reject all these proposals on the grounds that they will result in the parties having to attend the tribunal more than once, and will simply add to the burden of costs on the parties, and to the public purse.

Pre-hearing reviews

2.37 It follows from the general aim of requiring the parties to attend only once, that the use of hearings whose purpose is solely to direct what steps are to be taken to prepare a case should be greatly restricted. The preliminary inquiry procedure (above) will usually render any such meeting for directions unnecessary. At present, pre-hearing reviews sometimes have to be used where an unrepresented applicant or respondent writes endless letters to the tribunal or fails to deal adequately with orders for further and better particulars. The tribunal officer would be able to obtain the relevant information, including the number of witnesses and expected length of the hearing, and there should be no need for a pre-hearing review by the tribunal. It will, however, be essential to issue parties with a clear standard form in advance of the hearing informing them of the procedure that will be followed at the hearing and what steps they must take to prepare for the hearing.

2.38 A pre-trial review may, however, be useful and necessary in test cases with multiple applicants, or where the issues and evidence are highly complex and specialised. If our proposals for a two-tier Court and Tribunal (Chapter Four below) are accepted, these will generally be cases before the Court rather than the Tribunal.

Conduct of hearing

2.39 The present IT rule 8(1) gives the tribunal power to "conduct the hearing in such manner as it considers most suitable to the clarification of the issues before it and generally to the just handling of the proceedings". The tribunal must "seek to avoid formality in its proceedings" and is not bound by the strict rules of evidence. Subject to this, rule 8(2) allows a party to give evidence, to call witnesses, to question witnesses and to address the tribunal. It appears from recent case law in relation to the small claims procedure in county courts that the right to question witnesses means the opportunity directly to cross-examine the other party (*Chilton v Saga Holidays* [1986] 1 All ER 841).

2.40 A feature of the present system is that the tribunal usually knows little or nothing in advance about the facts, so heavy reliance is placed on oral presentation, examination and cross-examination of witnesses on oath, and what Lord Devlin once called, in relation to trial by jury, "verbal pugilism" and "display fighting" (Devlin, 1981, p.58). Although the right to make an opening speech was taken away in 1980, tribunals in England and Wales (but not Scotland) still usually allow one to be made. A practitioners' book notes that there are "great tactical advantages" in being able to do so because "once a particular picture of a case takes shape in a tribunal's mind, it takes some time to displace it" (Clayton, 1986, p.45). No stone is left unturned by some advocates in order to establish facts or to discredit their opponent's witnesses. The inquiries may extend many years into the past with small and imperfectly remembered incidents being minutely dissected. Since many of the advocates who appear in tribunals are inexperienced or unqualified, cross-examination is not infrequently inept and, on occasion, even

harmful to their client's case. Hostility between the parties may be unnecessarily heightened by such cross-examination, so discouraging the applicant from persisting in a claim for re-employment or strengthening the employer's resolve to resist any such remedy. As we have already pointed out, this mode of procedure greatly lengthens the proceedings and places the unrepresented party at a significant disadvantage.

2.41 The system of preliminary inquiry will, in most cases, make this adversarial procedure unnecessary. In its place we envisage the following investigative procedure.

(1) The tribunal would read the dossier containing the full statements of the parties and the essential documents in advance of the hearing, and would indicate to the parties at the beginning of the hearing what appeared to the tribunal to be the relevant issues of fact and law on which it would be helpful to have evidence by witnesses and oral submissions.

(2) The tribunal would elicit information from each of the parties and the witnesses by questioning them on matters which were disputed or not clear from the papers.

(3) The tribunal would then permit each party (or representative) to put other relevant questions.

(4) The parties (or representatives) would have an opportunity to make closing statements.

Costs

2.42 We see no reason to change the general rule that each party should bear his or her own costs. The development of a more investigative system should, in any event, reduce the need for outside representation and greatly reduce costs. The present exception to this rule, namely that costs can be awarded where the conduct of a party has been frivolous or vexatious or "otherwise unreasonable" is rarely used. Some members of our Committee believe that the third of these grounds, which was added in 1980, is an unnecessary deterrent to employees who are thinking of bringing cases. The test of "unreasonableness" allows the one party to write to the other at an appropriate stage and to notify him or her that an award of costs will be sought if the case is unreasonably continued. However, tribunals are usually loath to award costs against an employee and where they do so award sums which are small in relation to the total costs incurred by the employer. Most employers regard the costs of preparaton of a tribunal case as a necessary part of the personnel function and do not press for an award. (The IPM Industrial Tribunals Survey found that the average cost of a claim was quoted as between

£1,000 and £2,000 by many organisations. A study conducted in 1985 found that 70% of employers were unaware of the provision for the award of costs on grounds of unreasonableness [Evans, 1985]). A majority of the Committee take the view that there is no evidence that employees are being unfairly deterred by the present grounds for the award of costs. A majority of the Committee recommend that no change be made.

2.43 There appears to have been a considerable increase in the number of firms offering insurance in respect of costs of bringing or defending industrial tribunal cases, and the reimbursement of tribunal awards. The experience of practitioners whom we have interviewed is that insurance has a number of adverse effects on the pace and informality of tribunal procedure. The insurance company requires to be kept fully informed of the handling of the case, and settlements are often held up because agreement cannot be reached without the consent of the insurance company. Insurance companies may also have an interest in delaying payment or prolonging appeals. This is an issue which requires further scrutiny and research.

CHAPTER THREE - JURISDICTION

Waste, frustration and delay

3.1 The Donovan Commission (paragraph 570) pointed out that a multiplicity of jurisdictions is apt to lead to "waste, frustration and delay". Accordingly, they recommended that the jurisdiction of industrial tribunals should be defined so as to comprise "all disputes arising between employers and employees from their contracts of employment or from any statutory claims they may have in their capacity as employer and employee". This would have *excluded* (a) damages for personal injuries; (b) differences between employers and groups of workers which the Commission believed should be settled by procedures of or agreed through collective bargaining; (c) matters between trade unions and their members which would go to an independent review body; (d) damages arising out of strikes or other labour disputes, except damages for breach of contract. The jurisidiction of the tribunals was to be co-extensive with that of the ordinary courts in matters arising out of the contract of employment (paragraph 579).

3.2 These recommendations were not implemented. The jurisdiction of the tribunals has been extended piecemeal on grounds of expediency. They were created in order to determine appeals by employers against the imposition or amount of industrial training levies under the Industrial Training Act 1964. For a time they also heard appeals against selective employment tax. In December 1965 they acquired their first jurisdiction to deal with employer - employee disputes, in respect of claims for statutory redundancy payments under the Redundancy Payments Act 1965. In 1986-87 these constituted 13.7% of the tribunals' caseload. They also adjudicate on disputes between employers and the Secretary of State regarding reimbursement from the Redundancy Fund. At the same time they were given limited jurisdiction to determine what written particulars of employment should have been given by employers under the Contracts of Employment Acts 1963-1972. Jurisdiction was also conferred upon them to adjudicate on issues under miscellaneous pieces of legislation (e.g. the Docks and Harbours Act 1966 on the meaning of "dock work").

3.3 The great growth in the work of the tribunals came with the Industrial Relations Act 1971. Although some of these jurisdictions were removed with the repeal of the Act in 1974, the most important of these remained. This is the adjudication of disputes relating to the right not to be unfairly dismissed which still accounts for about 74% of all applications to the tribunals. The Employment Protection Act 1975 conferred a number of new statutory rights on employees subject to adjudication by industrial tribunals and these made up 4.5% of the caseload in 1986-87. Most, but not all, this legislation was consolidated in the Employment Protection (Consolidation) Act 1978, section 128 of which is now the basis for the establishment and rules of the tribunals, although reference still has to be made to earlier Industrial Tribunals Regulations 1965 for the constitution of the tribunals.

3.4 There have been other sources of new jurisdictions. The Health & Safety at Work etc. Act 1974 made provision for appeals against improvement and prohibition notices to be determined by industrial tribunals and they also deal with complaints relating to time off for safety representatives under the Safety Committee Regulations 1977. Together, these amounted in the financial year 1985-86 to only 0.4% of the tribunals' caseload. The Equal Pay Act 1970, as amended, which came into force at the end of 1975, gave the tribunals jurisdiction over certain equal pay disputes. The Sex Discrimination Act 1975 and Race Relations Act 1976 gave tribunals exclusive jurisdiction over complaints of discrimination in the field of employment on grounds of sex, marital status and race. In 1986-87, equal pay claims accounted for 1.3% of the tribunals' caseload (a proportion likely to increase as more use is made of the Equal Value Amendment Regulations 1983), sex discrimination 1.5% and racial discrimination 1.7%. The entry of the U.K. into the EEC has also resulted in new jurisdictions (e.g. under the Transfer of Undertakings (Protection of Employment) Regulations 1981) and has led to the complex legal problems before tribunals about the interaction between the Community legal order and national legislation. Even now, fourteen years after joining the Community, it has not been finally settled whether the tribunals have jurisdiction to enforce free-standing Community rights where directly applicable Community law (e.g. on equal remuneration for work of equal value) is in clear conflict with national legislation.

3.5 The Employment Acts 1980 and 1982 extended the range of jurisdiction from disputes between employers and employees into the sensitive area of complaints of unreasonable exclusion or expulsion from trade unions in "closed shop" situations, and enabled tribunals to join and make awards against third parties (e.g. trade unions) where there is a complaint of pressure to compel or prevent trade union membership. However, other statutory claims against trade unions (e.g. under the Trade Union Act 1984) have to be brought to the Certification Officer and/or the High Court. Common law claims by members against their trade unions, arising under the contract of membership, are dealt with in the High Court. Similarly, actions for damages and applications for injunctions in respect of civil wrongs in the course of strikes and other industrial action are brought by employers and others in the High Court.

3.6 The "waste, frustration and delay" which the Donovan Commission wished to avoid have been compounded by the piecemeal approach to the industrial tribunals.

(a) The tribunals have not yet been given jurisdiction over disputes arising out of the contract of employment, although provision to do so by Order has existed since 1975 and is presently in section 131 of the Employment Protection (Consolidation) Act 1978. Such claims, therefore, have to be brought in the county court or High Court (sheriff court or Court of Session in Scotland).

