SELWYN'S
LAW OF EMPLOYMENT

Eighteenth Edition

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OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
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Fifteenth edition 2008
Sixteenth edition 2010
Seventeenth edition 2012

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2014933489

ISBN 978–0–19–968155–6

Printed in Italy by L.E.G.O. S.p.A.

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The Institutions of Employment Law

Advisory, Conciliation and Arbitration Service

1.1 The Advisory, Conciliation and Arbitration Service (ACAS) was placed on a statutory basis by the Employment Protection Act 1975 and continued by virtue of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A, s 247). It is charged with the general duty of promoting the improvement of industrial relations. Its work is directed by a Council, which consists of a chairman and up to nine other members appointed by the Secretary of State. Three of these are to be appointed after consultations with employers' organisations, three after consultation with workers' organisations, and three 'neutral' (usually academic) appointments are usually made. Additionally up to three deputy chairmen may be appointed. The Secretary of State may appoint two further members of the Council, after consultation with both sides of industry. Currently, the Council has 12 members. The appointments will be initially for a period of five years, and may be renewed for a further period (TULR(C)A, s 248).

1.2 ACAS will appoint its own staff, including a secretary, and will also provide staff for the Certification Officer and the Central Arbitration Committee. Although it will perform its functions on behalf of the Crown, it shall not be subject to any directions from any minister as to the manner in which it is to exercise any of those functions. It is this complete independence from government control which is a distinguishing feature of ACAS. It will make an annual report on its activities and those of the Central Arbitration Committee to the Secretary of State, which will be laid before Parliament and published.

Whenever it thinks appropriate to do so, ACAS may charge a fee for its services, and also the Secretary of State may direct ACAS to charge fees, either at a full economic cost or a specified proportion or percentage of the economic cost. However, ACAS must notify the person concerned that a fee may or will be charged (TULR(C)A, s 251A).

1.3 The function of ACAS can be examined under the following headings:

A. **Advice**

1.4 ACAS may, on request or otherwise, give employers, employers' associations, workers and trade unions such advice as it thinks appropriate on matters connected with or likely to affect industrial relations. General advice on this topic may also be published (TULR(C)A, s 213). ACAS has produced a number of Advisory Booklets and Advice Leaflets on a wide range of topics with the aim of giving advice to employers and employees about employment rights generally.

B. **Conciliation**

1.5 Where a trade dispute exists or is apprehended, ACAS may offer its assistance to the parties, either on its own volition or at the request of any party, with a view to bringing about a settlement. This may be achieved by conciliation or other means, and by the appointment, if necessary, of someone outside ACAS whose assistance may be used. Due regard will be had to the desirability of encouraging the parties to use any appropriate agreed procedures (TULR(C)A, s 210).

If there is a dispute over union recognition, ACAS may be invited to use its conciliation role. At the request of both parties, it may hold a ballot of workers involved in the dispute, and/or ascertain the strength of union membership of such workers. However, any such request may be withdrawn by either side, whereupon ACAS shall cease to take any further steps in the matter (TULR(C)A, s 210A).

1.6 It should be noted that for conciliation purposes, the definition of 'trade dispute' is the old definition (based on the Employment Protection Act 1975), now contained in TULR(C)A, s 218, not the more restricted definition (based on the Trade Union and Labour Relations Act 1974) now contained in TULR(C)A, s 244. The effect is to give ACAS a wider conciliation brief.

1.7 Conciliation officers will also be appointed for the purpose of settling by conciliation certain matters which are, or could be, the subject of proceedings before an employment tribunal under any legislation, whenever passed (TULR(C)A, s 211), provided the relevant legislation so indicates (see Employment Tribunals Act 1996, s 18).

1.8 The Enterprise and Regulatory Reform Act (ERRA) 2013, ss 7–9 introduced a further type of individual pre-trial conciliation scheme from April 2014, by inserting ss 18A and 18B to the Employment Tribunals Act 1996. The aim of this 'Early Conciliation' scheme is to reduce the number of employment tribunal cases, and extending the former pre-claim conciliation system, which was very successful.

A person who wants to make an employment tribunal claim is therefore obliged to contact ACAS first, by submitting an 'Early Conciliation' form giving basic details. ACAS will then contact the claimant to obtain further details and offer conciliation. If this is accepted, then ACAS will take steps to resolve the matter within one month. If the matter is not resolved, or the parties refuse conciliation, then ACAS will issue a certificate to the claimant. The claimant will not be permitted to make a claim to the tribunal without this.

Submission of the Early Conciliation form will 'stop the clock' on the time limit on submitting a claim (see para 20.6), and the clock will restart when the certificate is issued by ACAS.

In practice, a large number of claims made to employment tribunals are disposed of as a result of the intervention of the conciliation officer. The majority of these will be settled on the basis of the employer making some financial payment to the claimant, and the rest will be withdrawn or a private settlement reached.

1.9 Anything communicated to the conciliation officer in connection with the performance of his functions shall not be admissible in evidence in any proceedings before the tribunal without the consent of the party who communicated it. So far as dismissals are concerned, he shall try to promote the re-engagement or reinstatement of the claimant by the employer or by a successor or associated employer on terms appearing to him to be equitable or, if this is not possible, to try to promote a settlement on the sum to be paid by way of compensation. Apart from certain specific instances (see para 20.45), it is not possible for a person to contract out of his statutory rights, and any agreement to this effect is generally void, but this rule does not apply to any agreement reached through the

intervention of the conciliation officer, and any such settlement agreed between the parties will be legally binding (Employment Rights Act 1996 (ERA), s 203(2)(e)).

1.10 In *Clarke v Redcar and Cleveland Borough Council,*[1] the EAT restated the principles which guide the conciliation process.

(a) ACAS officers have no responsibility to see that the terms of the settlement are fair on the employee.

(b) The expression 'promote a settlement' requires a liberal construction which will enable the officer to take such action as is appropriate in the circumstances of the case.

(c) ACAS officers must never advise on the merits of the case being brought by the claimant.

The employment tribunal should only be concerned with whether the officer has purported to act under s 18 of ERA.

It is only when the officer has acted in bad faith or has adopted unfair methods when promoting a settlement that the agreement reached under s 18 of the Employment Tribunals Act can be set aside and not bar subsequent proceedings. Thus if the parties have reached an agreement, the conciliation officer should not get involved in the merits but merely record it on the appropriate form and obtain the parties' signatures (*Moore v Dupont Furniture Products*[2]). Indeed, an agreement reached orally between the parties under the auspices of the conciliation officer is equally binding (*Gilbert v Kembridge Fibres*[3]).

1.11 In *Hennessy v Craigmyle & Co Ltd,*[4] the claimant was told that he would be dismissed summarily but, provided he signed an agreement which had been prepared by the conciliation officer giving up his rights to bring a complaint before an employment tribunal, he would be treated as having been made redundant and would be given certain monies. After taking legal advice, he signed the agreement, but subsequently brought a claim for unfair dismissal. He alleged that his consent had been obtained by economic duress, and hence was void. The argument was dismissed by the employment tribunal, the EAT and the Court of Appeal. Economic duress was a ground for avoiding an agreement only if the claimant's will was so overborne that his consent was vitiated because he had no real alternative. In this case there was such an alternative, for he could have refused to sign the agreement and taken his chance in the employment tribunal. In any case, whether economic duress exists is a question of fact for the employment tribunal to determine.

1.12 ACAS also has an enhanced helpline (08457 474747) and is available from 8.00am to 8.00pm weekdays and 9am to 1pm on Saturdays. Either employers or employees (or their representatives) may approach ACAS for assistance over a dispute that has not been resolved by the use of internal grievance or disciplinary procedures, in advance of any formal complaint. If this fails, the right to make a complaint to an employment tribunal is still available.

C. **Arbitration**

1.13 At the request of one or more parties to a trade dispute, but with the consent of all of them, ACAS may refer any matter to arbitration for settlement, either by a person appointed from outside ACAS, or by the Central Arbitration Committee. However, arbitration is not to be used unless the parties have exhausted agreed procedures for negotiation or the settlement of disputes, unless there is a special reason which justifies arbitration

[1] [2006] IRLR 324. [2] [1982] ICR 84, [1982] IRLR 31, 126 Sol Jo, HL.
[3] [1984] ICR 188, [1984] IRLR 52, EAT.
[4] [1986] ICR 461, [1986] IRLR 300, 130 Sol Jo 633, [1986] LS Gaz R 2160, CA.

as an alternative to those procedures (TULR(C)A, s 212). With the consent of all the parties, ACAS may decide to publish the award. The Arbitration Act 1996 does not apply to any arbitration under this section, and thus the award is not capable of being legally enforced in a court of law.

In an effort to reduce the number of cases going to employment tribunals, and to avoid the intense legalism which is frequently found there, TULR(C)A, s 212A enabled ACAS to introduce an arbitration alternative, whereby claims for unfair dismissal (only) may, with the agreement of both parties, be heard in private by a single arbitrator. The scheme only operates when both sides have signed a COT3 or a compromise agreement (see para 20.49). The arbitrator will be appointed from a special panel of ACAS arbitrators, the actual hearing will be as informal as possible, and held in private at a convenient location. By agreeing to submit to ACAS arbitration, both parties waive their rights to raise any jurisdictional issues, eg whether time limits have been observed, whether there was or was not a dismissal, etc. A constructive dismissal case can only be heard if both parties agree that there was in fact a dismissal.

The parties will be invited to submit a written statement of their case in advance of the hearing, and will be expected to cooperate in the production of relevant documents. The arbitrator will adopt an inquisitorial approach, ie he will generally ask the questions and seek out the relevant facts, rather than leaving it to the parties to adopt the traditional adversarial approach to the case. Legal representation is not necessary. Strict legal principles and legal precedents will not be followed, but the arbitrator will take account of the general principles of fairness and good practice set out in the ACAS Code of Practice on 'Disciplinary and Grievance Procedures' and the ACAS Handbook 'Discipline at Work'. The arbitrator can make awards (which will be confidential to the parties and ACAS) identical to those which could be made by an employment tribunal (see Chapter 17). An award will generally be binding, and no appeal will be permitted, except where there is a point of EC law or the Human Rights Act 1998 is relevant, or where there is an allegation of serious irregularity.

The scheme will not be suitable for cases where there is a jurisdictional issue (eg was the applicant an employee, etc), where there are complex legal issues involved (eg was there a transfer of an undertaking), or where issues arising out of the implementation of EC law are concerned (eg Working Time Regulations, sex discrimination cases, etc). If issues other than unfair dismissal are revealed, these must be settled, withdrawn, or heard by an employment tribunal.

If the arbitrator recommends that the employee is re-engaged or reinstated, this order can be enforced, if necessary, by an employment tribunal. Continuity of employment will be preserved.

To date, the scheme has not been a success. Since it was introduced, very few applications have been received.

Full details of the scheme can be found in the ACAS Arbitration Scheme (Great Britain) Order 2004.

ACAS also has an arbitration scheme to deal with disputes over applications for flexible working (see para 6.129). The scheme is set out in the ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004 and can be used as a voluntary alternative to employment tribunal proceedings. It is claimed that the scheme will be confidential, informal, relatively fast and cost efficient. Again, the scheme has not proven to be popular.

D. **Enquiries**

1.14 ACAS may enquire into industrial relations generally, or in a particular industry, or in a particular undertaking. After taking into account the views of the parties, such findings may be published (TULR(C)A, s 214).

E. Codes of Practice

1.15 ACAS may issue Codes of Practice containing such practical guidance as it thinks fit for the purpose of promoting the improvement of industrial relations (TULR(C)A, s 199). Four Codes are currently in force, namely:

(a) Disciplinary and Grievance Procedures;

(b) Disclosure of Information to Trade Unions for Collective Bargaining Purposes;

(c) Time Off for Trade Union Duties and Activities;

(d) Settlement Agreements.

1.16 The codes are first prepared and published in draft form, and then ACAS shall consider any representations made about them (and if necessary modify them) before they are finally submitted to the Secretary of State. If he approves, he shall lay them before Parliament. If he does not approve, he will give reasons for withholding his approval. After completing the Parliamentary procedure, the code will be issued in the form of a draft by ACAS and will come into effect on a day appointed by the Secretary of State. A failure on the part of any person to observe a code shall not of itself make him liable to any proceedings, but in any proceedings before an employment tribunal or the Central Arbitration Committee the code will be admissible in evidence and any relevant provision shall be taken into account in determining the issue (TULR(C)A, s 207) (see *Lock v Cardiff Rly Co*[5]).

