

UNIVERSITY OF SOUTHAMPTON

FACULTY OF LAW

THE EFFECTIVENESS OF THE WAGES COUNCIL AND UNFAIR DISMISSAL
LEGISLATION IN THE LICENSED HOTEL AND RESTAURANT SECTOR

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ABSTRACT

FACULTY OF LAW

Master of Philosophy

THE EFFECTIVENESS OF THE WAGES COUNCIL AND UNFAIR DISMISSAL
LEGISLATION IN THE LICENSED HOTEL AND RESTAURANT
SECTOR

by Jill Morgan

This study describes how, because of the diffuse nature of the industry and the consequent insularity of its members, workers in licensed hotels and restaurants have never enjoyed the protection afforded against the vagaries of their employers by the regulatory process of collective bargaining. Instead they have had to rely on the strength of their individual bargaining positions and the rights given to them by the law.

An examination is made of what is, in theory at least, an important source of protection for hotel and catering workers: namely, the wages council system. The apparent failure of the system is compared with the unfair dismissal laws - part of the 'floor of rights' legislation of the 1970s - which seemd to herald a shift in the balance of power in favour of employees.

The study concludes that the specific problems of the licensed hotel and restaurant sector, coupled with the general failure of the law to meet the shortcomings of industrial relations, have rendered the rights of many of its workers virtually meaningless. Since greater unionisation is unlikely, the only solution seems to be a more positive implementation of the existing law.

The law is stated as at the 1st February 1988

INTRODUCTION

From the fourteenth until the early nineteenth century, the State considered the regulation of wages and conditions of work to be its sole prerogative, Justices of the Peace being empowered to fix wages annually at their General Sessions. Attempts by combinations of workers to interfere were regarded as potentially damaging conspiracies and were made illegal by a series of statutes, commencing with the Statute of Artificers 1351 and culminating in the Combination Acts 1799 and 1800.

In the eighteenth century, with the growth of industrial organisation, state regulation fell into disuse (1) and freedom of contract became the prevailing legal doctrine, allowing terms and conditions of employment to be settled by market factors. Even so, the notion of self-reliance became less tenable as it grew increasingly apparent that an individual labourer's working and living conditions were determined largely by forces outside his control.

"The idea was gaining ground that...it was the duty of the community to assure to every workman at least the minimum conditions of well-being....The realisation that there are many things that can be better done by the state than by individual effort and...the spread of the belief that the primary conditions of industrial well-being cannot be assured on individualist lines converged to create an atmosphere favourable to new conceptions of distributive justice, by which the state should be guided in dealing with the problems of economic organisation". (2)

The state restricted its legislative activities in ensuring the minimum

conditions of "industrial well-being" to the three areas of health and safety at work, social security and the protection of those workers deemed unable to look after their own interests. This last category included not only women and young people, whose hours etc. were limited by the Factories Acts, but also those workers falling within the scope of the wages council legislation. Otherwise, right up to 1971, the development of labour law was dominated by individualism - the insistence on the contract of employment as the legal basis of the employment relationship - and "by the principle of collective laissez-faire - the retreat of the law from industrial relations and vice versa - dominating not only the attitude of the unions but also that of the employers and their associations". (3) Wedderburn explains that there is

"a long tradition that regards autonomous collective bargaining between employers and trade unions as the normal way to behave in industry. With that has gone a legal tradition whereby the 'primacy' of that voluntary process is recognised by our legal institutions, which have aimed to sustain it but not to regulate it. But that tradition of 'the law' has often escaped the lawyers. For the English lawyer, the central institution of labour relations has never been (as it is for most employers and workers) the collective bargain between 'workers' and 'employers'. His primary concern in labour law has been with the individual relationship between the employer and each employee, especially the contract of employment...