(b) The distinction between individual and collective disputes, suggested by the Donovan Commission, has proved to be a difficult one. Tribunals are not infrequently involved in the task of interpreting collective agreements and, in effect, ruling on the merits of collective disputes in the context of individual statutory claims. Moreover, in some cases they have to deal with trade union recognition and consultation with and the provision of information to trade unions (e.g. in respect of proposed redundancies under the Employment Protection Act 1975, Part IV, and the transfer of undertakings under the Transfer of Undertakings (Protection of Employment) Regulations 1981). They also adjudicate on rights to belong or not to belong to trade unions and to participate in their activities (e.g. 1978 Act, ss. 23, 58) which have an obvious collective dimension.

(c) Most serious of all, is that there is a confusing multiplicity of jurisdictions which results in individuals being shunted around the legal system, some of them giving up hope of finding the right "slot" to get the remedy provided by legislation or the common law for their grievance. For example, it regularly happens that meritorious claims for contractual holiday pay or sick pay, arrears of wages, or wages in lieu of notice have to be turned away by tribunals in the knowledge that it is unlikely that individuals will go to the county court to enforce these claims.

(d) The allocation of business between the courts and tribunals is often arbitrary. For example, tribunals deal with unauthorised deductions from wages (Wages Act 1986, s.5), but the county courts deal with unauthorised deduction from wages of political fund subscriptions (Trade Union Act 1984, s.18).

Disputes arising from the contract of employment

3.7 Section 131 of the Employment Protection (Consolidation) Act 1978 confers power on the appropriate Minister to confer jurisdiction on the industrial tribunals, concurrent with that of the ordinary courts, in respect of the following claims:

(a) a claim for damages for breach of a contract of employment or any other contract connected with employment;

(b) a claim for a sum due under such a contract;

(c) a claim for the recovery of a sum in pursuance of any enactment relating to the terms of performance of such a contract.

Claims for a sum due or damages in respect of personal injuries cannot, however, be transferred to the tribunals. Moreover, any Order made under section 131 must restrict the tribunals' jurisdiction to claims which arise or are outstanding on the termination of employment, or arise in circumstances which also give rise to proceedings already or simultaneously brought before an industrial tribunal other than by virtue of the section.

3.8 In 1978 a draft Order was prepared but this was not brought into effect. We understand that this was because of opposition by the Trades Union Congress. These objections were to the effect that to introduce contractual issues would further remove tribunals from their primary task of acting as an industrial jury, that tribunals would inevitably become more legalistic, that they would become involved in the interpretation of collective agreements, that they might be led into ruling on the merits of industrial disputes and that employers would be able to counterclaim or set off aginst the employee's claim losses caused by the employee's conduct, particularly in an industrial dispute.

3.9 In addition to these objections, it can be argued that there would be a number of other disadvantages in an extension of the tribunals' jurisdiction to all contractual claims:

(a) The remedies available before a civil court (e.g. injunctions and orders for delivery of documents) are not available in industrial tribunal proceedings. If the tribunals were given power to award injunctive relief, the question would arise as to whether or not tribunals should themselves punish disobedience of their orders as a "contempt of court", by imprisonment or fines or sequestration.

(b) Unlike the ordinary courts, there is usually no award of costs in tribunal cases (see Chapter Two above) and the system of taxation of costs does not apply.

(c) Legal aid is not available for representation in tribunals (see Chapter 2 above), but is in the ordinary courts.

(d) Unlike the ordinary courts, there is no provision for "payment in" of a sum of money by way of offer of settlement of a claim in the tribunals, nor is there any provision for summary judgment.

(e) The tribunals do not necessarily have the appropriate expertise to deal with all types of contractual claim, for example those in respect of personal injuries, restrictive covenants against competition by former employees, or breach of the duty of confidentiality and preserving trade secrets.

(f) Even if "home-made" pleadings continue to be allowed in tribunals, there would inevitably be pressure for more precise allegations and evidence in respect of contractual matters than there is for most of the issues which tribunals currently determine. This would increase legalism.

(g) There is no financial limit on contractual claims in the High Court or the ordinary civil jurisdiction of the sheriff court (the limit in the county court is currently £5,000). There are varying limits on awards by tribunals (e.g. £8,500 for the compensatory award in respect of unfair dismissal; and a minimum of £17,250 and no maximum in certain cases where a special award is made in respect of dismissal for non-membership or membership etc. of a trade union). The question would arise whether or not there should be such a limit for contractual claims. If there were, some claims would continue to be heard in the ordinary courts.

(h) The extension of jurisdiction to a more accessible and informal, cheaper and speedier tribunal, is likely to encourage employees to take a greatly increased number of matters, currently dealt with by grievance and disciplinary procedures, to the tribunals. Many of these procedures form an express or implied part of the contractual terms and conditions of employment. The conventional philosophy on both sides of industry has been that these matters (e.g. disciplinary warnings, suspension on pay etc.) should not be litigated. Although, in recent times, there has been an increased use of the courts by both employers and employees in respect of such matters, the cost, formality and delay of the ordinary courts has been a deterrent against litigation. It is arguable that easier access to litigation would have undesirable effects on voluntary methods of resolving employment disputes.

3.10 Against these disadvantages, should be weighed a number of important advantages of a transfer of jurisdiction to the industrial tribunals.

(a) There would be a single forum for (nearly) all individual employment disputes, so removing the present confusing multiplicity of jurisdictions.

(b) This would minimise costs.

(c) This would avoid the court-room atmosphere of the ordinary courts which frightens the unrepresented litigant.

(d) There would be greater accessibility, particularly in relation to small claims which are not easily dealt with even in county courts.

(e) There would be no need for formal pleadings and the complicated drafting of documents.

(f) The proceedings would be far more expeditiously handled than in the ordinary courts. At present, proceedings based on unfair dismissal are nearly always concluded far sooner than contemporaneous contractual claims in the courts arising out of the same termination. Moreover, legal representatives often play off one jurisdiction against another depending upon whether delay will give their client a tactical advantage.

(g) Industrial tribunals are often called upon to interpret contracts and to determine disputes over unfair dismissal, while the same contract may have to be interpreted by a county court or the High Court in respect of a claim for wrongful dismissal. The possibility of conflicting interpretations has to be resolved either by staying the industrial tribunal proceedings, pending an authoritative determination by the High Court, or by way of appeal to the Court of Appeal (which hears appeals both from EAT and from the county court and High Court).

(h) Industrial tribunals, because of their membership, seem better qualified than the ordinary courts to interpret contracts of employment in a way which accords with industrial relations realities. A single jurisdiction would be able to develop a consistent body of law applicable in contractual and statutory contexts (e.g. harmonising the law on wrongful dismissal and on unfair dismissal).

3.11 In our view, the balance between these advantages and disadvantages tends to favour some transfer of jurisdiction of the industrial tribunals, while retaining the concurrent jurisdiction of the courts. We consider that the compromise contained in section 131 of the 1978 Act still provides a fair basis on which to give the tribunals an extended jurisdiction in individual disputes. An extension of jurisidiction to all individual employment disputes is not feasible unless the substantive statute law and common law is integrated into a single code of employment law. We recommend that an Order be made under section 131 enabling proceedings to be brought in an industrial tribunal for the recovery of damages or any other sum which

(a) arises on or is outstanding on the termination of the employee's employment; or

(b) arises in circumstances which already give rise to other proceedings already or simultaneously brought before the tribunal; and

(c) does not exceed the limit for the time being specified in the Taxes Acts as a termination payment which is exempt from income tax (currently £25,000); and

(d) is not in respect of damages or a sum due in respect of personal injuries, or of a patent, a registered design, a trademark or copyright, or the breach of a covenant restraining competition by the employee on the

termination of his or her employment, or the breach of an obligation, whether express or implied, that the employee will not disclose to another trade secrets or misuse confidential information acquired as a result of the employment, or which arises in connection with any strike, lock-out or other industrial action.

Claims by members against trade unions

3.12 As already pointed out, claims by individuals against trade unions for unreasonable exclusion or expulsion in closed shop situations and for compensation in respect of pressure on the employer to take action against an individual by reason of membership or non-membership of a union, are within the jurisdiction of industrial tribunals. Other statutory claims against trade unions, in particular under Part I of the Trade Union Act 1984 (election of voting members of principal executive committee and compilation and maintenance of register of members) and under the Trade Union Act 1913 as amended (breach of political fund rules), have to be brought before the Certification Officer and/or the High Court (Court of Session in Scotland). Claims arising under the contract of membership of the union can be brought only in the ordinary courts, and in recent years there has been a spate of such actions in the High Court, notably during the miners' strike 1984–85. The Government has recently proposed (*Trade Unions and their Members*, Cm 95, 1987) a number of new rights for individuals against trade unions and suggests that the dual route of complaint to the Certification Officer and High Court should be retained and strengthened.

3.13 It is beyond our terms of reference to express any view on the merits and demerits of the existing and proposed new remedies against trade unions. However, we are concerned at the growth of a multiplicity of jurisdictions in respect of these matters for similar reasons to those given in respect of complaints against employers. If Parliament considers that members of unions should have certain statutory rights then the individuals and trade unions concerned should have an accessible, informal, cheap and expeditious forum in which to resolve their disputes.

3.14 For several reasons a majority of the Committee consider that industrial tribunals, as presently constituted, are not the most appropriate forum for this purpose or for that of claims under the contract of membership.

(a) The composition of the tribunal, including an employer's representative may not be acceptable for dealing with internal union affairs.

(b) A tribunal consisting of the legally-qualified Chairman and two persons from the panel nominated by trade unions would also not be suitable because there may be objections to those persons on grounds that the union with which they are associated has a direct or indirect interest in the dispute.

(c) The credibility of industrial tribunals would be put at risk if the orders they made against trade unions were disobeyed.

(d) The Certification Officer (and the former Registrar of Trade Unions and Registrar of Friendly Societies) is an office which has developed expertise in trade union matters and is generally regarded as independent, whereas the tribunals have rarely had to exercise any jurisdiction in this respect.