1.17 A Code of Practice may be revised or revoked with the approval of the Secretary of State (TULR(C)A, ss 201–202).

Certification Officer (TULR(C)A, s 254)

1.18 The post of Certification Officer was originally created to take over certain administrative functions exercised in connection with trade unions, although nowadays he has wide powers of investigation and supervision over matters such as register of members, accounting records, elections, breaches of union rules, funds for political objects, and so on (see Chapter 22). He is appointed by the Secretary of State, and will make an annual report to him and also to ACAS. Although the staff of the Certification Officer is provided by ACAS, he is completely independent of that organisation.

Since TULRA 1974 (now TULR(C)A, s 2) the Certification Officer has kept a list of organisations which are trade unions and employers' associations within the legal definition. Since the Employment Protection Act 1975 (now TULR(C)A, s 6) he has issued certificates of independence to those trade unions which have applied, and meet the necessary criteria (see Chapter 22). He has issued a booklet entitled 'Guidance for trade unions wishing to apply for a certificate of independence'. He has taken custody of all documents held by his predecessors since 1871, and will keep these for public inspection, along with the list of trade unions and records of all applications for certificates of independence (TULR(C)A, ss 255–258). The Certification Officer has wide powers in respect of complaints by trade union members of alleged breaches of trade union law and trade union rules, and can make declarations and orders on a number of matters, which may be enforced in the same manner as an order of the courts (see Chapter 22). An appeal from his decisions may be made on a point of law to the Employment Appeal Tribunal.

[5] [1998] IRLR 358, 599 IRLB 6, EAT.

The Certification Officer may also strike out an application or complaint on the ground that it is scandalous, vexatious, has no reasonable prospect of success, or is otherwise misconceived, or refuse to entertain an application by a vexatious litigant (TULR(C)A, ss 256A–256AA).

Central Arbitration Committee

1.19 This body consists of a chairman (and 11 deputy chairmen) appointed by the Secretary of State (after consultation with ACAS) and other persons appointed from representatives of employers and workers who are experienced in industrial relations. The appointments may be for up to five years, and are renewable. The Central Arbitration Committee (CAC) will exercise its functions on behalf of the Crown, but will not be subject to directions of any kind from any ministers as to the manner in which those functions are to be exercised. CAC has a central role in the new statutory scheme for the recognition of trade unions, created by the Employment Relations Act 1999 (see Chapter 23). In performing its functions, CAC must have regard to the object of encouraging and promoting fair and efficient practices and arrangements in the workplace, although it will remain neutral on the issue of collective bargaining. CAC will continue to exercise its former statutory functions to adjudicate on claims relating to disclosure of information for collective bargaining purposes brought under TULR(C)A, s 183 (see para 23.15) and will also adjudicate on certain disputes arising out of the provisions of the Transnational Information and Consultation of Employees Regulations 1999 (see para 23.132), and the Information and Consultation Regulations 2004 (see para 23.142).

CAC also resolves disputes concerning the provision of information, consultation and participation arising from the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009, and can act as a voluntary arbitration body following a reference from ACAS under TULR(C)A, s 212.

Employment Appeal Tribunal (Employment Tribunals Act 1996, ss 20–37)

1.20 This tribunal consists of judges of the High Court appointed by the Judicial Appointments Commission on the recommendation of the Lord Chancellor in England, and the Lord President of the Court of Session in Scotland, plus other members (appointed on the joint recommendations of the Lord Chancellor and the Secretary of State) who have special knowledge or experience of industrial relations as representatives of employers or of workers. The Employment Appeal Tribunal (the EAT) is a superior court of record, with a central office in London, but it may sit anywhere in the country, and one or more divisions of the EAT may sit at the same time. In practice, hearings take place either in London or Edinburgh.

1.21 The jurisdiction of the EAT is as follows:

(a) to hear appeals on points of law from decisions of employment tribunals under the various statutory provisions set out in s 21 of the Employment Tribunals Act 1996, which generally cover most, but not all, of the jurisdiction enjoyed by employment tribunals (see para 1.28). In particular, it should be noted that appeals against decisions of an employment tribunal relating to the issue of improvement notices and prohibition notices go to the Divisional Court. The reason is that a breach of these notices amounts to a criminal offence, and the EAT only has specific civil jurisdiction. There have been a few cases where the relevant statutory provision has inadvertently not been included in s 21 of the Employment Tribunals Act, with the

result that the EAT lacked jurisdiction to hear an appeal: see eg *Wolstenholme v Refreshment Systems Ltd (t/a Northern Vending Services*[6]*);*

(b) to hear appeals from the decisions of the Certification Officer on various matters arising out of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A, see Chapter 22);

(c) to hear appeals from the decisions of the Central Arbitration Committee arising from the Transnational Information and Consultation of Employees Regulations 1999, the Information and Consultation of Employees Regulations 2004 (see Chapter 23) and the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009.

1.22 The procedure before the EAT is governed by the Employment Appeal Tribunal Rules 1993, which have been amended several times in order to align procedures with those followed by employment tribunals. Thus the overriding objective of the Rules is to enable the EAT to deal with cases justly, including, so far as practicable, ensuring that the parties are on equal footing, saving expense, dealing with cases in ways which are proportionate to the importance and complexity of the issues, and ensuring that cases are dealt with expeditiously and fairly. The Rules lay down the procedure to be followed when lodging an appeal, although if a judge or Registrar thinks that an appeal has no reasonable grounds of succeeding, or is an abuse of process, he can notify the appellant accordingly, and order that no further action be taken in the matter. Further details of the procedure before the EAT can be found in Practice Direction 2008, which supersedes all previous directions.

A party may appear before the EAT in person, or be represented by a solicitor, barrister, representative of a trade union or employers association, or any other person whom he desires to represent him. Costs will not normally be awarded by the EAT, although there is a power to make a costs order, if the proceedings brought by a party were unnecessary, improper or vexatious, or there has been unreasonable delay or other unreasonable conduct in bringing or conducting the proceedings. The EAT may make a costs order in favour of a litigant in person, and also make a wasted costs order against a party's representative if there has been improper, unreasonable or negligent acts on his part.

The ERRA 2013 amended section 28(2) and (3) of the Employment Tribunals Act 1996 so that from 25 June 2013 cases in the EAT are heard by a judge sitting alone except where he directs that they are to be heard by a judge and either two or four lay members. This reversed the previous position.

If a judge feels that there may be a conflict of interest because he (or a member of his family) have had some form of professional or personal connection with one of the parties, he should ensure that the full facts are placed before the parties, with an explanation. If there is a real chance of an objection, he should ascertain whether there is another judge who can hear the case (*Jones v DAS Legal Expenses Insurance Co Ltd*[7]). For example, there is an objection to an advocate appearing before the EAT if he is also a part-time judge in that tribunal, and such action is contrary to Art 6 of the Human Rights Convention as being a violation of the right to a fair hearing (*Lawal v Northern Spirit Ltd*[8]). A restriction on proceedings order may be made to prevent vexatious litigants wasting court time (rr 13–17), and a restricting reporting order may be made in cases where sexual misconduct is alleged (r 23) or disability discrimination (r 23A). It is an offence, punishable by a fine

[6] [2004] All ER (D) 185 (Mar), EAT.

[7] [2003] EWCA Civ 1071, [2004] IRLR 218, 147 Sol Jo LB 932, [2003] All ER (D) 425 (Jul).

[8] [2002] ICR 486, [2002] IRLR 228, [2002] All ER (D) 36 (Jan), EAT; aff'd [2002] EWCA Civ 1218, [2002] ICR 1507, [2002] IRLR 714, [2002] 46 LS Gaz R 33, [2002] All ER (D) 442 (Oct); revsd [2003] UKHL 35, [2004] 1 All ER 187, [2003] ICR 856, [2003] IRLR 538, [2003] 28 LS Gaz R 30, [2003] NJLR 1005, 147 Sol Jo LB 783, [2003] All ER (D) 255 (Jun).

not exceeding level 5 on the standard scale (currently £5,000) to act in contravention of such an order.

1.23 An appeal can only be entertained by the EAT if there is a genuine dispute between the parties (*IMI Yorkshire Imperial Ltd v Olender*[9]) and appeals should not be pursued with other ulterior motives (*Baker v Superite Tools Ltd*[10]). A further appeal will lie on a point of law to the Court of Appeal or, in Scotland, to the Court of Session, and a final appeal will lie to the Supreme Court (formerly the House of Lords). At any time, however, a tribunal or court can refer a case to the European Court of Justice in Luxembourg, if a question arises as to the application of European law (see para 1.71).

Employment tribunals

1.24 The constitutional basis for employment tribunals can be found in the Employment Tribunals Act 1996. An employment tribunal is an inferior court, exercising the judicial powers of the state for the purpose of the Contempt of Court Act 1981, s 19, and contempt of court proceedings may be brought if there is an attempt to pervert the course of justice or any other breach of the Act (*Peach Grey & Co v Sommers*[11]).

1.25 An employment tribunal generally consists of an employment judge and two lay members, although employment judges now have powers to sit alone more often. The employment judge can be either a barrister or solicitor, and may be full-time or part-time. The lay members, who are all part-time, are selected from a panel drawn up after consultation with representatives of employers' organisations and trade unions. There is also a self-nomination procedure, designed to attract women, ethnic minorities, and persons with disabilities. Where a hearing consists of a judge and two lay members, there will always be a representative from each side of industry, although an employment judge can sit with one lay member only if both parties to the dispute agree, or alone in unfair dismissal cases. Each member of the employment tribunal has an equal vote, and although decisions can be reached by a majority vote, in practice it appears that, despite the somewhat diverse backgrounds, 96% of all decisions reached are unanimous. In the remaining cases, the 'wingmen' are just as likely to unite in outvoting the employment judge as the latter is likely to have the support of one or the other members. In cases of sex discrimination, it is desirable to have one member of either sex, and in race discrimination cases, a member who has special experience of race relations, but there is no absolute legal requirement that an employment tribunal should be so composed (*Habib v Elkington & Co Ltd*[12]). An employment judge or member should not have any connection with any of the parties who appear before them (see para 20.91), nor with any of the witnesses (*University of Swansea v Cornelius*[13]). However, the fact that the employment judge or members know an advocate who appears before them should not cause any problem, unless there is a close relationship between them.

Although, generally speaking, an employment tribunal will consist of an employment judge and two members, in the following circumstances an employment judge may sit alone (Employment Tribunals Act, s 4). These are:

(a) the following complaints made under TULR(C)A, ie s 68A (unauthorised or excessive deductions of trade union subscriptions), s 87 (unauthorised deduction of contribution to a political fund), ss 161, 165, 166 (application for interim relief etc), s 192 (failure by employer to pay a protective award);

[9] [1982] ICR 69, EAT. [10] [1986] ICR 189, [1985] LS Gaz R 2906, EAT.
[11] [1995] 2 All ER 513, [1995] ICR 549, [1995] IRLR 363, [1995] 13 LS Gaz R 31.
[12] [1981] ICR 435, [1981] IRLR 344, EAT. [13] [1988] ICR 735, EAT.

(b) a complaint under the Pension Schemes Act 1993, s 126;

(c) proceedings brought under the following provisions of the Employment Rights Act 1996, ie s 11 (failure to give written statement of terms and conditions), s 23 (unauthorised deductions from wages), s 34 (failure to make a guarantee payment), s 70 (failure to pay remuneration following suspension on medical grounds), s 111 (unfair dismissal), ss 128, 131, 132 (application for interim relief etc), s 163 (right to or amount of redundancy payment), s 170 (reference following an application to the Secretary of State for a redundancy payment), s 188 (rights of employee on employer's insolvency), s 206(4) (appointment of an appropriate person where there is no personal representative of a deceased employee);

(d) complaints brought under the Transfer of Undertakings (Protection of Employment) Regulations 2006, reg 15(10) (failure to pay compensation in pursuance of an order made following a failure to consult on a transfer);

(e) complaints made under the National Minimum Wage Act 1998, s 11 (failure to allow access to records), s 19 (appeal by an employer against an enforcement notice), s 22 (appeal against a penalty notice);

(f) proceedings brought under the provisions of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 (breach of contract claims);

(g) proceedings in which the parties give their written consent to be heard by an employment judge alone;

(h) proceedings in which the person against whom they are brought does not contest the case;

(i) complaints relating to the non-payment of holiday pay;

(j) stage one of equal pay cases.

1.26 However, in any of the circumstances in para 1.25, the employment judge may at any stage decide to have the case heard by a full tribunal:

(a) where there is a likelihood of a dispute arising from the facts;

(b) where there is a likelihood of an issue of law arising;

(c) having taken into account the views of any of the parties;

where there are other proceedings which might be heard concurrently and which do not come within the above categories which enable an employment judge to sit alone.

1.27 If the employment judge decides to hear the case sitting alone, he is under a continuing duty to keep that decision under review. Thus, if it becomes evident that the parties intend to call a number of witnesses, this would be a clear indication that the claim should be heard by a full tribunal (*Clarke v Arriva Kent Thameside Ltd*[14]). Indeed, an employment judge should not sit alone, even if all the parties agree to him so doing, where there is a likelihood of a dispute on the facts (*Sogbetun v Hackney London Borough*[15]).

1.28 The main jurisdiction of employment tribunals is to deal with claims made under the following statutory provisions:

(a) Employment Agencies Act 1973;

(b) Health and Safety at Work etc Act 1974;

(c) Industrial Training Act 1982;

[14] [2001] All ER (D) 485 (Jul), EAT. [15] [1998] ICR 1264, [1998] IRLR 676, EAT.

(d) Trade Union and Labour Relations (Consolidation) Act 1992;
(e) Pension Schemes Act 1993;
(f) Employment Rights Act 1996;
(g) National Minimum Wage Act 1998;
(h) Employment Relations Act 1999;
(i) Equality Act 2006;
(j) Work and Families Act 2006;
(k) Equality Act 2010.

Employment tribunals also have jurisdiction to deal with claims made under the following statutory instruments:

(a) Safety Representatives and Safety Committee Regulations 1977;
(b) Industrial Tribunals (Interest) Order 1990;
(c) Employment Tribunals Extension of Jurisdiction Order 1994;
(d) Suspension from Work (on Maternity Grounds) Order 1994;
(e) Health and Safety (Consultation with Employees) Regulations 1996;
(f) Working Time Regulations 1998;
(g) National Minimum Wage Regulations 1999;
(h) Maternity and Parental Leave etc Regulations 1999;
(i) Transnational Information and Consultation of Employees Regulations 1999;
(j) Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000;
(k) Employment Relations (Offshore Employment) Order 2000;
(l) Right to Time Off for Study or Training Regulations 2001;
(m) Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002;
(n) Paternity and Adoption Leave Regulations 2002;
(o) Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002;
(p) Flexible Working (Procedural Requirements) Regulations 2002;
(q) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004;
(r) Information and Consultation of Employees Regulations 2004;
(s) Transfer of Undertakings (Protection of Employment) Regulations 2006;
(t) Occupational and Personal Pension Schemes (Consultation with Employees) Regulations 2006;
(u) Employment Equality (Age) Regulations 2006;
(v) Companies (Cross Border Mergers) Regulations 2007;
(w) European Public Limited Liability Company (Employee Involvement) (Great Britain) Regulations 2009;
(x) Agency Workers Regulations 2010;
(y) Employment Relations Act 1999 (Blacklists) Regulations 2010;
(z) Time off Work for Study or Training Regulations 2010;
(aa) Additional Paternity Leave Regulations 2010;
(ab) Additional Paternity Leave (Adoption from Overseas) Regulations 2010.

Employment tribunals have jurisdiction to apply EC law to claims made under UK law, ie as laid down in specific UK legislation (eg Equality Act). But there is no jurisdiction to hear or determine 'free-standing' claims based on the Treaty of Rome or an EC Directive, outside the domestic statutory framework (*Biggs v Somerset County Council*[16]). Also, there is no jurisdiction to hear '*Francovich*' style claims (*Secretary of State for Employment v Mann*[17]). An employment tribunal does have a duty to apply EC law to the extent of disapplying an offending provision in UK legislation if it is inconsistent with EC law (see *Redcar & Cleveland Borough Council v Bainbridge*,[18] para 5.34).

1.29 The procedure before employment tribunals is governed by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. These regulations provide for the making and rejection of claims, appearance by respondents, case management, further particulars, witness attendance orders, pre-hearing review, procedure at the hearing, applications for review, award of costs, extension of time, joinder of parties, default judgments, electronic communications and other miscellaneous matters. Generally speaking the tribunal has a wide discretion in operating its procedures, and its decision can only be challenged on appeal where the discretion was wrongly exercised because of a mistake of law, a disregard of principle, a misapplication of the facts, or the tribunal took into account irrelevant matters or failed to take into account relevant matters, or where the decision was outside the generous ambit within which a reasonable disagreement is possible (*Noorani v Merseyside TEC Ltd*[19]) (see Chapter 20).

A. **Territorial jurisdiction**

1.30 The jurisdiction of employment tribunals is based on particular statutory provisions. Thus certain sections of TULR(C)A do not apply to employment where an employee works outside Great Britain, ie access to employment (ss 137–143), inducement and detriment (ss 145A-151), time off for trade union duties and activities (ss 168–173) and duty to notify Secretary of State of redundancies (ss 193–194).

1.31 The territorial jurisdiction of the Employment Rights Act was originally found in s 196, which excluded a number of claims where the employee ordinarily worked outside Great Britain, but the section was repealed in 1999 (in order to comply with the Posted Workers Directive) and not replaced. It thus fell to the courts to devise tests for determining the territorial jurisdiction in respect of various statutory claims which were brought.

1.32 The leading case on territorial jurisdiction is the House of Lords' decision in *Lawson v Serco Ltd*,[20] where it was held that claimants could be divided into three categories:

(a) *Standard cases*. The question to be asked here is, was the claimant working in Great Britain? The contract of employment will be a major factor, but attention must also be paid to what happens in practice.

(b) *Peripatetic employees*. Here, the factual 'base' test could be used, eg where the employee lived, was paying taxes and where his work was organised from (*Todd v*

[16] [1995] ICR 811, [1995] IRLR 452, EAT; aff'd [1996] 2 All ER 734, [1996] 2 CMLR 292, [1996] ICR 364, [1996] IRLR 203, [1996] 06 LS Gaz R 27, [1996] NJLR 174, 140 Sol Jo LB 59, CA.

[17] [1996] ICR 197, [1996] IRLR 4, EAT; revsd [1997] ICR 209, CA; aff'd on other grounds sub nom *Mann v Secretary of State for Employment* [1999] ICR 898, [1999] All ER (D) 791.

[18] [2005] EWCA Civ 726, [2005] IRLR 504.

[19] [1999] IRLR 184, CA.

[20] [2006] UKHL 3, [2006] 1 All ER 823, [2006] ICR 250, [2006] IRLR 289, (2006) 103(6) LSG 36, (2006) 156 NLJ 184, (2006) 150 SJLB 131, (2006) *Times*, 27 January.

British Midlands Airways Ltd[21]), where his duty begins and where it ends (*Diggins v Condor Marine*[22]). Where the employee is working is a question of fact for the tribunal: *Ravat v Halliburton Manufacturing & Services Ltd*[23] where the Supreme Court emphasised the need for a sufficiently close connection between the employment and Great Britain, stronger than with the country where the employee works.

(c) *Expatriate employees*. Generally, the employee must rely on the law where he is working, but there are two major exceptions, ie where an employee is posted abroad for the purpose of a business carried on in Great Britain, and an expatriate working in an extraterritorial enclave in a foreign country. Thus in *Lawson v Serco Ltd*[24] the claimant was employed by a British company to work as a security supervisor on Ascension Island, a British Overseas Dependency with no local population. It was held that the connection with the employment relationship and the United Kingdom was overwhelmingly strong, and the claimant was entitled to pursue his claim for unfair dismissal in this country. This was also the case in *Duncombe v Secretary of State for Children, Schools and Families*,[25] where teachers were employed by the Secretary of State for Children, Schools and Families to work in European Schools abroad. Their employment was held to have an overwhelmingly closer connection with Britain and with British employment law than with any other system of law.

1.33 However, there are bound to be difficult decisions to be made regarding an employee who works abroad for a British employer for the purpose of a business carried on in the UK, eg a sales representative, or a newspaper correspondent whose despatches are sent to different countries (*Financial Times v Bishop*[26]). The correct approach when considering the territorial scope of the right to claim is to consider the place of employment as being the major determining factor, and there is no room for using the 'substantial connection with Great Britain' approach. It is only in exceptional circumstances that the employment tribunal will have jurisdiction where the employee works wholly abroad (*Dolphin Drilling Personnel PTE Ltd v Winks*[27]). In *Haynes v Alan Dick & Co Ltd*[28] the claimant was employed by a British company to work in Nigeria. It was held that the employment tribunal had no jurisdiction to hear his claim for unfair dismissal. Although he was recruited in England, worked for a British firm for a business conducted in a foreign country, and was paid in sterling to a British bank account, all of his work was carried out in the context of a substantial business operation carried on in Nigeria, and the connection with that country was greater and stronger than that of the United Kingdom.

1.34 If the respondent is a company registered in Great Britain, it is resident here even though it carries on business elsewhere (*Odeco (UK) Inc v Peacham*[29]), and it may carry on a business in Great Britain even though it has no registered office here (*Knulty v Eloc Electro Optick Communicatie BV*[30]).

1.35 The Equality Act 2010 is also silent on the question of territorial jurisdiction (unlike many of the repealed regulations) apart from certain provisions relating to ships, hovercraft and offshore work, and such questions must be determined by the employment tribunals in accordance with the principles outlined.

[21] [1978] IRLR 370, (1978) ICR 959. [22] [2009] EWCA Civ 1133, [2010] ICR 213, [2010] IRLR 119.
[23] [2012] UKSC 1, [2012] IRLR 315 SC.
[24] [2006] UKHL 3, [2006] 1 All ER 823, [2006] ICR 250, [2006] IRLR 289, (2006) 103(6) LSG 36, (2006) 156 NLJ 184, (2006) 150 SJLB 131, (2006) *Times*, 27 January.
[25] (No. 2) [2011] UKSC 36. [26] Employment Appeal Tribunal, 25 November 2003.
[27] [2009] UKEAT 0049_08_2104. [28] [2008] EWHC 2695, QB.
[29] [1979] ICR 823. [30] [1979] ICR 827.

1.36 Whether the work is for the purpose of a business carried on in Great Britain is to be determined in the light of the jurisdictional rules outlined in *Lawson v Serco Ltd*,[31] because, although that case concerned the issue of unfair dismissal, it is likely that the principles outlined therein will also apply to the various anti-discrimination provisions (*Williams v University of Nottingham*[32]).

1.37 Where an employee raises a claim under UK law which is derived from EU law, it is the duty of an employment tribunal to give effect to the EU derived entitlement, even though the work is performed by a foreign national outside Great Britain. In *Bleuse v MBT Transport Ltd*[33] a German employee, who worked as a driver in Europe, but never worked in the United Kingdom, was able to make a claim for holiday pay against his British employer, because the Working Time Regulations were intended to implement an EC Directive. Since most anti-discrimination rights are so derived, it seems clear that the wider tests will apply to claims brought under the Equality Act. Thus in *Mangold v Helm*[34] it was held that non-discrimination is a fundamental principle of EU law, which can be relied upon against private individuals as well as the state. Thus workers in the private sector, as well as those in the public sector, will be able to claim even though their connection with Great Britain is somewhat tenuous.

1.38 Contractual entitlements are separate from statutory employment rights. The parties are free to agree the law applicable to their employment contracts, subject to international conventions, including Rome I and II Regulations, the Posting of Workers Directive and the Brussels I Regulation, which generally provide that the employment rights of the country with which the employment is closely connected shall apply. Breach of contract claims (eg under the Employment Tribunals Extension of Jurisdiction Order) shadow the jurisdiction of the civil courts (*Dickie v Cathay Pacific Airways Ltd*[35]).

B. Legal aid

1.39 Legal aid is not generally available in England and Wales, although there is provision in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 where the lack of legal aid would breach an individual's rights under the European Convention on Human Rights, or to the provision of services under EU law. In Scotland the system is more generous, but it is still only granted if (a) the applicant is unable to fund or find alternative representation elsewhere, (b) the case is an arguable one, and (c) the case is too complex to allow the applicant to present it to a minimum standard of effectiveness.

C. Claims for breach of contract

1.40 Under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, and the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, employment tribunals have jurisdiction to hear claims for damages for breach of a contract of employment, or any other contract (subject to certain exceptions, see para 1.42) connected with employment, including a claim for a sum due under such a contract, and a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract. The claim must be outstanding on the termination of the employee's employment, which is the moment in time when the employee ceases to work

[31] [2006] UKHL 3, [2006] 1 All ER 823, [2006] ICR 250, [2006] IRLR 289, (2006) 103(6) LSG 36, (2006) 156 NLJ 184, (2006) 150 SJLB 131, (2006) *Times*, 27 January.

[32] [2007] IRLR 660.