3.15 Accordingly, a majority of the Committee recommend that the existing jurisdiction of industrial tribunals in respect of unreasonable exclusion or expulsion from a trade union, under sections 4 and 5 of EA 1980, and related forms of relief, should be transferred to the Certification Officer and/or the High Court (Court of Session in Scotland).

Complaints of discrimination on grounds of sex, marital status and race

3.16 When hearing complaints of sex discrimination, industrial tribunals as a matter of practice usually have at least one member of the same sex as the applicant. In race cases, one of the members is usually drawn from a panel appointed by the Secretary of State, from those nominated by employers' and employees' organisations, of persons with special knowledge and experience of race and community relations. The latter are not necessarily drawn from ethnic minorities. Indeed, in March 1986 only about 24 of the 2,128 lay members came from ethnic minorities. At the end of the last reappointment exercise, carried out at the end of 1986, out of 2,136 members, 31 came from ethnic minorities (we return to the under-representation of women and ethnic minorities in Chapter Four).

3.17 There is overwhelming evidence from empirical research (in particular, Leonard 1987a, and Kumar, 1986) that there is a serious lack of judicial expertise in the handling of these cases, which are both complex and sensitive, and that this is one of the reasons why so many complaints fail. Leonard (1987a) scrutinised all the sex discrimination cases decided by tribunals over a three year period and found that the legislation was being misunderstood and misapplied, that tribunals were using the wrong legal standard, were failing to analyse the employer's explanations for prima facie discriminatory conduct, and were attaching undue weight to considerations which were irrelevant in the context of the rights against unlawful discrimination, such as the "fairness" of the employer's conduct, or his benevolent motives, or the effect of the employee's claim on industrial relations. Kumar's study (1986) of applicants under the Race Relations Act 1976 found that almost one-half of them had a negative view of the way in which the tribunals had handled their cases.

3.18 The relatively poor handling of these cases arises from a number of factors.

(a) The legislation is extremely complex and novel and quite different from the vague notions of "reasonableness" which dominate the main jurisdiction of unfair dismissal. It can also involve extremely difficult and controversial questions about the interaction between EEC law and national legislation.

(b) Chairmen of tribunals and industrial members lack knowledge and experience both of the law in this field and of the skills of fact-finding in cases where there is rarely direct evidence of discrimination.

(c) Chairmen and members have little opportunity to develop their skills in practice because discrimination cases form only 2–3% of the tribunals' caseload. Leonard found that the 215 cases she studied had been asigned to 116 different Chairmen, only seven of whom heard more than one case a year, "hardly a number calculated to develop or maintain expertise". The industrial members sat even less frequently on these cases.

(d) The vast majority of Chairmen of tribunals and industrial members have never experienced discrimination on grounds of sex or race. They tend to be white, male, middle-aged and middle-class. Many of them make traditional assumptions about the role of women in society, and sometimes make unfortunate remarks about women or ethnic minorities in the course of proceedings.

(e) The expertise of the tribunals in industrial relations may actually run counter to the policy of discrimination law. The desire of industrial members to uphold existing norms, collective agreements and pay structures, which informs their approach to issues such as unfair dismissal, can easily lead them to deny claims for equal rights which appear to threaten those norms, agreements and structures. The applicant may be challenging both the employer and the union.

3.19 Three main proposals have been made to overcome these deficiencies. It is to be noted that none of these proposals envisages taking discrimination cases out of the hands of the tribunals and the EAT and transferring them to the ordinary courts. On the contrary, the EOC and the CRE have proposed that the present county court and sherriff court jurisdiction, in non-employment cases, should be transferred to the tribunals because the performance of those courts has been much worse than that of the tribunals. No one wants the delay, formality and cost associated with litigation in the ordinary courts.

3.20 The first proposal, which has been made by the CRE, is that there should be a discrimination division within industrial tribunals to hear all discrimination cases. Although there are precedents for this (e.g. in the Australian states of Victoria and New South Wales there are specialist discrimination tribunals), there are several disadvantages. First, all members of the specialist division would have to be part-time because there would be an insufficient number of cases to occupy them full-time in one region. So they would have to travel around which would be expensive, lead to great difficulties with listing and lengthy delays in the hearing of cases. The alternative would be to ask the parties to travel to a necessarily limited number of venues and this would greatly limit the accessibility of the tribunals. Secondly, the Chairman and members who sat exclusively in these cases would become saturated and stale and would lose touch with other closely related areas of employment law and industrial relations. Thirdly, discrimination would tend to become marginalised (as has happened with immigration appeals) and the Discrimination Tribunal would be a sitting target for sensationalisation by some sections of the media, with an adverse impact on race relations and equality for women.

3.21 The second proposal, favoured by the EOC, is that all discrimination cases should be heard in the industrial tribunals, but by a Chairman and members who have been specially trained and have the appropriate experience. This would enable the Chairman and members to sit, as well, in other types of case but would exclude those without the requisite training or experience. It would keep discrimination cases within the mainstream of employment law and practice. It would make efficient use of resources to train a relatively small number of persons for these cases, while keeping the tribunals accessible on a regional basis.

3.22 The third proposal is that original jurisdiction, at least in the more complex cases, should be transferred to the EAT, which has the powers of a Division of the High Court. The advantages of this would be to utilise the legal expertise of a High Court (or Court of Session) judge from the outset on the complex issues of law which may arise, and also to have access to legal aid and more effective representation. However, it is not clear that a High Court judge would be any better equipped than a Chairman of tribunals who had been specially trained and was experienced in this field. In Chapter Four we make proposals for a two-tier Court and tribunal which would make it possible for the more complex, adversarial-type cases to be heard in the upper-tier Court by an experienced judge and lay members.

3.23 We recommend:

(a) So far as practicable, every tribunal hearing a sex discrimination case should have at least one industrial member of the same sex as the applicant, and every tribunal hearing a race discrimination case at least one industrial member from the same ethnic minority as the applicant.

(b) The Chairman of the tribunal should be specially trained in discrimination law and in the skills of fact-finding in the field of discrimination. The

industrial members should receive training in fact-finding.

(c) No person should be allowed to sit as a Chairman or member in such cases without special training.

(d) These Chairman and members should specialise in such cases but would also be expected to sit in other cases.

(e) If jurisdiction is extended to non-employment cases, the members should have special knowledge and experience of the field in question, e.g. education, housing etc.

Equal pay cases

3.24 Disputes as to equal pay for men and women under the Equal Pay Act 1970, as amended, may be presented to an industrial tribunal. The original jurisdiction was only in respect of claims for equal pay for the same or broadly similar work, or for equal pay where the jobs had been equally rated under a job evaluation study. As a result of the Equal Pay (Amendment) Regulations 1983, introduced in order to comply with a judgment of the European Court of Justice under article 119 of the Treaty of Rome, the tribunals also now deal with claims for equal pay for work of equal value. However, a procedure which is notoriously complex and tortuous has to be followed in these equal value claims, which now form the majority of equal pay cases. The tribunal is required, after an initial screening process, to refer the claim to an independent expert drawn from a panel nominated by ACAS. The expert has no powers of his or her own to investigate the facts, but may apply to the tribunal for orders against any person with relevant information or documents to furnish these. The expert has to observe a number of procedural requirements (broadly to act in accordance with natural justice). The expert is obliged to prepare a report which must be admitted in evidence unless the tribunal finds that the expert has breached the procedural requirements, or that his or her conclusion is one which could not reasonably have been reached or that for some other material reason the report is unsatisfactory. The expert is compellable as a witness and may be cross-examined. In addition, a party may, on giving notice, call one expert who is then subject to cross-examination. It is only at this stage that the tribunal can determine the substantive issue whether the work is of equal value. The independent expert's costs are payable by the Secretary of State.

3.25 In practice, this lengthy procedure has resulted in inordinate delays. Although the tribunal rules envisage that the report will be received within 42 days of the expert being commisioned, we understand that the shortest time so far taken to prepare a report has been five and a half months, and the longest 18 months, the average time being 10 months. In the first three years of operation, fewer than 10 cases had completed the whole procedure. In one case the expert took 10 months only to have the report rejected by the tribunal with the result that the procedure had to start all over again. The experts blame the parties for "diary problems", and the parties blame the experts who are employed on a part-time basis. As far as is known, the experts have not experienced deliberate obstruction, nor have the investigations been particularly complex. The delays must be ascribed to inefficiency or lack of expertise and training and to lack of effective judicial control of the timetable. Criticisms can also be made of the sifting mechanism, which allows the tribunal to reject an equal value claim at a preliminary hearing without reference to an independent expert. There is no restriction on the production of expert evidence by the parties at this stage and the preliminary hearings can take several days.

3.26 There seems to us to be four possible solutions to the problems to which the 1983 Regulations have given rise.

(a) To retain the present system but to appoint independent experts on a full-time basis, provide them with adequate training, and to have strictly enforced tribunal-imposed deadlines, automatic discovery of documents and the right to enter premises etc. This is open to the objection that there would still have to be an elaborate sifting mechanism, and a hearing to consider the report.

(b) To remove the independent experts from the procedure, but allow each party to call an expert. This would introduce additional costs for the parties and would suffer from all the defects of unequal representaton of the adversarial system (above Chapter One). If this approach were adopted, it would be necessary to make additional funds available to the EOC so that it could pay the costs of an expert on behalf of an applicant whom it was supporting.

(c) To take equal pay cases out of the jurisdiction of the tribunals and refer them to arbitration by an independent expert. This would be less formal and less costly than an adversarial tribunal procedure. However, it seems unlikely that sufficient arbitrators with the relevant expertise could be found. There would still need to be some form of judicial review in respect of errors of law on the face of the record, because the EEC Equal Pay Directive requires national courts to exercise "effective control over compliance" with the Directive (*Johnston v Chief Constable of Royal Ulster Constabulary*. European Court of Justice, Case 222/84, paragraph 13). Since difficult preliminary questions of law can arise under the Directive there is every likelihood that there would be frequent applications for review by the non-expert High Court and that this would undermine the aim of informal arbitration.