[33] [2008] ICR 488, [2008] IRLR 264.

[34] [2006] All ER (EC) 383, [2005] ECR I–9981, [2006] 1 CMLR 43, [2006] CEC 372, [2006] IRLR 143.

[35] [2005] EWCA Civ 599, [2005] ICR 1436, [2005] IRLR 624, (2005) *Times*, 31 May.

for the employer (*Miller Bros & FP Butler Ltd v Johnston*[36]), and the maximum award which can be made in respect of any number of claims is £25,000. The claim must be brought within three months from the effective date of termination of the contract of employment (or within three months from the last day when the employee worked in the employment which has been terminated) with the usual extension of time if it was not reasonably practicable to bring the claim within that time (see also para 20.2). There is no requirement that the employee should have been employed for any particular period of employment before bringing a claim under the Order.

1.41 Once an employee has lodged such a claim, the employer may lodge a counterclaim in respect of breach of contract by the employee, within six weeks (or, if not reasonably practicable to do so, within such further time as the employment tribunal considers to be reasonable). The counterclaim is not limited by the amount of the original claim, and may be continued irrespective of what happens to the original claim, as long as it has been presented before the employee's claim has been settled or withdrawn. Indeed, if the employee's breach of contract claim fails because it was not presented within the appropriate time limits, the employer's counterclaim, validly presented, can still proceed (*Patel v RCMS Ltd*[37]).

1.42 Neither the employee nor the employer can bring a claim or counterclaim in respect of:

(a) damages for personal injuries;

(b) breach of a term requiring the employer to provide living accommodation for the employee, or a term imposing an obligation on either of them in connection with the provision of living accommodation;

(c) a term relating to intellectual property;

(d) a term imposing an obligation of confidence;

(e) a term which is a covenant in restraint of trade.

1.43 One effect of the Order is to give an alternative route for claims (other than the exceptions in para 1.42) which would otherwise have to be brought in the county court, although it should be noted that there are a number of differences in the respective jurisdictions and procedures (see para 8.3). Another effect of the Order is to enable employment tribunals to deal with matters which hitherto were not within the scope of the Wages Act 1986 (now Employment Rights Act 1996, ss 13–22, see para 8.4), in particular claims for payments in lieu of notice, holiday pay, advances etc. Again, there are differences between the Order and the Act, and it will be necessary to scrutinise the nature of a claim very carefully in order to bring it under the appropriate heading.

1.44 If a claimant is successful in recovering £25,000 under the provisions of the Order, he cannot recover any excess of that amount by instituting subsequent High Court proceedings in respect of a wrongful dismissal claim (*Fraser v Hlmad Ltd*[38]).

D. **Mediation**

1.45 Judicial mediation is available as an alternative to employment tribunal proceedings. The mediator, who will be a tribunal judge trained in alternative dispute resolution, will try to assist the parties to resolve their dispute by mutual agreement. Cases which are suitable for judicial mediation will be identified at the sift stage or preliminary hearing, and if all parties agree to this course being adopted, mediation will take place in private, and the proceedings will be entirely confidential. ACAS also provides access to mediation.

[36] [2002] ICR 744, [2002] IRLR 386, [2002] All ER (D) 220 (Mar), EAT.
[37] [1999] IRLR 161, EAT. [38] [2006] EWCA Civ 738.

Industrial training boards

1.46 The Industrial Training Act 1982 enables the minister to set up training boards in any industry in order to provide for industrial and commercial training of persons who are over school-leaving age. Only two such statutory boards are currently operating (construction and engineering).

1.47 To meet its expenses a board may impose a levy on employers in the industry, which is assessed by reference to a percentage of the payroll. For this purpose a board may require employers to furnish returns and information, and keep and produce records (eg, see Industrial Training Levy (Construction Board) Order 2009). An employer who has been assessed for a levy may appeal to an employment tribunal which may rescind or reduce or increase it as the tribunal determines (see Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 3).

Equality and Human Rights Commission

1.48 The Equality Act 2006 created a new institution, called the Equality and Human Rights Commission (EHRC), which took over the existing functions of the Equal Opportunities Commission, the Commission for Racial Equality, and the Disability Rights Commission, but with additional responsibilities and wider powers.

Basically, the EHRC has the fundamental duty to create a society in which:

(a) people's ability to achieve their potential is not limited by prejudice or discrimination;

(b) there is respect for and protection of each individual's human rights;

(c) there is respect for the dignity and worth of each individual;

(d) each individual has an equal opportunity to participate in society; and

(e) there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

1.49 The EHRC has wider functions than its predecessors, and will draw up a strategic plan showing the activities to be undertaken in pursuance of its statutory powers. In addition to taking over the work of the existing Commissions, the EHRC will assume responsibility for promoting understanding of the importance of equality and diversity, and work towards the elimination of unlawful discrimination in the areas of race, sex, religion or belief, sexual orientation, sexual reassignment, age, disability, as well as the promotion of human rights. It will promote good relations between and within different groups, encourage good practice in the area of relations between different groups, and work towards the elimination of prejudice, and hatred of and hostility towards members of groups. It will monitor the effectiveness of equality and human rights enactments, give advice to the Government, and make recommendations. It will issue (and revise, where necessary) Codes of Practice, which must be approved in draft by the Secretary of State, and be subject to the negative approval parliamentary procedure.

1.50 The EHRC can make enquiries into matters relating to its duties in respect of equality and diversity, human rights, disabilities and groups. It can make grants and carry out investigations. If, following an investigation, it is satisfied that a person has committed an unlawful act, it can issue an unlawful act notice, which may be followed by requiring that person to prepare an action plan for the purpose of avoiding repetition or continuance of the unlawful act. As an alternative, the Commission may enter into a legally enforceable

agreement whereby the person concerned undertakes not to commit (or prepare to commit) an unlawful act, and in return the Commission undertakes not to proceed with an investigation or issue an unlawful act notice.

Health and Safety Executive

1.51 The former Health and Safety Commission and the Health and Safety Executive were abolished by the Legislative Reform (Health and Safety Executive) Order 2008, and replaced by a new unitary organisation, called the Health and Safety Executive. This consists of 11 non-executive members appointed by the Secretary of State. Three members are appointed after consultation with employers' associations, three members are appointed after consultation with employees' associations, one member is appointed after consultation with organisations representing local authorities, and up to four members are appointed after consultation with professional bodies and devolved administrations. The new HSE appoints a chief executive. All the powers and functions of the old Commission and Executive have been transferred to the new organisation.

1.52 It shall be the duty of HSE to do such things and make such arrangements as it considers appropriate for the general purposes of the Health and Safety at Work Act 1974. In particular, HSE shall:

(a) assist and encourage persons concerned with matters relevant to those purposes to further those purposes;

(b) make arrangements as it considers appropriate for the carrying out of research and the publication of the results of research, and the provisions of training and information, and encourage research and the provision of training and information by others;

(c) make arrangements to provide information and advisory services to government departments, local authorities, employers, employees and their organisations, and other purposes concerned with matters relevant to the general purposes of the Act.

1.53 HSE will submit proposals to the Secretary of State, provide particulars of what it proposes to do for the purpose of carrying out its functions, ensure that its activities are in accordance with proposals approved by, and give effect to any directions issued by, the Secretary of State. However, the Secretary of State may not give directions with regard to the enforcement of the relevant statutory provisions in any particular case.

1.54 HSE may carry out an investigation or hold an enquiry into any matter, occurrence, or situation, in accordance with the Health and Safety Enquiries (Procedure) Regulations 1975. It will issue guidance to local authorities, and work with them to establish best practice and consistency in the enforcement of health and safety law. The enforcement powers of HSE and local authorities remain unchanged.

Health and Work Advisory and Assessment Service

1.55 This new service is being rolled out around the country during 2014, and aims to give employers of all sizes help with managing long-term sickness absence, although it is expected to be particularly helpful to small employers who have no access to occupational health services. It will provide free advice and support to employers who have employees who are off work for over four weeks. There are two elements to the service: a health and

work telephone helpline and online support for employers, employees and GPs, and access to an occupational health assessment for employees on a period of sickness absence lasting four weeks or more. HWAS will also aim to produce a 'return to work plan' setting out any obstacles, recommended interventions and a timetable.

Low Pay Commission

1.56 This body, which consists of a chairman and eight other members appointed by the Secretary of State, was put on a statutory basis by the National Minimum Wage Act 1998, and is responsible for recommending to the Secretary of State the level of the national minimum wage. Before making regulations establishing the national minimum wage, the Secretary of State will refer the following matters to the LPC, ie:

what single hourly rate should be prescribed as the national minimum wage;

what shall be the pay reference period;

what methods should be used for determining the hourly rate at which a person is remunerated;

whether persons under the age of 26 should be excluded from the right to a national minimum wage, or be entitled to a different hourly rate;

whether any other persons should be excluded, and if so, what hourly rate should be prescribed.

The role of the government

1.57 The responsibility for employment law issues is shared by a number of government departments, including the Department for Business, Innovation and Skills, the Department for Transport, the Department for Communities and Local Government, the Department for Work and Pensions, and so forth, each headed by a Secretary of State. Within these departments, junior ministers deal with a wide range of issues, such as employment relations generally, employment tribunals, ACAS and CAC, health and safety, race, sex and disability issues, job action programmes, maternity, paternity and adoption matters, pensions, work permits, adult and youth training, and so on.

Codes of practice

1.58 Codes of practice may be issued by the Advisory, Conciliation and Arbitration Service, the Equality and Human Rights Commission, the Health and Safety Executive, and the Secretary of State. A failure by a person to comply with a provision in the code will not, by itself, render a person liable for criminal or civil proceedings, but in any such proceedings a relevant code shall be admissible in evidence, and be taken account of by a court or tribunal when determining any issue before it.

1.59 The Secretary of State has power to issue Codes of Practice (TULR(C)A, s 203), and codes have been issued on Picketing, Industrial Action Ballots and Notice to Employers, and Access to Workers during Recognition and Derecognition Ballots. It is of interest to note that whereas codes of practice which have been issued by ACAS and EHRC are admissible before employment tribunals, those issued by the Secretary of State are also admissible in the courts.

Supreme Court

1.60 The Constitutional Reform Act 2005 paved the way for the abolition of the House of Lords as the highest court of appeal, with its powers and functions being transferred to a new Supreme Court. Earlier decisions of the House of Lords will, of course, still be binding on lower courts and tribunals. The Supreme Court commenced functioning in October 2009.

The impact of the European Union

1.61 As from 1 January 1973, the United Kingdom became a member of the European Union, and by the European Communities Act 1972 (s 2) all obligations arising out of the various treaties which set up the EU are to be given legal effect in this country without further enactment. European law is thus of particular importance in the study of domestic employment law, for it will override domestic provisions. In order to understand European Union law, we must examine the treaties, the institutions and the nature of the legal rules which take effect.

A. **Treaty of Rome**

1.62 This Treaty was signed in 1957 by the original six founding states (France, West Germany, Italy, Belgium, the Netherlands and Luxembourg). The UK, Ireland and Denmark acceded to the Treaty in 1973, Greece in 1981, Spain and Portugal became full members in 1992 and Austria, Finland and Sweden joined in 1995. The original Treaty required unanimity between all the member states before laws could be passed, although subsequently a system of qualified majority voting has been introduced. So far as is relevant, Art 140 of the Treaty stated that one of the objects of the Community was to harmonise laws relating to 'employment, labour law and working conditions, basic and advanced training, social security, protection against occupational accidents and diseases, occupational hygiene, law of trade unions, and collective bargaining between workers and employers'. The Treaty of Amsterdam brought about a renumbering of the Articles of the Treaty of Rome.

B. **Treaty of Lisbon**

1.63 The Lisbon Treaty has now been ratified by all member states of the EU. Among other things, the Treaty will make the Charter on Fundamental Human Rights legally binding on EU institutions, but this only affects member states when they are implementing EU law. Additionally, the UK Government has secured an opt-out protocol, which means that no court or tribunal can find the laws or practices of the UK to be inconsistent with the fundamental rights and freedoms of the Charter.

1.64 The Lisbon Treaty renamed the Treaty of Rome as the Treaty on the Functioning of the European Union (TFEU) and the Maastricht Treaty as the Treaty on European Union (TEU). The co-decision legislative procedure has been rebranded as the ordinary legislative procedure, whereby the European Commission will propose legislation, which then has to be passed by the Council of Ministers and the European Parliament before it becomes law. Some of the Articles of the Treaty of Rome have been renumbered (eg Art 141 on equal pay is now Art 157). A new 'double majority' voting system will come into force in 2014, and it is proposed to reduce the number of EU commissioners.

C. Expansion of the EU

1.65 At the meeting in Maastricht in 1992, the EU adopted criteria for other states to become members of the Union. The conditions were stable institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities, a functioning market economy and the ability to take on the obligations of political, economic and monetary union. As a result, a further 10 countries joined the European Union in 2004, ie Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic and Slovenia. Romania and Bulgaria joined in 2007, and Croatia in 2013, bringing the total membership of the EU to 28. Macedonia, Iceland, Montenegro, Turkey and Serbia are candidate countries which have applied to join.

D. EU institutions

Council of Ministers

1.66 This is the supreme policy-making body of the EU. Each meeting of the Council is attended by a minister from each member state. Usually, this will be the respective prime ministers or foreign secretaries, but sometimes, when specific detailed proposals are being discussed, the respective 'portfolio' ministers will attend. One member of the Council will hold the presidency for six months and then the position rotates. The Council is assisted by a Secretariat (comprising a staff of some 2,500) and preparatory work for the meetings is undertaken by frequent meetings of senior civil servants from the respective countries, known as the Committee of Permanent Representatives (Coreper).

The Commission

1.67 This is sometimes described as being the 'bureaucracy' of the Union, but perhaps a more accurate description would be the 'engine room'. At present there are 28 commissioners (although this number will be reduced by the Lisbon Treaty), plus a President. However, although appointed by their respective countries, commissioners are totally independent of them. Each commissioner has certain departmental responsibilities and is assisted by a cabinet and directorate general. Decisions are taken on a collegiate basis.

1.68 The Commission has the responsibility of initiating and drafting proposals for approval by the Council. It acts as a mediator between states, and as a 'watchdog' to ensure that EU rules are being observed. Indeed, if the Commission considers that a member state is failing to comply with an EU law, it can take enforcement action by referring the alleged breach to the European Court of Justice for a ruling (see para 1.70).

European Parliament

1.69 This body sits in Strasbourg and Brussels and currently consists of 766 members of the European Parliament (MEPs) elected directly from each member state. It can express an opinion to the Council of Ministers on proposals which emanate from the Commission, can submit questions to both institutions, and can, as a final sanction, dismiss the Commission on a vote of censure passed by a two-thirds majority. The Lisbon Treaty increased the involvement of the European Parliament through an extended co-decision process with the Council of Ministers.

Court of Justice of the European Communities

1.70 This Court sits in Luxembourg, and comprises 27 judges and eight advocates general. Appointments are made for six years. The Court gives rulings on the interpretation of European law, either on a reference from the Commission, at the request of the courts of a

member state or on a claim brought by an individual person or corporation in a member state. Once it has given its ruling the matter is then referred back to the courts of the member state for compliance.

European Union law

1.71 For the purpose of this book, the law of the European Union consists of (a) Articles of the Treaty of Rome, (b) Directives passed by the Council of Ministers, (c) Recommendations, and (d) Decisions of the European Court of Justice. It must be borne in mind that any common law or statutory rule which is contrary to European law is void, and if there is any conflict between European law and UK law, the former is to be applied. Indeed, if, in any preliminary proceedings, it appears that the sole obstacle towards granting interim relief is a rule of national law which is in conflict with European law, that national law has to be set aside (*R v Secretary of State for Transport, ex p Factortame (No 2)*[39]). Further, the UK courts have now held that an organisation (*R v Secretary of State for Employment, ex p Equal Opportunities Commission*[40]) or a private individual (*R v Secretary of State for Employment, ex p Seymour-Smith and Perez*[41]) can bring an action for a declaration that UK law does not correctly implement EU law.

A. **Articles of the Treaty**

1.72 If an article of the Treaty on the Functioning of the European Union (TFEU) is clear, precise, unconditional, requires no further implementation, and does not give any discretion to member states, it is directly applicable and becomes an integral part of the law of member states (*Defrenne v Sabena*[42]). For example, Art 157 (formerly 119) of the Treaty provides 'Each Member State shall ensure and maintain the application of the principle that men and women should receive equal pay for equal work . . . '. This article has been invoked in a number of cases, and has been held to confer a distinct legal right on an individual, which can be enforced in national courts, in addition to any legal right conferred by national law (*Garland v British Rail Engineering Ltd*[43]). Similarly, Art 45 (formerly 48) of the Treaty on the Functioning of the European Union provides that member states shall ensure

[39] (C-213/89) [1991] 1 AC 603, [1990] 3 WLR 818, [1990] ECR I–2433, [1990] 3 CMLR 1, [1990] 2 Lloyd's Rep 351, 1990] 41 LS Gaz R 33, sub nom *Factortame Ltd v Secretary of State for Transport (No 2)* [1991] 1 All ER 70, [1990] NLJR 927, ECJ; apld sub nom *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603, [1990] 3 WLR 818, [1990] 3 CMLR 375, [1990] 2 Lloyd's Rep 365n, [1991] 1 Lloyd's Rep 10, 134 Sol Jo 1189, [1990] 41 LS Gaz R 36, [1990] NLJR 1457, sub nom *Factortame Ltd v Secretary of State for Transport (No 2)* [1991] 1 All ER 70, HL.

[40] [1993] 1 All ER 1022, [1993] 1 WLR 872, [1993] 1 CMLR 915, [1993] ICR 251, [1993] IRLR 10, [1993] NLJR 332n, CA; on appeal [1995] 1 AC 1, [1994] 2 WLR 409, [1995] 1 CMLR 391, 92 LGR 360, [1994] IRLR 176, [1994] 18 LS Gaz R 43, NLJR 358, sub nom *Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910, [1994] ICR 317, HL.

[41] [1994] IRLR 448, DC; aff'd on other grounds [1996] All ER (EC) 1, [1995] ICR 889, [1995] IRLR 464, CA; revsd [1997] 2 All ER 273, [1997] 1 WLR 473, [1997] 2 CMLR 904, [1997] ICR 371, [1997] IRLR 315, 56 IRLB 15, HL; refd sub nom *R v Secretary of State for Employment, ex p Seymour-Smith*: C-167/97 [1999] 2 AC 554, [1999] 3 WLR 460, [1999] All ER (EC) 97, [1999] 2 CMLR 273, [1999] ICR 447, [1999] IRLR 253, ECJ; apld sub nom *R v Secretary of State for Employment, ex p Seymour-Smith (No 2)* [2000] 1 All ER 857, [2000] 1 WLR 435, [2000] 1 CMLR 770, [2000] ICR 244, [2000] IRLR 263, [2000] 09 LS Gaz R 40, HL.

[42] (C-43/75) [1981] 1 All ER 122, [1976] ECR 455, [1976] 2 CMLR 98, [1976] ICR 547, ECJ.

[43] [1983] 2 AC 751, [1982] 2 WLR 918, [1981] 2 CMLR 542, [1982] ICR 420, HL; refd 12/81 [1983] 2 AC 751, [1982] 2 All ER 402, [1982] 2 WLR 918, [1982] ECR 359, [1982] 1 CMLR 696, [1982] ICR 420, [1982] IRLR 111, ECJ; apld [1983] 2 AC 751, [1982] 2 All ER 402, [1982 2 WLR 918, [1982] 2 CMLR 174, [1982] ICR 420, [1982] IRLR 257, 126 Sol Jo 309, HL.

the free movement of workers within the Community without discrimination as regards employment, remuneration and other conditions of work and employment, and this too has a direct legal effect (*Van Duyn v Home Office (No 2)*[44]). Thus if a national of a member state wishes to obtain employment in the United Kingdom, he does not need a work permit, and he must be given equal access to social security benefits, holidays, equal pay, etc.

B. **Directives**

1.73 A Directive, passed by the Council of Ministers, is binding as to the result to be achieved, but the national authorities are given a choice of form and methods. However, as Directives are binding on member states, it is the duty of those states to implement them, and if the state fails to do so, an individual may seek to enforce the terms of the Directive against a state in its capacity as an employer (*Marshall v Southampton and South West Hampshire Area Health Authority*[45]). For this purpose, 'the state' includes any body which is an emanation of the state (eg a nationalised industry) or which provides a public service under the control of the state. In other words, a state cannot take advantage of its own failure to comply with European law (*Foster v British Gas*[46]).

In *Doughty v Rolls-Royce plc,*[47] the Court of Appeal laid down three criteria to be applied in considering whether or not any particular body is 'an emanation of the State', following principles laid down by the European Court in *Foster v British Gas*. These are:

> whether the entity was made responsible, pursuant to a measure adopted by the state, for providing a public service;
>
> whether the service it provided was under the control of the state; and
>
> whether it possessed or claimed to exercise any special powers.

Thus, although Rolls Royce was 100% owned by the state, it was a commercial undertaking rather than a state body for the purposes of enforcing the provisions of a Directive.

For example, in *Impact v Ministry of Agriculture & Food*[48] the ECJ held that the non-discrimination provisions of the Fixed-Term Workers Directive (99/70/EC) were sufficiently 'clear, precise and unconditional' to have a direct effect, and can thus be enforced directly against a public authority irrespective of the provisions of national law. This would include, for example, pension entitlements that were discriminatory. However, the provisions that provide for the conversion of successive fixed-term contracts into permanent ones did not have a direct effect, although national law should be interpreted consistently with the Directive if this was possible.

1.74 In strict legal theory, a Directive is not enforceable against a non-state body or a private individual. Thus, if there are no national rules on a subject, it is not permissible to rely on the provisions of a Directive as the basis of a claim. However, the European Court of Justice has gone a great deal further in a number of cases. In *Dekker v Stichting*

[44] (C-41/74) [1975] Ch 358, [1975] 3 All ER 190, 2 WLR 760, [1974] ECR 1337, [1975] 1 CMLR 1, 119 Sol Jo 302, ECJ.

[45] [1983] 2 AC 751, [1982] 2 WLR 918, [1981] 2 CMLR 542, [1982] ICR 420, HL; refd 12/81 [1983] 2 AC 751, [1982] 2 All ER 402, [1982] 2 WLR 918, [1982] ECR 359, [1982] 1 CMLR 696, [1982] ICR 420, [1982] IRLR 111, ECJ; apld [1983] 2 AC 751, [1982] 2 All ER 402, [1982] 2 WLR 918, [1982] 2 CMLR 174, [1982] ICR 420, [1982] IRLR 257, 126 Sol Jo 309, HL.

[46] (C-188/89) [1991] 1 QB 405, [1990] 3 All ER 897, [1991] 2 WLR 258, [1990] ECR I–3313, [1990] 2 CMLR 833, [1991] ICR 84, [1990] IRLR 353, ECJ.

[47] [1992] 1 CMLR 1045, [1992] IRLR 126, sub nom *Rolls-Royce plc v Doughty* [1992] ICR 538, CA.

[48] [2009] All ER (EC) 306, [2008] ECR I–2483, [2008] 2 CMLR 47, [2009] CEC 871, [2008] IRLR 552, [2008] Pens LR 323.

Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus,[49] it was held that it is permissible to rely on the provisions of a Directive in order to interpret national law, and in particular those provisions of national law which were designed to implement a Directive. Thus the European Court will interpret national law in the light of the language and aims of the Directive. In *Marleasing SA v La Comercial Internacional de Alimentación,*[50] the Court went still further. They stated: 'It follows from the obligation on member states to take all measures appropriate to ensure the performance of their obligation to achieve the results provided for in Directives, that in applying national law, whether it was a case of provisions prior to or subsequent to the Directive, the national court called on to interpret it was required to do so as far as possible in the light of the wording and purpose of the Directive in order to achieve the result sought by the Directive.'

Finally, in an historic decision, the European Court has stated that if a member state fails to take the necessary steps to achieve the results required by a Directive, an individual who suffers damage thereby may sue the state for the loss suffered which results from that failure. In *Francovich v Italy,*[51] the Italian Government had failed to implement EC Directive 80/987 on the protection of employees on an employer's insolvency. In consequence, an employee was unable to recover wages owed to him following his employer's insolvency, and he sued the Italian Government for compensation. It was held that his claim could succeed as long as three conditions were satisfied. These were that: (a) the result required by the Directive includes the conferring of rights for the benefit of individuals, (b) the contents of those rights may be determined by reference to the provisions of the Directive, and (c) there is a causal link between the breach of the obligation of the state and the damage suffered by the person affected.

Since these three conditions were met, the claim succeeded. However, the European Court appeared to suggest that a claim could be made not only when a member state fails to implement the terms of a Directive, but also when it incorrectly implements a Directive. Further, national courts are the appropriate forum for such claims, without the necessity of seeking a remedy in the European Court. However it should be noted that in *R v Secretary of State for Transport, ex p Factortame,*[52] the Advocate-General expressed the view that such liability would only arise if the breach was 'manifest and serious', which suggests that inadvertent or unwitting breaches of European law may not necessarily attract such a remedy.