(d) To take equal pay cases out of the jurisdiction of the tribunals and refer them to arbitration by the Central Arbitration Committee. This procedure would be appropriate in collective claims brought by

representative trade unions or by the EOC on behalf of a class of women, but it is not obvious that it would be suitable for individual cases. Moreover, we have to pay regard to the fact that the present Government secured the repeal of section 3 of the Equal Pay Act by the Sex Discrimination Act 1986 (which allowed certain discriminatory collective agreements to be vetted by the CAC) with effect from February 1987, so that there is little prospect of an extension of the CAC's jurisdiction, which some members of the Committee think desirable. This touches upon the broader issue of remedies for unequal pay for men and women, beyond our remit.

3.27 We recommend, as a sensible reform in present circumstances, the removal of the independent experts from the procedure (as set out in paragraph 3.26 (b)). The public expenditure so saved should be allocated to the EOC so that it can pay the costs of an expert for a party whom it has decided to support. The present powers of the tribunal to require information and documents to be given to the independent expert would then need to be exercisable on the application of each party's expert, and the tribunal would need to stipulate a strict timetable for the completion and exchange of experts' reports.

An arbitration alternative to industrial tribunals in unfair dismissal or other cases?

3.28 Some members of our Committee favour the use of arbitration as an alternative to industrial tribunals in unfair dismissal and certain other cases, such as those relating to time off for union activites, guarantee payments. written particulars and the right to return to work after pregnancy and confinement. The advantages of arbitration are thought to be that (a) arbitration is speedier, cheaper and less legalistic than adjudication; (b) arbitrators usually apply standards of good industrial relations practice and take account of wider collective interests, whereas tribunals must apply statutory provisions, as interpreted by the EAT and higher courts, and are concerned only with the individual dispute; (c) arbitration hearings usually adopt an investigative and not an adversarial procedure; and (d) arbitrators are, at present, far more likely than tribunals to award re-employment as a remedy for unfair dismissal.

3.29 The Committee, however, believe that the industrial tribunal system is far too well entrenched for it to be realistic to consider replacing tribunals entirely by an arbitration system. Moreover, they consider that the procedural reforms advocated in Chapter Two of this Report, towards a more effective investigative system, will enable the tribunals to display many of the advantages of arbitration listed above. They believe that the standards applied by tribunals and the remedies could be changed by legislation, if that were considered desirable.

3.30 The Committee has considered whether, instead of replacing the tribunal system by arbitration, arbitration should be available in individual cases as an alternative *with the consent of both the employer and employee*. It has to be pointed out that this possibility is already open to parties who make it a term on any conciliated settlement that they will resolve their dispute by arbitration. So far as we know, this option is little used in practice and this may be because neither employers and employees are sufficiently aware of it. Moreover, some legal doubts exist as to whether such a conciliated settlement can validly prevent the employee from pursuing a complaint to an industrial tribunal. In 1986, ACAS made arrangements for arbitration in some 184 cases, but only 61 of these were concerned with dismissal and discipline (33%). This is an increase from 162 cases, 43 concerned with dismissal and discipline, in 1985. An unknown number of cases are privately referred to arbitration without ACAS assistance. The question is whether the choice of binding arbitration, without further appeal, should be made possible without the need to make it a term of a conciliated settlement. The obstacle to this at present, is that section 140 of the Employment Protection (Consolidation) Act 1978 prohibits contracting-out unless a conciliation officer has taken action in respect of the complaint. Should there be a direct route to binding arbitration, excluding any recourse to the industrial tribunals, with the consent of both parties but without ACAS intervention? The arbitration award would be binding and subject only to a judicial review on grounds of an error of law on the face of the record. Arbitration is usually in private and frequently no reason is given by the arbitrator for the award.

3.31 A majority of the Committee believe that this form of arbitration alternative is open to a number of objections. First, it could lead within the same enterprise to two standards of unfair dismissal, one applied by the industrial tribunals and the other by arbitrators. Managers are bound to complain that this undermines sound personnel policies and encourages tactical play-offs between the two systems. Secondly, the non-unionised or inadequately represented or unrepresented employee may be put under unfair pressure by the employer or others to consent to arbitration. Thirdly, there is no reason to believe that employees would be significantly better off under an arbitration system than under a tribunal system, reformed as we have proposed in Chapter One, when claiming only compensation. Unless the employee is adequately represented, he or she will be at a disadvantage against the employer who regularly arbitrates, particularly in preparing the written representations which are usual in arbitration. Fourthly, it would be extremely difficult to recruit a sufficient number of suitably qualified arbitrators, at least in the short term. The ACAS panel of arbitrators is part-time, and any significant increase in their case load would lead to lengthy delays of this kind being experienced with independent equal value experts. Accordingly, a majority of the Committee are not in favour of providing any new arbitration alternative for individuals. However, the Committee unanimously recommends that sections 134 and 140 of the Employment Protection (Consolidation) Act 1978 should be

clarified so as to remove any doubts about the validity of a conciliated settlement which provides for binding arbitration without the matter being determined by an industrial tribunal.

3.32 Arbitration is at present available where the Secretary of State has given approval, under section 65 of the Employment Protection (Consolidation) Act 1978 to a dismissal procedures agreement with an independent trade union. Such an agreement must include a right to arbitration or adjudication by an independent referee or by a tribunal or other independent body, in cases where a decision cannot otherwise be reached. The major advantages of an exempted procedure are that re-employment is the usual remedy, that they normally cover all employees without any qualifying period, and that they play a positive role in encouraging and building on agreed procedures with independent trade unions with beneficial effects on industrial relations. To date, however, only one such agreement has received approval, that applying to members of the EETPU whose employers belong to the Electrical Contractors' Association. The current view in the Department of Employment seems to be that, in order to obtain exemption, the agreed procedure must mirror almost exactly the statutory scheme for unfair dismissal. Those enterprises which have procedures which seem to come close to the requirements for exemption apparently believe that the price to pay in order to qualify is too high compared to the relatively small risk that an industrial tribunal will overturn a decision reached under the enterprise's non-exempt domestic disciplinary procedure. This in turn is partly due to the standard applied by industrial tribunals to dismissals. Since most decisions of domestic disciplinary bodies are "within the range of responses of a reasonable employer" they are upheld as "fair" by tribunals. If the standard were raised to one of "good industrial relations practice having regard to the interests of both the employer and the employee", the tribunals would have more scope for interfering with managerial decisions and it is then likely than employers would be more attracted by an arbitration alternative. The question whether or not the legal standard of unfair dismissal should be so altered falls outside our terms of reference, and is a matter on which opinions on our Committee are divided.

3.33 Our Committee is, however, agreed that the provisions of sections 65 should be modified so as to encourage contracting-out by approved agreed procedures.

(a) Responsibility for approving such procedures should be transferred from the Department of Employment to the Central Arbitration Committee (CAC), which should be given the duty of positively promoting exempt procedures.

(b) The CAC should have regard to the provisions of section 65(2)(d) which provides that the remedies under by the agreement must "on the whole be as beneficial as (but not necessarily identical with) those provided in respect of unfair dismissal" by the Act.

(c) There should be express provision to allow either the employers' side or trade union to terminate the agreement on giving reasonable notice in writing. This would encourage them to try exempted procedures as an experiment.

3.34 Some members of our Committee have come across cases in which individuals covered by an exempted agreement have complained that their trade union has failed or refused to put their grievance through the exempted agreed procedure. This is a matter of grave concern because it means that an individual can be denied the right to complain of unfair dismissal, which is available to all employees, by the act or neglect of one or both the parties to the exempted agreement. There is no explicit form of redress, although there may be the possibility of an application for judicial review or an action for breach of the contract of membership in the ordinary courts. We recommend that no contracted-out procedure should be approved unless the individual is able to put his or her case into procedure where the union has failed or refused to do so.

Enforcement of tribunal awards

3.35 In England and Wales, a tribunal award has to enforced through the county court. An application has to be made *ex parte* by filing an affidavit verifying the amount due and exhibiting a copy of the industrial tribunal's decision. The application is considered by a registrar who may then make an appropriate order. If the debtor fails to pay within the time specified, the order may be enforced by bankruptcy or winding-up proceedings, obtaining a charging order, attachment of earnings order, administration order, taking garnishee proceedings or executing against goods. This procedure is also available where a settlement has been recorded as a consent order specifying the amount to be paid. However, if the settlement merely constituted an agreement between the parties, it is necessary to sue on the agreement in the county court. In Scotland there is a far more expeditious method of enforcement. The person seeking to enforce the award simply obtains an extract of the award from the Secretary of Tribunals and instructs the sheriff officer to enforce it directly. (The sheriff officer is an officer of the court but operates as a private practitioner.) This procedure would not be possible in England and Wales without significant changes in county court practice.

3.36 Both the Warwick Study (Dickens, 1985, p.208) and the study by Leonard of the outcomes of successful sex discrimination and equal pay cases (Leonard 1987b), show that applicants experience considerable difficulty, delay and frustration in enforcing awards in England and Wales. In the latter study, nearly half of the successful parties reported difficulty and delay in getting the compensation paid by the employer. It is to be noted that an employee can obtain payment of a redundancy payment direct from the Redundancy Fund, on showing

that he or she has taken all reasonable steps to obtain payment from the employer. However, if a claim is made against the Secretary of State for other statutory payments, under EPCA s.122, it is necessary to show that the employer has become insolvent and that the employment of the employee has been terminated. We were informed of many cases in which small employers ceased trading and had insufficient assets to satisfy employee's claims. In these cases the employee had to take steps to wind up the company before a claim could be made against the Secretary of State.

3.37 We recommend that the tribunals in England and Wales should be given powers to collect the award from the debtor. This would be similar to the system in small claims courts. The debtor would have to pay the amount to the tribunal which would then pay it to the winning party (where appropriate after recoupement of unemployment benefit or social security benefit). This would not only help the winning party, but would reduce the administrative burden on employers who at present have to make two payments, one to the Department of Employment and one to the employee, in cases where recoupment applies.

3.38 The EA 1982, sched. 3, paragraph 7, amended the EPCA, sched. 9, by inserting a new paragraph 6A enabling the Secretary of State to make an Order providing that sums payable in pursuance of decisions of industrial tribunals shall carry interest at such rate and between such times as may be prescribed. This power has not yet been exercised, despite frequent judicial expressions of concern that employers can delay making payment for a considerable length of time, for example by lodging an appeal, with no financial penalty. In *Caledonian Mining Company Ltd. v Bassett* [1987] IRLR 165 at 168, Popplewell J described the position that the tribunal could not award interest on awards as "a blot on the administration of justice" and hoped that this "deplorable situation" would be rectified in the near furture. We recommend, as a matter of urgency, that the Government should make an Order under the relevant statutory provisions.