A *Francovich* claim must be brought within the six-year period laid down in the Limitation Act 1980 (*Spencer v Secretary of State for Work and Pensions*[53]).

Thus, although Directives are addressed to member states, and can be enforced by intended beneficiaries against the state, there also appears to be an interesting remedy against a state which fails to implement or incorrectly implements a Directive by persons who suffer damage thereby.

It should be noted that '*Francovich*' style claims arising from an alleged failure by a state properly to implement a Directive must be brought in the High Court, not an employment tribunal (*Secretary of State for Employment v Mann*[54]). In *Brasserie du Pêcheur SA v*

[49] (C-177/88) [1990] ECR I–3941, [1992] ICR 325, [1991] IRLR 27, ECJ.

[50] (C-106/89) [1990] ECR I–4135, [1992] 1 CMLR 305, [1993] BCC 421, 135 Sol Jo 15, ECJ.

[51] (C-6/90 and 9/90) [1991] ECR I–5357, [1993] 2 CMLR 66, [1995] ICR 722, [1992] IRLR 84, ECJ.

[52] (C-48/93) [1996] QB 404, [1996] 2 WLR 506, [1996] ECR I–1029, [1996] All ER (EC) 301, [1996] 1 CMLR 889, [1996] IRLR 267, ECJ; apld [1998] 1 CMLR 1353, [1997] TLR 482, [1997] Eu LR 475, [1998] 1 All ER 736n, DC; aff'd [1998] 3 CMLR 192, [1998] NPC 68, [1998] TLR 261, [1998] Eu LR 456, [1999] 2 All ER 640n, CA; aff'd [2000] 1 AC 524, [1999] 4 All ER 906, [1999] 3 WLR 1062, [1999] 3 CMLR 597, [1999] 43 LS Gaz R 32, HL.

[53] [2008] EWCA Civ 750, [2009] QB 358, [2009] 2 WLR 593, [2009] 1 All ER 314, [2008] CP Rep 40, [2009] RTR 5, [2008] 3 CMLR 15, [2008] Eu LR 779, [2008] ICR 1359, [2008] IRLR 911, [2008] PIQR P21, (2008) 152(27) SJLB 31, (2008) *Times*, 24 July.

[54] n 17.

Germany,[55] the European Court of Justice gave guidance on the principles and approach to be adopted when national courts deal with *Francovich* type claims. The three issues considered were liability, damages and retrospection.

So far as liability was concerned, the Court stated that there was no difference in principle between those EU rights which were directly or indirectly applicable. Thus a right arising out of the Treaty (eg Art 141) or a right against a state body by a state employee (*Foster v British Gas*[56]) is to be treated in the same way as those rights which were indirectly applicable (*Marleasing SA v La Comercial Internacional de Alimentación*[57]). Further, the state was to be considered as a single entity, and thus it did not matter if the breach was attributable to the executive, the legislature or the judiciary.

If the EU rule confers a wide discretion (as do some Directives), it must be established that it was intended to confer rights on an individual. If so, the next question to answer is whether the breach was 'sufficiently serious' in that there was a manifest and serious disregard of the discretion. This is for the national courts to decide, taking into account the clarity and precision of the rule that has been breached, the measure of the discretion given to national authorities, whether the breach was voluntary or involuntary, whether any error of law was excusable or inexcusable, whether it was caused or contributed to by any position taken by an EU institution, and the general adoption or retention of national measures which are contrary to EU law. A breach will be sufficiently serious if it has continued despite a judgment finding that there has been a breach, or where there has been a previous legal ruling from the ECJ making it clear that there has been an infringement.

So far as damages are concerned, the Court stated that national rules must not make it impossible or extremely difficult for an individual to obtain reparation, and damages awarded must be commensurate with the loss suffered. The criteria should not be less favourable than those applicable to similar claims based on domestic law. However, a national court is entitled to enquire into the steps taken by a complainant to mitigate the loss, in particular having regard to available legal remedies.

Finally, so far as retrospection was concerned, the ECJ was of the opinion that the main issue was whether the breach was sufficiently serious. If it was, then there was no temporal limit on the effect of an ECJ judgment. However, claims could be subjected to substantive and procedural limitations imposed by national law, which could take into account principles of legal certainty by applying time limits on claims.

If a Directive is not capable of having direct effect, but is then subsequently transposed into domestic law, national courts are required to interpret the legislation in a manner which gives effect to the aims of the Directive, from the date that the period for transposition into national law has expired (*Adeneler v Ellinikos Organismos Galaktos*[58]).

1.75 Currently, there are a number of Directives in force which have a particular bearing on employment law, and which have been implemented by UK legislation.

Directive 75/117/EEC (Equal Pay)

1.76 This states that the principle of equal pay means, for the same work or for work to which equal value has been attributed, the elimination of all discrimination on grounds

[55] (C-46/93) [1996] QB 404, [1996] 2 WLR 506, [1996] ECR I–1029, [1996] All ER (EC) 301, [1996] 1 CMLR 889, [1996] IRLR 267, ECJ; apld [1998] 1 CMLR 1353, [1997] TLR 482, [1997] Eu LR 475, [1998] 1 All ER 736n, DC; aff'd [1998] 3 CMLR 192, [1998] NPC 68, [1998] TLR 261, [1998] Eu LR 456, [1999] 2 All ER 640n, CA; aff'd [2000] 1 AC 524, [1999] 4 All ER 906, [1999] 3 WLR 1062, [1999] 3 CMLR 597, [1999] 43 LS Gaz R 32, HL.

[56] n 46.

[57] (C-106/89) [1990] ECR I–4135, [1992] 1 CMLR 305, [1993] BCC 421, 135 Sol Jo 15, ECJ.

[58] (C-212/04) [2006] ECR I–6057, [2006] IRLR 716, [2006] 3 CMLR 30, [2006] EUECJ C-212/04, [2007] All ER (EC) 82, ECJ.

of sex with regard to all aspects and conditions of remuneration. Member states shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be declared null and void or may be amended. The Equal Pay Act 1970 and the Equal Pay (Amendment) Regulations 1983 implemented this Directive.

Directive 76/207/EEC (Equal Treatment)

1.77 This states that men and women shall be entitled to equal treatment as regards access to employment, including promotion, and also to vocational training and working conditions. There shall be no discrimination on grounds of sex, either directly or indirectly by reference to marital or family status. To comply with this Directive, reference may now be made to the Equality Act 2010. Equal access to occupational pension schemes is now provided for in the Pension Schemes Act 1993, and equal benefits will come within the provisions of the Pensions Act 1995. The dismissal of a transsexual for a reason relating to a sex change is precluded by the Directive (see *P v S* and para 4.119).[59]

Directive 75/129/EEC (Collective Redundancies)

1.78 This Directive requires employers to consult with workers' representatives before making collective redundancies, and also requires that prior notification be given to the competent public authorities. The provisions of TULR(C)A, ss 188–194 (as amended) are designed to meet this Directive. This Directive has been repealed and replaced by 98/59/EC.

Directive 77/187/EEC (Acquired Rights)

1.79 This Directive provides for the safeguarding of the rights of employees when their employment is transferred from one employer to another. The transferor and transferee are also required to consult with employees' representatives about the consequences of the transfer. The Transfer of Undertakings (Protection of Employment) Regulations 2006 implement the Directive. This Directive has been repealed and replaced by 2001/23/EC.

Directive 79/7/EEC (Equal Treatment in Social Security Matters)

1.80 This Directive requires that there should be no discrimination on grounds of sex (either directly or indirectly by reference to marital or family status) in the scope of social security schemes (ie sickness, invalidity, old age, occupational accidents and diseases, and unemployment benefits), the conditions of access thereto, contributions, the calculation of benefits (including benefits for spouses and dependants) and the duration of benefits. However, excluded from this Directive are benefits which arise from the determination of pensionable age. At the present time, women are permitted to receive the state pension at 60, whereas men receive it when they are 65 although the Pensions Act 1995 makes provisions for the progressive equalisation of state pensions at age 65 for both sexes, and this is permissible under the Directive. Other social security legislation has been passed to conform to its provisions.

Directive 86/378/EEC (Equal Treatment in Occupational Social Security Schemes)

1.81 This Directive requires that there shall be no discrimination between men and women in access to and benefits from occupational pension schemes. The Social Security Act 1989 was designed to implement the Directive, but further problems have arisen as a result of the decision in *Barber v Guardian Royal Exchange Assurance Group*.[60]

[59] (C-13/94) [1996] ECR I–2143, [1996] All ER (EC) 397, [1996] 2 CMLR 247, [1996] ICR 795, [1996] IRLR 347, [1997] 2 FCR 180, [1996] 2 FLR 347, [1996] Fam Law 609, ECJ.

[60] (C-262/88) [1991] 1 QB 344, [1990] 2 All ER 660, [1991] 2 WLR 72, [1990] ECR I–1889, [1990] 2 CMLR 513, [1990] ICR 616, [1990] IRLR 240, [1990] NJLR 925, ECJ.

Directive 86/613/EEC (Equal Treatment for Self-employed)

1.82 This Directive requires that the laws of member states relating to self-employment shall not contain any discriminatory provisions, that there shall be protection for self-employed persons and their wives during pregnancy and motherhood, and that discrimination does not arise from the establishing of businesses or other self-employed activities.

Directive 80/987/EEC (Employers' Insolvency)

1.83 This Directive requires member states to guarantee the payment of certain outstanding claims due to an employee when his employer becomes insolvent, subject to certain limits. The provisions of the Insolvency Act 1986 meet the terms of this Directive.

Directive 91/533/EEC (Proof of Employment Relationship)

1.84 This Directive requires employers to inform employees on the terms and conditions which apply to the employment relationship. It has been given effect by the Employment Rights Act, ss 1–10.

Directive 93/104/EEC (Working Time)

1.85 This Directive concerns aspects of the organisation of working time, with compulsory rest periods, holidays, and a maximum working week of 48 hours. This Directive was passed under the provisions of Art 139 of the Treaty of Rome, which permits health and safety matters to be passed by a qualified majority vote. The lawfulness of this Directive was challenged by the UK Government (*United Kingdom v EU Council*[61]) but the ECJ held that it was properly a health and safety matter, and in consequence the Working Time Regulations 1998 were introduced. This Directive has been repealed and replaced by 2003/88/EC.

Directive 94/45/EC (European Works Councils)

1.86 This Directive requires works councils to be set up in Community-scale undertakings, ie an undertaking with at least 1,000 employees in a member state and at least 150 employees in at least two member states. The Transnational Information and Consultation of Employees Regulations 1999 implement this Directive. This Directive has been repealed and replaced by 2009/38/EC.

Directive 94/33/EC (Protection of Young People at Work)

1.87 This Directive has been implemented by various provisions, eg Management of Health and Safety at Work Regulations, Working Time Regulations etc.

Directive 96/34/EC (Parental Leave)

1.88 This Directive gave certain minimum rights in relation to parental leave, and time off to care for dependants. It has been repealed and replaced by Directive 2010/18/EU (see para 1.97).

Directive 97/81/EC (Part-time Work)

1.89 This Directive requires the removal of less favourable treatment in respect of part-time workers. It has been implemented by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

Directive 96/71/EC (Posted Workers)

1.90 This Directive requires that workers who move from one EC country to another are treated no less favourably than the employees of the host country. The Directive has been implemented by various provisions in the Employment Rights Act.

[61] (C-84/94) [1996] ECR I–05755.

Directive 99/70/EC (Fixed-term Workers)

1.91 This Directive applies the principle of non-discrimination to employees who are in fixed-term employment, and requires that action be taken to eliminate the abuse of successive fixed-term contracts. The Fixed Term Employees (Protection of Less Favourable Treatment) Regulations 2002 implement this Directive.

Directive 97/80/EC (Burden of Proof)

1.92 This Directive requires that if a person claims that s/he has suffered direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. The Directive has been implemented by the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001.

Directive 2000/78/EC (Equal Treatment in Employment and Occupation)

1.93 This Directive requires that there shall be no discrimination in employment on grounds of religion or belief, disability, age or sexual orientation. These matters are dealt with generally by the Sex Discrimination Act, Disability Discrimination Act, Employment Equality (Sexual Orientation) Regulations 2003, Employment Equality (Religion or Belief) Regulations 2003, Disability Discrimination Act 1995 (Amendment) Regulations 2003 and the Employment Equality (Age) Regulations 2006 all of which were replaced by the Equality Act 2010.