CHAPTER FOUR - CONSTITUTION AND EXPERTISE

Lack of expertise

4.1 Apart from their procedures, the other main justification for specialist industrial tribunals is their expertise in industrial relations and the handling of employee grievances. This is supposed to follow from their unique constitution. The legally-qualified Chairman may be outvoted on questions of law and fact by the two industrial members who are appointed because of their knowledge and practical experience. The same mixture of legal and industrial expertise is prescribed in the Employment Appeal Tribunal. This chapter examines a number of criticisms which have been made of the recruitment and lack of expertise of tribunals and the EAT, and proposes some important reforms in their constitution and in training. We recommend in particular the establishment of a two-tier Court and tribunal.

Chairmen of tribunals

4.2 The Chairman of tribunals must be a barrister, advocate or solicitor of not less than seven years' standing. In July 1987 there were 65 full-time Chairmen and 122 part-time Chairmen. Full-time Chairmen are appointed to the retiring age (72) and about 12 of them also sit, for 20 days or more a year, as Assistant Recorders or Recorders in the Crown Court. There have been a few cases of promotion to the Circuit Bench and at least two Crown Court judges sit as part-time Chairmen of Tribunals. In Scotland, five of the nine full-time Chairmen hold commissions as temporary sheriffs and sit in criminal and civil cases for up to 25 days annually. No one is now appointed as a full-time Chairman without first having served part-time. The part-timers are appointed for three years at a time in England and Wales and on an annual basis in Scotland. They are expected to sit for a minimum of 30 days and a maximum of 80 days a year. They are mainly solicitors in private practice, but there are also a number of barristers and advocates, some lawyers who have worked in the Armed Services, the Civil Service and public corporations and a few academic lawyers with professional experience.

4.3 Among the main criticisms which have been made of the relative lack of expertise of the Chairmen of tribunals are the following.

(a) Chairmen tend to come from social and professional backgrounds

which make them unsympathetic to the parties who appear before them.

(b) Chairmen, on appointment, often lack specific expertise in employment law and receive inadequate training for their task.

(c) Chairmen do not understand the need for informal procedures in tribunals and are too strongly influenced by habits learned in the ordinary courts, or are erratic and inconsistent in the procedures they adopt.

(d) Chairmen tend to dominate the industrial members, making those members feel that they are subordinates whose task is to assist the Chairman rather than to act as equal members.

(e) Women are underrepresented as Chairmen. In July 1987 there were only 6 full-time and 10 part-time women Chairmen of tribunals in England and Wales. In Scotland 2 of the 9 full-time Chairmen are women and there is one woman part-time Chairman who sits at least 100 days annually.

(f) There appears to be no ethnic monitoring, but, so far as is known, there is one black person who is a full-time Chairman of Tribunals, and no part-time Chairman from a black ethnic minority.

4.4 It has been suggested by some of the critics that there is no need for a legally-qualified Chairman of the tribunal. As long ago as 1967, a Ministry of Labour National Joint Advisory Committee report suggested that the representatives of employers and workers might take the chair in turn. The oldest form of labour court in Europe, the French *conseils des prud'hommes*, are presided over by a president elected alternately, for a year at a time, by employer and employee members respectively. Decisions are by majority vote; in the event of a tie (said to be rare) a professional judge from the local *tribunal d'instance* participates and has a casting vote. This may be contrasted with the situation in Italy, where *pretori* (career judges), many of them specialists in labour law, hear these cases without industrial members. In the Federal Republic of Germany the labour courts are, as in the United Kingdom, tripartite with industrial judges from nominees of employers and trade unions, but the professional judges are lawyers who make their career in the labour courts soon after graduation, and whose nomination has to be approved by a tripartite committee. (Fuller details of these and other countries will be found in Appendix 1.)

4.5 Our Committee believes that in the British context it would be a mistake to move away from the tripartite structure, with a legally-qualified Chairman. The Franks Committee (1957, paragraph 55) took the view that "objectivity in the treatment of cases and the proper sifting of facts are most often secured by having a legally-qualified chairman". The general trend of administrative law has been towards increased use of legal Chairmen in other kinds of tribunals and we can see no case for making an exception in the case of industrial tribunals. There is no guarantee that non-legal Chairmen will be any less legalistic; indeed lack of legal knowledge and experience might lead to more errors of law which would increase intervention by the courts and so add to legalism. Some knowledge of general legal principles and practice is essential to the interpretation of a complex body of legislation and to the fair conduct of adjudication.

4.6 Chairmen of tribunals could, however, do more to involve the members in decision-making. There is a great variation between the willingness of Chairmen to respect the expertise of industrial members. We recommend that Chairmen of tribunals should be given specific guidance to ensure that (a) the reasons of the industrial members (especially if they differ from those of the Chairman) are properly presented; (b) in the case of reserved decisions, the industrial members are given an opportunity to approve the reasons in draft where this can be done without causing undue delay in promulgating the decision; and (c) in appropriate cases, one of the industrial members is allowed to deliver the decision of the tribunal when it is orally announced.

4.7 We are also of the view that recruitment of Chairmen of tribunals could be improved. There are several part-time Chairmen who appear to have little or no previous experience of court or tribunal work. Most appointees still have little or no previous knowledge and experience of employment law and almost invariably lack industrial experience. There is now a growing body of legal practitioners specialising in this field from whom future Chairmen might be chosen. However, they might be deterred from applying for a number of reasons. First, they may not wish to specialise exclusively in industrial tribunal work. Secondly, they may be worried by the lack of financial incentives or promotion prospects. Both these deterrents might be reduced by a closer link being made between the Circuit Bench and the Chairmen of tribunals. We recommend that (a) preference should be given to candidates with previous experience in employment law, industrial relations and tribunal work and who have the ability to work as an equal with lay persons; and (b) suitably qualified practitioners should be encouraged to accept secondment for a period of say, five years, as full-time Chairmen at an appropriate stage in their careers; and (c) a career structure should be developed by encouraging the appointment of suitably qualified Chairmen as Assistant Recorders and Recorders or other judicial work, with the prospect of promotion, for example to the Circuit Bench.

4.8 There is a need for positive action to promote the appointment of more women and members of ethnic minorities as Chairmen of tribunals. This might be done by direct approaches to firms of solicitors and sets of chambers in which there are known to be women and black lawyers, encouraging applications. Where necessary, special training in employment law and tribunal practice could be arranged for these underrepresented groups (as allowed by the Sex Discrimination

and Race Relations Acts) so as to enable them to attain the necessary skills to meet the criteria we have specified in paragraph 4.7 above. We recommend that such positive action be taken.

4.9 A more radical approach would be to permit an alternative mode of entry to the present one which is based entirely on those with experience in private practice. This would be to recruit law graduates into a modified form of career judiciary. In the first stage of their careers, they could work as tribunal officers, for example carrying out the investigation functions we have recommended in paragraph 2.23. During this period, they would be expected to take specialist courses on employment law and industrial relations. Those who passed an examination and were considered suitable for a judicial career could then be appointed to an office, similar to that of Registrar in the county court, to deal with interlocutory matters and to assist the Regional Chairman of Tribunals. They would sit in with senior Chairmen, and those who were considered suitable would then be promoted to the position of Chairman of tribunals. The fear is sometimes express that this type of career judiciary would not be sufficiently independent-minded. The Italian experience, however, shows that it is possible to have a relatively young, specialist labour law career judiciary which is very independent of both employers and unions and also highly respected. This mode of entry would be attractive to a growing number of law graduates who have a special interest in industrial relations but who do not want to follow a conventional legal career, nor to be permanently tied to the executive or administrative grades in the civil service. It would also be likely to attract women who have had career breaks because of family responsibilities. The social base and the expertise of the presiding judicial officers would, over time, be greatly improved. We recommend that there should be an alternative mode of selection of Chairmen of tribunals along these lines.

4.10 Last but not least, there is clearly a need for more extensive training and specialisation. We have made proposals earlier (Chapter Three) for increased specialisation in discrimination cases, and there may be a case for specialisation in one or two other complex areas. The welcome innovation has been made in England and Wales, following earlier Scottish and Northern Ireland precedents, of providing initial training for all new part-time Chairmen of tribunals. Previously, the only training they received was to sit in for a few days with an experienced full-time Chairman. The training covers some general aspects of the judicial function, practical advice on the law of unfair dismissal and redundancy and the conduct of hearings and decision-writing. Another recent innovation has been to introduce refresher courses for full-time Chairmen on selected topics. The first of these in England and Wales was on racial discrimination. The industrial tribunals have recently been brought within the scope of the Judicial Studies Board. We welcome the recent steps towards increased training and specialisation and strongly urge the allocation of more resources through the Judicial Studies Board for regular training and refresher courses for all Chairmen of tribunals.

Industrial members

4.12 The Secretary of State appoints lay members from those nominated by a sponsoring body. On the employers' side these are: the Confederation of British Industry (CBI), the Retail Consortium, the Local Authorities Conditions of Service Advisory Board (LACSAB), the National Joint Councils for Local Authorities Services (Scottish Services), the Department of Health and Social Security (in respect of National Health Service Managers) and there is also an arrangement through which Chambers of Commerce submit nominations through the CBI. On the employees' side nominations came from the Trades Union Congress (TUC), the Federated Union of Managerial and Professional Officers (FUMPO) and the Managerial, Professional and Staff Liaison Group. According to the Department of Employment, the Secretary of State "looks for good candidates with practical experience of industrial relations who are capable of acting impartially in reaching decisions on facts presented to them" (*Employment Gazette*, Mar/Apr 1986, p.117). Appointments are made for a three-year period and members can be reappointed at the Secretry of State's discretion. Occasionally, members are not reappointed because of adverse reports on the way in which they have discharged their duties. Normally, new members are appointed over the age of 60 only when other suitable candidates are not available, and must retire before reaching the age of 69.