Directive 2000/43/EC (Equal Treatment between Persons Irrespective of Racial or Ethnic Origins)

1.94 This Directive requires that there shall be no direct or indirect discrimination based on racial or ethnic grounds. Its provisions are covered by the Race Relations Act (now the Equality Act).

Directive 2002/14/EC (Information and Consultation)

1.95 This Directive required employers of a certain size to give information about the conduct of the undertaking. It is implemented by the Information and Consultation of Employees Regulations 2004.

Directive 2008/104/EC (Agency Workers Directive)

1.96 This Directive requires that temporary agency workers shall be given equal treatment in comparison to permanent workers in the same undertaking doing the same job, as regards basic working conditions, such as pay, working hours, rest breaks, night work and holidays. However, there is no protection for unfair dismissal, notice periods or the right to a redundancy payment. The Government has opted to make use of a permitted derogation that will provide that the equal treatment rule will only apply after the agency worker has been employed at the same job for 12 calendar weeks. However, entitlement to certain rights, such as the right to receive information about job vacancies, will operate from the commencement of employment. The Agency Workers Regulations 2010 implement this Directive (see para 2.163).

Directive 2010/18/EU (Parental Leave)

1.97 This Directive replaced Directive 96/34/EC with effect from 8 March 2012. It states that men and women have an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least four months, until the child reaches the age of eight. The length of service qualification should be no more than one year. In addition, the right is in principle 'non-transferable' ie either a man or woman can take leave in respect of a child, but not both of them, and not alternatively,

however the Directive allows member states to make the leave transferable so long as at least one of the months is not transferable.

The Directive leaves it to member states to decide the details of how the scheme for parental leave should be implemented, eg on a full-time or part-time basis, in a piecemeal way, or in the form of a time credit system. There is to be protection against dismissal for applying for or taking parental leave, and, at the end of the leave, workers will have the right to return to their old job, or to a similar or equivalent job.

It also requires states to provide that employers take measures to ensure that workers returning from such leave may request changes to their working hours and/or patterns for a set period of time, and for employers to consider such requests. States are also required to provide that workers are to be permitted to take time off work in the event of *force majeure* for urgent family reasons in cases of sickness or accident. This Directive has led to the provisions on parental and paternity leave, time off work to care for dependants, and the right to request flexible working (see Chapter 6 for family friendly legislation).

Other Directives

1.98 A number of other Directives relating to health and safety at work have also been passed by the Council of Ministers, and these are referred to in Chapter 11. In 2006 all seven measures dealing with the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation were consolidated into the Equal Treatment Directive 2006/54/EC with effect from August 2009.

C. Recommendations

1.99 A Recommendation made under Community law has no binding effect, and cannot be relied upon to enforce a legal right in a national court. However, in *Grimaldi v Fonds des Maladies Professionnelles,*[62] the European Court of Justice held that national courts are bound to take Recommendations into account when determining disputes which are referred to them, in particular when they clarify the interpretation of laws passed to implement them, or when they are designed to supplement binding Community measures.

1.100 Recommendations have been made on such topics as the employment of disabled persons, hours of work and holidays generally, flexible retirement, vocational training for women and sexual harassment.

D. Decisions of the Court of Justice of the European Union

1.101 The Court of Justice of the European Union has jurisdiction under Art 234 of the Treaty of the Functioning of the European Union to give rulings concerning the interpretation of the Treaty or Regulations or Directives made by the Council of Ministers. A member state may be taken to the Court by another state or by the European Commission (see *EC Commission v United Kingdom,*[63] para 18.69). A UK court may, but is not bound to, make a reference to the Court if it is necessary to enable a decision to be made (see *Macarthys Ltd v Smith,*[64] para 5.11). Once the Court has given its opinion, the matter is

[62] (C-322/88) [1989] ECR 4407, [1991] 2 CMLR 265, [1990] IRLR 400, ECJ.

[63] (C-382/92) [1994] ECR I–2435, [1995] 1 CMLR 345, [1994] ICR 664, [1994] IRLR 392, ECJ.

[64] (C-129/79) [1978] 2 All ER 746, [1978] 1 WLR 849, [1978] ICR 500, [1978] IRLR 10, 122 Sol Jo 456, EAT; on appeal [1979] 3 All ER 325, [1979] 1 WLR 1189, [1979] 3 CMLR 44, [1979] ICR 785, [1979] IRLR 316, 123 Sol Jo 603, CA; refd [1981] QB 180, [1981] 1 All ER 111, [1980] 3 WLR 929, [1980] ECR 1275, [1980] 2 CMLR 205, [1980] ICR 672, [1980] IRLR 210, 124 Sol Jo 808, ECJ; apld [1981] QB 180, [1981] 1 All ER 111, [1980] 3 WLR 929, [1980] 2 CMLR 217, [1980] ICR 672, [1980] IRLR 210, 124 Sol Jo 808, CA.

referred back to the national court for the application of the opinion to the facts of the case (see *Jenkins v Kingsgate (Clothing Productions) Ltd*[65]).

1.102 It should be noted that there are no specified time limits for bringing a claim under European law, as the provisions of the Treaty of Rome came into force upon accession (see *Stevens v Bexley Health Authority*[66]). Time will start to run against a state body from the day the state makes good its failure to comply with the objectives laid down in the Directive (*Cannon v Barnsley Metropolitan Borough Council*[67]). However, the European Court may, when giving a ruling, indicate that this shall only apply to claims lodged at the date of the ruling (*Barber v Guardian Royal Exchange*[68]).

1.103 If a person is seeking to enforce a private right which has come to light as a result of the interpretation of EC law by the European Court, national domestic procedures relating to time limits must be adhered to. Thus in *Biggs v Somerset County Council*[69] the applicant was a teacher who worked for 14 hours per week. She was dismissed in 1976 but, relying on the House of Lords' decision in *R v Secretary of State for Employment, ex p Equal Opportunities Commission*[70] (which held that the 'hours' requirement was discriminatory and contrary to the EC Equal Treatment Directive), brought a claim for unfair dismissal in 1994. It was held that her claim was out of time. She was not seeking to enforce a Community right (there is no EC right to be unfairly dismissed), and there is no separate procedure for bringing claims under EC law (see also *Setiya v East Yorkshire Health Authority*[71] and Chapter 20). (Note that in case law before 2011 the court was referred to as the ECJ, after that time it became CJEU.)

Human Rights Act 1998

1.104 In order to prevent a re-occurrence of the horrors and atrocities which took place before and during the Second World War, the European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in 1950. Many European countries subsequently incorporated the Convention into their domestic law, but UK citizens who wished to assert a Convention right were forced to petition the European Court of Human Rights in Strasbourg. The UK Government would always give effect to any ruling from that court, but the Convention itself was not enforceable in UK courts.

1.105 Despite the financial and practical difficulties involved in pursuing a claim under the Convention, some notable decisions were given against the UK Government in circumstances where the ordinary legal system could not or would not provide a remedy. For example, in *R v Admiralty Board of the Defence Council, ex p Lustig-Prean,*[72] the Court of Appeal refused to interfere with a decision to discharge the applicant from the Royal Navy on the ground that he was a homosexual, and he thus brought proceedings in the European Court of Human Rights. That Court held (*Lustig-Prean v United Kingdom*[73]) that a decision to discharge homosexuals from the armed forces on grounds of their sexual orientation was a violation of their right to respect for their private lives, and thus was contrary to Art 8 of the Convention. The outcome was the lifting of the ban on homosexuals and lesbians joining or staying in the armed forces. A similar outcome was reached in three other cases (see *Smith v United Kingdom*[74]).

[65] [1981] ICR 715, [1981] IRLR 388, EAT. [66] [1989] ICR 224, [1989] IRLR 240, EAT.
[67] [1992] 2 CMLR 795, [1992] ICR 698, [1992] IRLR 474, EAT. [68] n 60. [69] n 16.
[70] n 40. [71] [1995] IRLR 348, EAT.
[72] [1996] QB 517, [1996] 2 WLR 305, [1996] ICR 740, sub nom *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257, [1996] IRLR 100, CA.
[73] (1999) 29 EHRR 548, 7 BHRC 65, ECtHR.
[74] (Applications 33985/96 and 33986/96) 29 EHRR 493, [1999] ECHR 33985/96, ECtHR.

1.106 The Human Rights Act 1998 is designed to give effect to the rights and freedoms guaranteed under the Convention, by effectively incorporating it into UK law. It came into force in October 2000 and its basic provisions may be summarised as follows:

> A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights. But although it is mandatory to take these into account, the court or tribunal is given a discretion whether to follow that decision etc (see *Kleinwort Benson Ltd v Glasgow City Council*[75]). It has long been recognised that the Convention is a 'living instrument', and a previous decision of the Court need not be followed if it is out of step with current practices and opinions, or if it is unpersuasive. Further, the Court itself developed the doctrine of 'the margin of appreciation' which recognised the relatively restrained scrutiny of national law.
>
> So far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights. Thus, if a court or tribunal has a choice to interpret a statute in two ways, one of which is compatible with the Convention and one not, the former interpretation must prevail (see *Marleasing*, para 1.74). This obligation arises whenever the statutory provisions were passed. But if a statute has only one possible meaning, effect must be given to it accordingly.
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> If a court (not a tribunal) is satisfied that a provision in primary legislation is incompatible with a Convention right, it may make a declaration of incompatibility, although before doing so it must give the Crown notice of such intention, so as to enable the Crown to be joined as a party to the proceedings. Such a declaration does not affect the validity of the provision in question, nor is it binding on the parties to the proceedings but, once made, doubtless Parliament will consider taking steps to ensure compliance with the Convention.

It is unlawful for a public authority to act in a way which is incompatible with a Convention right. There is some uncertainty as to which bodies are 'public authorities', which will doubtless be the subject of case law, but courts and tribunals are certainly within the meaning of the term. A person aggrieved by such an act may bring proceedings in an appropriate legal venue, and certain remedies, including compensation, are available.

1.107 So far as the law of employment is concerned, there are a number of possible implications arising from the Act. An employee cannot lodge a claim in an employment tribunal based directly on a Convention right, but in any claim brought in a tribunal based on domestic law, the tribunal will take those rights into account, unless prohibited from so doing by domestic law. The Act is beginning to impact on employment law claims, but it should be borne in mind that some of the rights are hedged with qualifications. The following Articles of the Convention may well be relevant:

(a) *Article 4* states that 'no one shall be required to perform forced or compulsory labour'. In *R (on the application of Reilly and another) v Secretary of State for Work and Pensions*,[76] the Supreme Court held that making jobseeker's allowance (JSA) conditional on work or work-related activity does not constitute forced labour, as it was work forming part of 'normal civic obligations'. This is not the type of exploitative conduct at which Art 4 is aimed (although fault was found with the regulations for other reasons).

[75] (C-346/93) [1996] QB 57, [1995] 3 WLR 866, [1995] ECR I–615, [1995] All ER (EC) 514, ECJ; re-heard [1996] QB 678, [1996] 2 All ER 257, [1996] 2 WLR 655, CA; revsd [1999] 1 AC 153, [1997] 4 All ER 641, [1997] 3 WLR 923, [1997] NLJR 1617, 141 Sol Jo LB 237, HL.

[76] [2013] UKSC 68.

(b) *Article 6*. In the determination of a person's civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Thus in *Somjee v United Kingdom*[77] three claims before an employment tribunal and the Employment Appeal Tribunal took more than seven years to be resolved. The European Court held that this violated Art 6 of the Convention. If a person is charged with misconduct before a public body, this is a determination of his civil rights, and the protection in Art 6 applies. Thus he is entitled to have a fair hearing, ie to know in good time the nature of the charges, be given adequate time to prepare his case, to question witnesses, and to call evidence, etc (*R v Securities & Futures Authority Ltd, ex p Fleurose*[78]). The right does not apply indiscriminately, however. In *Al-Malki* & *Anor v Reyes & Anor*[79] the fact that the diplomatic immunity of the employer prevented an employee from bringing an action in an employment tribunal did not breach the employee's rights under Art 6 (but see *Kücükdeveci* and *Aklagaren* later in this section) This case may go to the Court of Appeal.

It was suggested in *Smith v Secretary of State for Trade and Industry*[80] that the independence of employment tribunals themselves was in doubt, because the Secretary of State exercised control over the appointment, tenure and pay of lay members, but subsequently changes were made in these matters which allayed the fears of any conflict of interest or lack of impartiality, and it has now been accepted that employment tribunals are impartial and independent within the meaning of Art 6 (*Scanfuture UK Ltd v Secretary of State for Trade and Industry*[81]). It has been held that there is an objection to an advocate appearing before the Employment Appeal Tribunal if he is also a part-time judge of that Tribunal, because there was a real possibility that lay members who had sat with him in that capacity might subconsciously be biased in favour of submissions made in his capacity as an advocate (*Lawal v Northern Spirit Ltd,* see para 1.22). On the other hand, s 40 of the Health and Safety at Work Act (see para 11.97), which reverses the burden of proof which would ordinarily apply in criminal proceedings, did not violate Art 6. Balancing the fundamental rights of the individual with the general interests of the community in ensuring health and safety at work, the reversal was justified as necessary and proportionate, and therefore compatible with the Convention (*Davies v Health and Safety Executive*[82]).

It is not a violation of Art 6 for an employer to refuse an employee the right of legal representation at a disciplinary hearing, even when the ultimate sanction is likely to be the loss of a job. But a different consideration will apply if the sanction could result in being deprived of an opportunity to practice his or her chosen career, or where some other serious consequence could result, eg being placed on the sex offenders register. In *G v X School*[83] a teacher was brought before a disciplinary body charged with an allegation of sexual misconduct with a 15-year-old student. If the allegations were established this could have adversely affected his whole career. It was held that although he was not facing a criminal charge, the serious nature of the

[77] (Application 42116/98) [2002] IRLR 886, [2002] All ER (D) 214 (Oct), ECtHR.
[78] [2002] IRLR 297, CA. [79] UKEAT/0403/12/GE.
[80] [2000] ICR 69, [2000] IRLR 6, EAT.
[81] [2001] ICR 1096, [2001] IRLR 416, [2001] Emp LR 590, EAT.
[82] [2002] EWCA Crim 2949, [2003] IRLR 170, [2003] 09 LS Gaz R 27, [2003] JPN 142, 147 Sol Jo LB 29, [2002] All ER (D) 275 (Dec).
[83] [2010] EWCA Civ 1, [2010] 2 All ER 555, [2010] IRLR 222, [2010] HRLR 13, [2010] BLGR 207, [2010] Med LR 45, (2010) *Times*, 23 February.

allegations and the severity of the consequences meant that he was entitled to have legal representation under Art 6 of the Convention. A similar view appears to have been taken in *Kulkarni v Milton Keynes Hospital NHS Foundation Trust*,[84] where a junior doctor was accused of inappropriately touching a female patient. It was stated obiter that if an adverse outcome of the case was so potentially damaging as to make it highly unlikely that he would be able to work in his chosen profession, then Art 6 requires that he be given the right to legal representation.

These decisions only affect public employers, who are required to act in a way compatible with Convention rights. Whether the principle can be extended to private employers has yet to be determined.

The Convention will not assist a claimant to pursue whims and fancies. In *Khan v Vignette Europe Ltd*[85] an employment tribunal refused to grant an adjournment mid-way through a hearing so that the claimant could experience a period of mental and spiritual purity during Ramadan. It was held that the decision did not violate his right to a fair trial under Art 6.

Where a fundamental principle of EU law is concerned, such as the right to a fair hearing, domestic courts must disapply a provision which stands in its way. In *Kücükdeveci v Swedex GmbH & Co KG*[86] and *Aklagaren v Hansson*[87] (see also para 17.4(f)) the ECJ confirmed that where a fundamental principle of EU law is concerned, such as the right to a fair hearing, domestic courts must disapply a provision which stands in its way. This was done in *Benkharbouche v Sudan*,[88] where the State Immunity Act 1978 prevented domestic workers employed by two embassies from bringing claims. The EAT held that its provisions were to be disapplied by the Charter of Fundamental Rights of the European Union in relation to discrimination and working time claims. Further claims of unfair dismissal and the minimum wage were not covered, as they did not derive from EU law. The EAT effectively held that as a result of the Lisbon Treaty, the EU charter was now directly applicable in the UK, and the tribunal was therefore bound to disapply UK law which conflicted with these principles even between private litigants. It is likely that this case will be appealed. This is a significant decision, which could mean that even where the ERA does not allow a statutory provision to be disapplied, EU law will require a tribunal to do so where it concerns EU law. This is likely to be appealed.

(c) *Article 8*. Everyone has the right to respect for his private and family life, his home and his correspondence. This right is subject to certain qualifications, ie when the interference is by a public authority in accordance with the law, and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others. In *McGowan v Scottish Water*[89] the employer obtained evidence through covert surveillance that the employee had been falsifying his time sheets. He claimed that he had been unfairly dismissed, arguing that his right to respect for his private life under Art 8 of the Convention had been breached. His claim was dismissed by the EAT. The interference with his rights was justified under Art 8(2), in that the

[84] [2009] EWCA Civ 789, [2010] ICR 101, [2009] IRLR 829, [2009] LS Law Medical 465, (2009) 109 BMLR 133, (2009) *Times*, 6 August.

[85] Employment Appeals Tribunal, 14 January 2010. [86] C-555/07. [87] Section 1.01.

[88] *Benkharbouche v Embassy of the Republic of Sudan* UKEAT/0401/12/GE; *Janah v Libya* UKEAT/0020/13/GE.

[89] [2005] IRLR 167, EAT.

employer's actions were 'in accordance with the law and necessary for the prevention of disorder or crime . . . '.

The right to respect for private life includes the right to privacy with respect to a person's sexual orientation. The European Court in *Smith v United Kingdom*[90] held that to discriminate against a person on grounds of his/her sexual orientation was a violation of Art 8 of the Convention, and this was transposed into UK law by the Employment Equality (Sexual Orientation) Regulations 2003 (see para 4.185).

An employee has a reasonable expectation of privacy in respect of private telephone calls. In *Halford v United Kingdom*[91] the employee was a senior police officer who alleged that her employer had tapped a private work telephone, in order to obtain details of a claim for sex discrimination she was pursuing. The European Court of Human Rights held that as she had not been given any prior indication that her telephone calls were liable to interception, there had been a breach of Art 8.

The right to privacy in respect of correspondence clearly includes unauthorised monitoring by employers of telephone calls, e-mail communications, and the use of the internet at the workplace. An employer must therefore seek to justify any such interference by relying on one of the qualifications mentioned earlier, or by notifying employees that such interception may take place at any time. The position is further clarified by the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, designed to ensure compliance with the Telecommunications Data Protection Directive (EC 97/66), which permits the interception and monitoring of telephone calls, e-mail communications etc, for certain specified purposes (see para 10.47). However, Art 8 of the Convention does not apply in respect of the commission of a criminal offence in a public place (*X v Y*[92]).

There are a number of other possibilities arising out of Art 8, including the lawfulness of mandatory medical examinations, confidentiality of medical reports, etc. It is unlikely that any remedy will exist in cases where an employee has given his consent to such action, or where there is a contractual power to do so, and the qualifications to Art 8 must always be borne in mind.

(d) *Article 9*. This Article provides for the right to freedom of thought, conscience and religion, but it is subject to the same qualifications as are found in Article 8, relating to the limitations imposed in the interests of national security, public safety, economic well-being of the country, preventing disorder or crime, protecting health and morals, and protecting the rights and freedoms of others. Thus in *Ahmad v United Kingdom*[93] the employers refused to permit a devout Muslim to take 45 minutes off work every Friday in order to pray at the local mosque. Instead, they offered to reduce his working hours from a five-day week to four and a half days. He refused this offer, arguing that he would suffer a loss of pay and benefits if he accepted, and resigned, claiming that he had been constructively dismissed. His claim was dismissed by an employment tribunal, and an appeal to the European Court of Human Rights was rejected. By offering to reduce his working hours to enable him to attend the local mosque in his own time the employers had not infringed his right to practise his religion. Similarly, in *Stedman v United Kingdom*[94] a woman's contract of employment required her to work on Sundays. She refused to do so, and was

[90] n 74.

[91] (Application 20605/92) (1997) 24 EHRR 523, [1997] IRLR 471, [1998] Crim LR 753, 94 LS Gaz R 24, 3 BHRC 31, ECtHR.

[92] [2004] EWCA Civ 662, [2004] ICR 1634, CA.

[93] (Application 8160/78) (1981) 4 EHRR 126, EComHR.

[94] (1997) 23 EHRR CD 168, [1997] EHRLR 545.

dismissed. She claimed that the dismissal was in breach of Art 9 of the Convention, but it was held that it was her refusal to comply with her contractual obligations, not her religious beliefs, which led to her dismissal.

(e) *Article 10*. This Article provides that everyone has the right to freedom of expression, including the freedom to hold opinions and receive and impart information and ideas without interference by a public authority. Again, the exercise of such freedoms may be limited by such formalities, conditions, restrictions or penalties as are prescribed by law, and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Thus freedom of speech is covered by the Convention, but hedged with a number of well-recognised limitations. In *Ahmad v United Kingdom*, the Local Government Officers (Political Restrictions) Regulations 1990 restricted the political activities of certain categories of local government officials. The applicant, who was a solicitor employed by one local authority, wished to stand as a candidate in the local elections in another area, but was obliged to withdraw his candidature. He claimed that his rights to freedom of expression had been infringed, but the European Court of Human Rights dismissed his claim. The restrictions imposed were 'prescribed by law', and they pursued a legitimate aim of aiming to ensure effective political democracy at the local level. The Court also applied the doctrine of 'margin of appreciation', ie leaving it to the contracting state to assess whether pressing social needs existed. In this case, the regulations had been passed following a thorough enquiry, and were a valid response by the legislature.

It could be argued that a requirement to follow a particular dress code potentially violates the right to freedom of expression, although a rule which applies to both men and women, and is designed to enforce a common standard of conventionality is not discriminatory on grounds of sex (*Smith v Safeways plc*[95]) and rules which are unlikely to come within the scope of the Convention. In *Kara v United Kingdom*[96] the Commission of Human Rights dismissed a claim by a male transvestite who wore female clothing at work, holding that a requirement to wear appropriate clothing was in accordance with the law and appropriate.

(f) *Article 11*. This states that everyone has the right to freedom of assembly and to freedom of association with others, including the right to form and join trade unions (see *Wilson v United Kingdom,*[97] para 21.49) for the protection of their interests. Again, there are the usual qualifications to this right, and, in addition, the Convention permits the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, the police, and the administration of the state.

Freedom of assembly and freedom of association also implies a freedom not to assemble or associate. In *Young, James and Webster v United Kingdom*[98] it was held that a requirement to join a trade union which did not exist when workers were first employed (with the threat of a dismissal if there was a failure to do so) amounted to an interference with freedom guaranteed under Art 11. It was wrong to compel someone to join an association contrary to their convictions. Also, the prohibition

[95] [1996] ICR 868, [1996] IRLR 456, CA.

[96] Unreported ECtHR.

[97] (Applications 30668/96, 30679/96 and 30678/96) [2002] IRLR 568, 13 BHRC 39, [2002] All ER (D) 35 (Jul), ECtHR.

[98] (Applications 7601/76 and 7806/77) 4 EHRR 38, [1981] IRLR 408, ECtHR.

of the right of a trade union to exclude a person from membership because he holds political views which were inimical to the trade union, contained in s 174(1) of TULR(C)A was held by the ECJ in *ASLEF v UK*[99] to violate Art 11 (see para 21.17).

Article 11 contains no express right to strike (*Ministry of Justice v Prison Officers Association*[100]), but in *Demir v Turkey*[101] the European Court of Human Rights ruled that the right to strike is a human right recognised and protected in international law, and may only be limited in strictly defined circumstances. In this case, the Turkish Government issued a general ban on strike action by civil servants when a Turkish trade union organised a national action day for the recognition of the right to collective bargaining in the public sector. It was held that there was breach of Art 11 of the Convention on Human Rights, because the action taken was in violation of the rights of employees to form trade unions and bargain collectively.

It has been held that the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992, with its stringent provisions and limitations on strike and other industrial action offend against the Convention, because balloting, industrial action notices, etc are prescribed by law, and it could be argued that these rules are necessary in a democratic society (*Metrobus v UNITE*[102]). It has also been suggested that the restriction on the number of pickets contained in the Code of Practice on Picketing (see para 1.59) is capable of being challenged, on the ground that there is no such restriction on any other form of public demonstration. However, Codes of Practice are not law, and a violation does not automatically lead to a breach of the law.

[99] (Application 11002/05) [2007] IRLR 361, 22 BHRC 140, (2007) 45 EHRR 34, ECtHR.
[100] [2008] ICR 702. [101] [2009] IRLR 766, (2009) 48 EHRR 54.
[102] [2009] EWCA Civ 829, [2010] ICR 173, [2009] IRLR 851.