4.13 The aim is to have a good spread of members on the panels in terms of age, sex, industry, occupation, public sector, private sector, size of firm etc. However, in practice this has not been achieved. There is serious underrepresentation of women. In July 1987, only 441 of the 2,128 panel members were women (21%), the same proportion as reported by the EOC in 1977 (EOC, 1978, p.27). At the end of 1986, only 31 lay members came from ethnic minority groups (see paragraph 3.16 above). There are also relatively few young members. The Warwick Study (Dickens, 1985, p.57) found that two-thirds of the union nominated members in their survey were over 56 and only 6% were aged below 45. A similar distribution was found on the employers' panel. The same Study found that 37% of employee lay members were full-time union officials, 30% were in non-manual occupation, 27% in manual occupations and 5% were retired. On the employer side, 38% were personnel or industrial relations managers and 6% directors of personnel, but 20% were directors with non-executive responsibilities and only 4% were production-related managers; 6% were self-employed and 19% were retired. It has to be pointed out that in constituting a particular tribunal no attempt is made to allocate industrial members to cases where their background and experience would be most relevant. Thus as Dickens points out, a school teacher and the director of an engineering firm may sit on a case about the dismissal of a farm labourer, shop assistant or construction worker.

4.14 In our view the selection process needs to be improved. The system of nomination by sponsoring organisations has failed to provide panels which are fully representative of industry. It has failed abysmally to provide a sufficient

number of women and black members. Moreover, the nomination process is not seen to be fair by those who wish to put their names forward. It is wrong in principle that appointment to a judicial post should be within the patronage of a particular organisation. The appointments process should be made more open, accessible and democratic. It is also wrong that judicial appointments should be controlled by the Department of Employment. This latter point is one to which we shall return below paragraph 4.29, when we propose changes in the administration of tribunals.

4.15 We propose that the appointments process should be made more open, accessible and democratic by (a) requiring the appropriate government department to advertise widely, particularly among underrepresented groups such as women and ethnic minorities and young persons, inviting applications; (b) vetting such applications in consultation with representative organisations; and (c) interviewing short-listed candidates by a regional appointments board including representatives of the tribunals and relevant organistations as well as some independent members.

4.16 The training of lay members could also be improved. At present new members are given three days of training, consisting of lectures and seminars and sitting in on hearings. They all receive IDS Brief, which surveys recent case law and legislation, twice each month, and official guidance leaflets. The amount and quality of training received by experienced members varies greatly between Regions. Usually there are two half-days a year, sometimes with seminars conducted by Chairmen of tribunals and occasionally by outside speakers. We recommend that there should be a national "core" curriculum for training of industrial members, and that experienced tutors should be used for this purpose. Those who sit in specialised jurisdictions (e.g. discrimination) should receive special training.

Employment Appeal Tribunal

4.17 Since the tribunals were established there has always been an appeal on a point of law, but not a question of fact, to an appellate court. Originally, these appeals were to a Divisional Court of the Queen's Bench Division. Then the Industrial Relations Act 1971 replaced this with an appeal in most cases to the National Industrial Relations Court. When that Act was repealed, appeals went for a transitional period to a single judge of the High Court and then, from March 30, 1976 to the Employment Appeal Tribunal. The EAT hears appeals on points of law arising out of most of the employment law jurisdictions of the industrial tribunals. It also hears appeals, in some cases on questions both of fact and law, from decisions of the Certification Officer relating to trade unions. The EAT has an original jurisdiction to assess compensation where a successful complainant has not been readmitted to a trade union under the provisions of the Employment Act 1980, s.5. Appeals under some tribunal jurisdictions, e.g. health and safety at work, docks and harbours, industrial training levies and certain rights to compensation for loss of office still go to a single judge of the Queen's Bench Division under the provisions of the Tribunals and Inquiries Act 1971, s.13. We have been unable to discover any reason for leaving these matters within the jurisdiction of the High Court. The industrial members of the EAT could play just as significant role in these appeals as do the members of industrial tribunals who hear the cases at first instance.

4.18 The EAT is a superior court of record and it may sit anywhere in England, Wales and Scotland. It consists of nominated High Court and Court of Session Judges (one of whom is President) and industrial members. The latter are appointed by Her Majesty on the joint recommendation of the Lord Chancellor and the Secretary of State, and they must be persons who have special knowledge or experience of industrial relations, either as representatives of employers or as representatives of workers. Each appeal is heard by a judge and two appointed members. (There is provision for four appointed members to sit, which has been utilised on at least one occasion.) The composition of the EAT is open to a number of criticisms.

(a) Apart from the President, the nominated High Court and Court of Session judges sit only part-time in the EAT, spending the remainder of their time in other Divisions. Most of them have no previous knowledge and experience of employment law and industrial tribunals. None of them in England and Wales has sat as a Chairman of tribunals. (In Scotland, both former Presidents of Industrial Tribunals were promoted to the Court of Session and have sat as Scottish EAT judges.) Although the President has the opportunity to acquire expertise, successive Presidents have held office for relatively short terms of about three years each.

(b) The appointed industrial members have a great deal of experience at senior levels of industry and trade unions, but few of them have sat as industrial members of industrial tribunals and so lack first-hand experience of the process of fact-finding and evaluation in tribunals.

(c) The industrial members receive no form of training, and although it is their task to decide questions of law (they may and occasionally do outvote the judge) they receive no regular information from the EAT on employment law. This appears in some cases to reduce their role to one of reliance upon the judge.

4.19 One result of these weaknesses has been to produce some decisions which have shown remarkable ignorance of basic principles of employment law, which have had to be corrected by the Court of Appeal. One recent example is *Marley v Forward Trust Group* [1986] IRLR 43, reversed by the Court of Appeal [1986] IRLR 369, in which the EAT misunderstood what Lawton L.J. described as the "long

judicial history" of the incorporation of collective agreements into contracts of employment. In specialised fields, such as discrimination law, this has been particularly noticeable. Under the Presidencies of Sir Raymond Phillips, Sir Gordon Slynn and Sir Nicholas Browne-Wilkinson, there was a considerable degree of specialisation with the President himself presiding in most appeals in discrimination cases. This played an important role in developing a relatively clear and consistent body of interpretation. However, since 1983, cases have been assigned to a number of part-time judges who have no expertise in this field. Although they may have the assistance of specialist counsel, particularly if the EOC or CRE are backing the appeal, this is by no means the usual case. There is also no regular practice of having a member of the same sex or ethnic group as the applicant in discrimination cases.

4.20 At the same time it can be argued that insufficient use has been made of the expertise of industrial members because of the constraints which the Court of Appeal has placed upon the EAT in laying down guidelines in unfair dismissal cases. As has been pointed out, the EAT can intervene only if there is an error of law by the industrial tribunal. This occurs where (1) the tribunal has misdirected itself in law, or misunderstood or misapplied the law, e.g. the construction of a statute; (2) there is no, or no adequate, evidence to support the tribunal's findings of fact, or (3) the decision is perverse in the sense that no reasonable tribunal could have reached the decision which it did. Nonetheless, following the lead given by Sir John Donaldson as President of the National Industrial Relations Court, in its early years the EAT frequently laid down general guidelines about unfair dismissal, particularly in relation to procedural fairness. These guidelines had the advantage of creating a measure of consistency in tribunal decisions, enabled personnel managers and trade union officials to take action to avoid unfair dismissal, and made the settlement process easier. The disadvantage of the guidelines was that they encouraged legalism in the tribunals. Representatives began to weigh down the tribunals with copious reference to decided cases which turned essentially only on the question of "reasonableness". There was strong temptation to appeal against decisions solely on the ground that one of the guidelines had not been followed, although the EAT itself frequently stressed that the guidelines were simply meant to help tribunals and were not binding precedents. From 1978 onwards, the Court of Appeal took a firm line against the development of guidelines, and decided that most of the issues which the tribunals had to determine (e.g. fairness, constructive dismissal etc) are questions of fact not subject to appeal. The EAT attempted to resuscitate a few guidelines in *Williams v Compair Maxam* [1982] IRLR 83 and *Grundy v Plummer* [1983] IRLR 98 (Sir Nicolas Browne-Wilkinson P. presiding) in which it was said that the wide industrial relations experience of the industrial members of the EAT could be used to give valuable non-binding guidance on fair industrial relations practice. However, the two subsequent Presidents of the EAT have reasserted, in the light of Court of Appeal decisions, that no guidelines are to be laid down, and that the appellate role is to be severely curtailed. This applies not only to questions of unfair dismissal, but also to such matters as the "justification" of indirect sex or racial discrimination.

4.21 The result of this reduction of the appellate function and the abandonment of guidelines has been to devalue the EAT. It has in effect condoned a great degree of inconsistency between tribunals hearing similar cases in different parts of the country. Little practical guidance can now be obtained from EAT decisions by industrial relations practitioners who wish to avoid facing an industrial tribunal. This prompts the question whether the EAT is still necessary. If there were no EAT, appeals would go to a single judge of the Queen's Bench Division, under the Tribunals and Inquiries Act 1971, s. 13. Alternatively, legislation could be introduced to allow an appeal directly to the Court of Appeal (as with county courts). Both these courses are open to serious objections. First, it is doubtful whether the High Court or Court of Appeal could deal with appeals as quickly as the EAT now does. These courts would certainly not welcome being flooded with industrial tribunal appeals and a considerable increase in judge-power would be necessary. Experience in Northern Ireland, where appeals go directly from industrial tribunals to the Court of Appeal by way of case stated, indicates that this procedure increases complexity, cost and delay. Secondly, the EAT is still a useful weeding-out device, and this can be better done by a body with industrial relations expertise. The single judge or Court of Appeal would be even more open to the objection of lack of specialisation and training than the present EAT.

4.22 A proposal is sometimes made in the opposite direction, namely that the role of the EAT should be extended, so as to take full advantage of the industrial members' expertise. This could be done by giving the EAT power to hear appeals on questions of fact as well as law. The arguments in favour of this are twofold. (1) The distinction between an appeal on law and an appeal on facts is artificial and a lawyer can often dress up a question of fact as one of law. (2) The industrial members would be able to utilise their experience more directly. The argument against this is that if the EAT heard appeals on questions of fact it would essentially be rehearing tribunal cases (many of which might be made the subject of appeals) without the benefit of seeing and hearing the witnesses. This would undermine the basic aims of the tribunal system to provide speedy, inexpensive and informal justice. The distinction between fact and law is a workable one. The EAT operates a satisfactory filter process to weed out appeals which do not raise a genuine question of law.

4.23 We accordingly recommend:

(a) The Employment Appeal Tribunal (or its replacement see below, paragraph 4.27) should be retained.

(b) Appeals should continue to be only on questions of law.

(c) These appeals should include those from jurisdictions which presently result in appeals to a single judge in the High Court.

(d) The industrial members should receive training and regular information from the EAT on legal matters.

(e) Guidelines on good industrial relations practice should be embodied in regularly revised ACAS Codes of Practice or guidelines, which industrial tribunals may take into consideration when determining relevant issues.

A two-tier structure of court and tribunal?

4.24 A number of strands in this Report point in the direction of restructuring the industrial tribunals and the EAT so as to create a single integrated system with an upper-tier (which we shall call the Industrial Court) and a lower-tier (which we shall call the industrial tribunal). The upper-tier court could consist of a President and a number of senior and experienced full-time and part-time Chairmen of tribunals and appointed industrial members, most of whom would have had experience as industrial members of tribunals. The Court would have original jurisdiction in certain matters (see below) and appellate jurisdiction from tribunals in place of the present EAT.

(a) There is a need to classify those cases which are suitable for an adversarial approach and those suitable for an investigative approach. The former could be assigned to the Court and the latter to the tribunal. (paragraph 2.12 and 2.13.)

(b) Legal aid needs to be available for cases classified as suitable for adversarial proceedings. Legal aid could be made available for the Court, but not the tribunal (paragraph 2.19).

(c) Some disputes arising out of the contract of employment could most suitably be assigned to the Court (paragraph 3.11).

(d) There is a strong need for a cadre of Chairmen and members who, by virtue of their experience and training, are able to take the most complex cases and those in specialist jurisdictions (e.g. some discrimination cases) (paragraph 4.10). By assigning these cases to the Court, they would come before the most senior and experienced Chairmen and members. This would reduce the number of appeals.

(e) There would be scope for a career structure for Chairmen, thus encouraging able young solicitors and barristers to seek appointment and also enhancing the career judiciary mode of entry which we advocate (paragraph 4.9).

(f) Appeals could be heard from tribunals by the upper-tier Court which would have greater expertise than the present EAT (paragraph 4.18).

(g) The Court would have the authority and expertise to develop a consistent body of case law. This might include non-binding guidelines on fair industrial relations practice, of the kind which the EAT attempted to develop in *Williams v Compair Maxam* (paragraph 4.20 above).

(h) The orders of industrial tribunals could be enforced through the Court.

(i) There could be a rational allocation of judicial skills and time, accommodation, staff and finance between the two tiers. We envisage that the Court would be able to sit anywhere in England, Wales and Scotland and would regularly sit in regional centres. (A similar structure of Court and tribunal should be considered for Northern Ireland.)

4.25 We envisage that all matters which fall within the jurisdiction of the Court and tribunals would start in the same way by originating application to the Central Office of Industrial Tribunals. The parties could apply either before or after the preliminary inquiry stage (paragraph 2.22) for the case to be assigned to the Court, or a Chairman of tribunals could so decide of his or her own motion. The Court would have the power, on application or of its own motion, to transfer a case back to the tribunal where such a proceeding appeared to be more suitable. There would be a general code of procedure for handling cases. There would be a single management system of Court and tribunal.

4.26 The Chairmen of tribunals and lay members would be appointed in the ways proposed above (paragraphs 4.7 and 4.15). The judges of the Industrial Court would be appointed by Her Majesty on advice of the appropriate Minister. The President of the Court would also be head of the tribunals. The Court, like the present EAT, would be a superior court of record. The Court would have both an original jurisdiction (above paragraphs 4.24 and 4.25) and an appellate jurisdiction from industrial tribunals. It would normally sit in a panel of 3 members (legal presiding judge and two industrial members), but there could be a full court of 5 members in respect of legal issues of general public importance.

4.27 The question arises as to what further stages of appeal (if any) there should be from decisions of the Court. Since this will be a specialist Industrial Court, developing an autonomous body of employment law, some members of the Committee believe that there is a strong case for restricting the right of appeal. A majority of the Committee, however, take the view that so long as the Court does not have exclusive jurisdiction in all labour disputes it seems inevitable that some overall appellate structure located within the ordinary courts will be required. They recommend that there should continue to be a right of appeal, with leave, on questions of law to the Court of Appeal (Court of Session, Inner House in Scotland) and the House of Lords.

Administration

4.28 At present industrial tribunals fall under the Department of Employment. The Lord Chancellor's Department (in England and Wales) is responsible only for the appointment of Chairmen of tribunals. This is undesirable for several reasons.

(a) The tribunals have come in the eyes of the public and politicians to be associated with the policy of the Department of Employment, and this has had an adverse affect on their status as independent judicial bodies. For example, there has been pressure to make various changes in procedure in order to satisfy political demands of the government rather than in terms of efficiency and justice.

(b) The budget of the tribunals falls under that of the Department of Employment and this, too, subjects the tribunals to an unacceptable degree of political control.

(c) The managerial efficiency of the tribunals would be improved by placing them under one Department of State rather than having one Department running administration and another judicial appointments.

(d) The Department of Employment can itself be a litigant before the tribunals (e.g. in redundancy rebate and insolvency cases).

4.29 The administration of the tribunals by the Department of Employment is a legacy of their origins as administrative tribunals. Now that they have become an established part of the system of civil justice it would be appropriate for them to fall under the Lord Chancellor's Department or, if we ever have one, a Ministry of Justice, and in Scotland the Scottish Courts Administration. We so recommend.

APPENDIX ONE - NOTES ON FOREIGN LABOUR COURTS*

Procedures for the resolution of disputes over rights in the labour-management context generally fall into one of the following three types:

(a) Labour courts
(b) Ordinary courts
(c) Arbitration

Some examples are given below.

1 Labour courts

(a) *France* The *conseils des prud'hommes* are essentially bipartite, the *conseillers* being elected representatives of employers and employees in equal numbers. Each chamber is presided over by a president elected alternately, for a year at a time, by employer and employee members. Decisions are by majority vote; in the event of a tie (said to be rare), a professional judge from the local *tribunal d'instance* participates and has a casting vote. Unions complain that the employee members often compromise their position in the face of employer opposition and accept the predominantly conservative views of the regular judiciary. The *conseils* deal with all disputes concerning individuals arising from a contract of employment. In practice they tend to interpret collective agreements, since these have a normative effect on individual contracts. Unions have a right to intervene, with the consent of an employee, where such a question of interpretation arises; unions may also join in the proceedings where there is possible prejudice to the collective group it represents. Appeals (where the amount claimed is over a prescribed sum) and requests for judicial review go to the ordinary courts - the social chamber of the *cours d'appel* and social division of the *Cour de Cassation*. The *conseil* is required to go through a conciliation procedure; the conciliators may be the very persons who later adjudicate and some commentators say this encourages settlements by giving parties a chance to evaluate their chances of winning or losing. If the case is not settled at conciliation or withdrawn it goes forward to a full hearing. The case may be investigated before hearing by two *conseillers*, one employer

*These notes have been prepared by the Chairman of the Committee.

and one employee, specially appointed as investigators, who may make inquiries at the place of work, thus easing the burden of proof for the employee. Their recommendations may be accepted by the full *conseil* consisting of two employer and two employee members, without a formal hearing. This investigatory process is used only for complicated cases where the full *conseil* might otherwise spend a long time establishing the facts. Van Noorden (1980) reports that legalism is regarded as being as much a problem in France as in Britain, largely because of the complexity of the substantive law, and there is much delay in the system (up to 2 years). Legal aid is available; legal representation is the norm among employers but is not common among employees who tend to come from small non-unionised enterprises. The *conseils* generally have power only to recommend but not to order reinstatement. Only in cases of *délégués syndicaux* and *délégués du personnel* can reinstatement be ordered with a criminal sanction for non-compliance, but such orders are rare.

(b) *Belgium* Before 1970 there was a multiplicity of courts, commissions and arbitral bodies concerned with labour and social security adjudication. A Royal Commission was set up in 1958 to propose a simpler, speedier and less costly process. The Commission was opposed to completely autonomous labour tribunals. After much discussion in parliamentary committees and political consultations, a compromise was found. The labour tribunals would enjoy a wide autonomy within the judicial system. The system, since 1970, consists of two tiers. The lower tier is a labour tribunal (*arbeidsrechtbank*) in each of the 26 judicial arondissements, with separate chambers for blue-collar and white-collar workers. The tribunal for each case consists of a career judge (*beroepsrechter/juge professionel*) as chairman, and two "social judges" (*rechters in soziale zaken/juges sociaux*) appointed by the Minister of Labour, one on the nomination of representative trade unions, one on the nomination of representative employers' organisations. The social judges are appointed for 3 years, subject to renewal, and sit on a part-time basis. Each judge has an equal vote, and in practice most decisions are unanimous. The tribunals' jurisdiction covers all "social law" including (a) all individual disputes in connection with employment contracts and training (in practice most concern termination of employment); (b) disputes about compensation for accidents at work and industrial diseases; (c) social security of workers and the self-employed; (d) disputes concerning works councils and safety committees; (e) disputes about administrative sanctions in social matters. Prosecutions for "social criminal law" (e.g. social security fraud, offences by foreign workers without permits, health and safety offences) are heard in the criminal courts. (As much as 80% of Belgian social law carries criminal sanctions). The upper tier is a

Labour Court (*Arbeidshof/La Cour*), similarly composed to the tribunal, which sits in 5 centres. Appeals go to this Court on questions of fact and law. In practice about 20–25% of decisions are the subject of appeals. There are limited possibilities for judicial review on grounds of gross error of law to the *Cour de Cassation*. Since the tribunals and Court are part of the judicial system, hearings take place in ordinary court buildings and the lawyers (including the social judges) wear robes. The procedure is inquisitorial. The tribunal or Court receives a full dossier, prepared by the parties (with the assistance of the *auditeur* in social security cases, see below). Most parties are legally represented (workers by trade union lawyers – 70% of workers are unionised, and non-unionised workers usually engage a lawyer of their own). At every tribunal and Court there is an *auditeur*, an independent public officer, whose functions include: (i) undertaking preliminary investigation to help the claimant in social security cases (e.g. to obtain the workers' social security records which might otherwise be inaccessible to the worker because of the "privatised" institutions responsible for social security); (ii) prosecuting in social criminal cases; (iii) advising the tribunal or Court; (iv) instituting appeals or review where the tribunal has acted contrary to law.

(c) *Sweden* The Labour Court (*Arbetsdomstolen*) began its activities on 1 Jan. 1929. This was seen to be a logical necessity following the incorporation of collective agreements into the legal system by the Act on Collective Agreements of 1928. It was widely believed that the ordinary courts were unsuited to the task of judging disputes over collective agreements. Since its inception the Court has been tripartite in character. Under the Act on Litigation in Labour Disputes of 1974 (which replaced the Law of 1928) the Court consists of (1) the officials; (2) the employer members; and (3) the employee members. For trials, 7 people normally sit in court; a chairman, 2 other officials, 2 employer members and 2 employee members. The chairman and vice-chairman have to be legally-trained and have judicial experience. The other official members must have "specialised knowledge of conditions on the labour market". The employer members are appointed on the recommendation of employers' organisations and the employee members on the recommendation of the trade unions. In the period 1929–74, officials dissented in 6%, employer members in 12% and union members in 15% of all decisions. The number of employee dissents dropped sharply to about 10% in the mid-1960's, but in the 1970's steadied at just under 20% (Schmidt, 1977, p.40). Under the 1974 Act a case goes exclusively to the Labour Court when the dispute concerns the relationship between parties to a collective agreement or relates to conditions of service of an employee who is a member of a trade union. A dispute between an

unorganised employee and his employer goes to an (ordinary) District Court in the first instance, but with an appeal to the Labour Court. The decisions of the Labour Court are final. A new trial may be ordered by the Supreme Court but only in the event of "gross error" or similar special cirumstances. Arbitration remains as an alternative procedure which can be agreed upon either in a particular dispute or for future disputes generally. It appears that most disputants prefer the Labour Court to arbitration. This is because of the Court's close links with the employers' organisations and trade unions, as well as the fact that its procedures are at least as speedy and inexpensive as arbitration, and the parties do not have to risk a dispute about the appointment of arbitrators. The collective organisations dominate the procedures of the Court. They have the right to represent members in all kinds of disputes. Should a union refuse to prosecute a member's case, the member may do so him/herself. A plaintiff who brings an action against a union member must also join the union as a party. A claim may not be tried until negotiations have taken place in accordance with the procedure laid down in the Act on the Joint Regulation of Working Life or in a procedural agreement which may be substituted for the Act's rules. The Court can grant prohibitory or mandatory injunctions but only if this is of "substantial importance" to one of the parties. Declaratory judgements can be sought in cases which are of importance as precedents. The procedure is relatively simple. The plaintiff's written application and the defendant's reply are exchanged after which one or more oral hearings are held. There is an informal pre-trial hearing to facilitate last-minute settlements. Decisions are often reasoned in considerable detail, but in a language comprehensible to those who are not legally trained. The decisions of the Court have played an important part in shaping the basic principles of Swedish Labour Law.

(d) *FR Germany* The labour courts are tripartite, each panel of the local *Arbeitsgerichte* and appellate *Landesarbeitsgerichte* consisting of two lay judges appointed by the Minister of Labour on nomination of employers' and trade union bodies, and one professional judge. The Federal Labour Court (*Bundesarbeitsgericht*) has multiple divisions, each with two laymen (who act as impartial judges) and three professional judges. The professional judges make their career in these courts soon after graduation, and enjoy life tenure after a 4-year probationary period. A nomination for labour court judgeship has to be approved by a tripartite committee. The courts have exclusive jurisdiction over both individual and collective disputes. Reinstatement of unfairly dismissed employees is rare. The courts have a statutory obligation to seek settlements by compromise, throughout the proceedings. The first oral pleas are made before the chairman, sitting without laymen for this

purpose, at a session designed to achieve settlement. The chairman discusses all aspects of the case with the parties 'under free consideration of all the circumstances'. She/he has broad discretionary power to develop the facts but may not investigate anyone under oath at this stage. If conciliation fails, about 3 months usually elapses before the full hearing (only about 10% of cases go to final decision). About 45% of these decisions are appealed against on fact or law. According to Blankenburg and Rogowski (1985), 50% of all plaintiffs win their cases in final judgments at trial level (compared to 27–30% in industrial tribunals). The procedure requires both parties to formulate their evidence and arguments in written briefs, which are studied by the judge who chairs the case and are sent to the opposing side for a written response. In this way a file is built up based on written exchanges. The judge takes the initiative in structuring the issues and arguments; the judge tends to be the most active participant in the courtroom, asking questions of fact and of law, and during the hearing may (repeatedly) propose terms for settlement shifting his role from judge to mediator or arbitrator. The lay members tend to play a smaller role both in court and in chambers than the professional chairman.

2 Ordinary courts

(a) *Italy* Labour disputes fall under the ordinary civil courts in Italy because article 102 of the Constitution forbids special courts. There are no significant demands for special labour courts, according to Treu (1977), because 'the ordinary civil courts, and in particular the *pretori* (usually young and more open-minded judges) have been seen to handle efficiently and competently the growing number of often very delicate labour disputes...' The *pretori* (career judges) have general first instance jurisdiction in all labour disputes in the private sector and these disputes are customarily assigned to one or more *pretori* in each local office (eg in Milan about one-third of the *pretori* hear labour disputes exclusively). Appeals on fact or law involving a minimum amount are heard by the *tribunale* (a panel of three professional judges), with a further appeal on questions of law only to the Supreme Court (*Corte di cassazione*). The proceedings before the *pretori* are designed to increase speed, informality and accessibility and differ significantly from ordinary civil proceedings. In theory, the maximum allowable period between submission and decision is 60 to 70 days; in practice, very few offices have enough judges to achieve this. The *pretori* have extensive investigative powers and may gather evidence independently of the parties, eg they can call additional witnesses, order 'free interrogation' of the parties, order inspection of the work place and ask for written or oral representations from union representatives. Oral evidence prevails over written evidence. Labour cases are exempt from

the usual taxes imposed in other cases. The parties have to pay their attorney's fees and costs are generally awarded against the loser. The worker usually has legal assistance from a trade union. There are tripartite conciliation commissions which seek to achieve the settlement *inter alia* of rights disputes under collective agreements, and settlements under this procedure can be enforced immediately by decree of the *pretori*.

(b) *Netherlands* All civil disputes concerning the contract of employment, collective agreements and strikes are dealt with in the ordinary courts. There are no labour courts or administrative boards, although in the case of termination of employment the Director of the District Labour Office has to decide whether or not to consent to termination by the employer, a role which in practice is the functional equivalent of the conciliation role of ACAS. There are 62 lower courts (*kantongerechten*), 19 district courts (*arondissementsrechtbanken*), 5 courts of appeal (*gerechtshoven*), and the Supreme Court (*Hoge Raad*). A lower court judge sits alone as the court of first instance in all disputes connected with the contract of employment or collective agreements, irrespective of the amount of the claim. There is an appeal to the district court, consisting of three professional judges. Decisions of all courts are subject to cassation (judicial review only on grounds of gross error of law). The *Hoge Raad* has, through cassation, established important rules in labour law providing guidelines (eg the liberal decision of 30 May 1986 on the legality of "political" strikes in the Netherlands Railway case). Although the judicial procedures have been criticised on grounds of delay and formality, there is no evidence of a growth of grievance procedures in collective agreements to provide an alternative. Nor does there appear to be any pressure from employers' organisations or trade unions for a system of labour courts.

3 Arbitration

Grievance arbitration has been extensively developed in the United States, where about 95% of all collective agreements in the private sector include some provision for arbitration by an independent third-party as the last stage of the agreed grievance procedure. Only cases that are not settled by negotiation proceed to arbitration. The employer and union usually have full-time officers to deal with grivances. They choose the arbitrator, either from those known to them or from lists submitted by bodies like the Federal Mediation Service or the American Arbitration Association (AAA). At the hearing, the employer is generally represented by a specialist lawyer or a member of the personnel staff; unions are frequently represented by a specialist lawyer. The employer and union share the arbitrator's fee and the cost of the hearing. The parties agree to accept the arbitrator's decision as final and binding and the award is legally determined by the parties themselves, through the collective agreement and usually covers a wide range of grievances in addition to unjust discharge. About one-third of agreements contain procedural rules governing the hearing, and most of the remainder follow the AAA procedural rules. Strict rules of evidence are rarely applied, but according to Aaron (1986, 71), most arbitrators 'seem to be aware of and to give some consideration to the policies underlying the exclusion of hearsay testimony and the parol evidence rule in judicial proceedings'. The arbitrator is under no duty to give reasons for his decisions unless the parties agree that he should do so. Aaron reports (1986, 71) that 'the increased employment of lawyers in arbitration has also led to the greater use of pre-hearing and post-hearing written arguments (briefs) and of verbatim transcripts of arbitration proceedings'. Arbitrators have power in most states to subpoena witnesses, administer oaths and examine witnesses. The procedures are adversarial. The main strengths of the system are (1) its essentially voluntary nature and flexibility, allowing the parties to make it as formal or informal as they wish; (2) the remedies, which almost always include reinstatement with back pay of employees found to have been unjustly discharged. The main weaknesses are (1) workers in enterprises where there is no collective bargaining representative (over 80% of the US workforce) have no protection against unfair treatment and unjust discharge; (2) even where there is a collective bargaining agent, the individual has less access to procedures than in labour court countries – the union 'owns' the grievance and controls the proceedings and individuals or groups in bad favour with the union face many procedural and evidential obstacles in suing either the union or employer or both for breach of the collective agreement or violation of the duty of fair representation; (3) the costs to the parties are relatively high, and there are long delays (an average of 244 days from filing of grievance to award in 1980).

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