Here then there is an ancient tension in the system. For the common law assumes it is dealing with a contract made between equals, but in reality, save in exceptional circumstances, the individual worker brings no equality of bargaining power to the labour market and to this transaction central to his life whereby the employer buys his labour power." (4)

The period since 1971 has witnessed an unprecedented expansion in the

legal protection theoretically afforded to employees in recognition of their weaker position in the employment relationship. The statutory floor of rights extends into many areas of employment law but better conditions may still be established by way of collective bargaining. Where there is no collective bargaining, workers are particularly vulnerable and their legal rights are, theoretically, of even greater value. In the private sector of the hotel and catering industry there is little by way of "collective bargain between 'workers and employers'"; the contract of employment is the "central institution" of labour relations and yet there are many workers within the sector who do not have a contract of employment with those for whom they work. The inequality of bargaining power between the two parties is particularly significant.

Some critics have said that the law has gone too far. (5) Clifton and Tatton-Brown, however, found that in general the impact on the behaviour of firms of the employment protection legislation was very much what one would expect on a priori grounds. The legislation gave employees rights in employment which might involve expense to employers. Employers, therefore, were more careful about whom they employed and might look more closely at their internal labour market before taking on new staff. The changes in the number of employees in the small firms apparently had not been directly influenced by the employment legislation provisions. Clifton and Tatton-Brown felt their results countered the suggestion that the legislation was particularly influential as regards small firms. (6) Even so, alterations brought about by Ss.6 and 8 Employment Act 1980, for instance, were partly attributable to the proposition that the employment protection laws had operated as a disincentive to employment.

Davies and Freedland maintain that

"from the early 1980s onwards, the massive growth in unemployment was so much more obviously attributable to conditions of economic recession than to the impact of the employment protection laws that these

laws ceased on the whole to be advanced as having a disincentive effect upon employment, and the preoccupation with reducing their impact seemed to diminish as a motive for governmental action." (7)

Since that was written, however, employment protection laws have again been used as a scapegoat - witness the rationale behind the Wages Act 1986: concern about the effects of wages councils on employment opportunities and the belief that "they also impose considerable burdens on employers and inhibit their flexibility in meeting changing market needs." (8)

The purpose of this study is to identify in broad terms the extent to which the unfair dismissal legislation, in comparison with the wages council legislation, has affected the balance of power between employers and their workers, particularly in a part of the hotel and catering industry where the actors are, in many cases, only one step away from "master" and "servant".

CHAPTER 1.

THE LICENSED HOTEL AND RESTAURANT SECTOR

Inn-keeping is one of the oldest professions in Great Britain and can be traced back to the time of the druids. (9) In spite of its longevity, however, it is only comparatively recently that the provision of hotel and catering services has come to be regarded as constituting an "industry", and there are considerable difficulties in identifying the boundaries of what is agreed by many to be a "complicated trade." (10)

A number of "official" definitions of the hotel and catering industry have been attempted, the first being that of the Catering Wages Act 1943. The Act applied to workers

"in any undertaking which consists wholly or mainly in the carrying on (whether for profit or not) of one or more of the following activities:

(i) the supply of food or drink for immediate consumption;

(ii) the provision of living accommodation for guests or lodgers or for persons employed in the undertaking;

(iii) any other activity incidental or ancillary to any of these activities".
S.1(2)

The Catering Wages Commission, which was set up under the Act, identified five sectors in the industry in which it recommended the establishment of wages boards (the forerunners of wage councils), one of them being the licensed residential establishment and licensed restaurant sector. (11) Medlik has said that:

"the statutory recognition of this group

in 1943....no doubt stimulated its emergence as an entity with common interests and the concept as we understand it probably dates from that year". (12)

Hotel-keeping and catering is not an industry which is easily defined but, nonetheless, a definition has become necessary as the provision of hotel and catering services has become increasingly important. The growth of tourism and its contribution to the balance of payments, the creation of industrial and staff canteens and the expansion of catering in hospitals and educational establishments have all brought about a greater awareness of these services. More importantly, the hotel and catering industry is the country's fourth largest commercial employer and it has been estimated that by 1990 it is likely to have created 120,000 new jobs (13).

Because of its size and diversity, an attempt to measure the success of any legal enactment in the whole industry would be impracticable. This study, therefore, concentrates on the licensed hotel and restaurant sector (the largest sector of the hotel and catering industry), embracing those establishments which fall within the scope of the Licensed Residential Establishment and Licensed Restaurant (LRE and LR) Wages Council. The Wages Council (Licensed Residential Establishment and Licensed Restaurant) Order defines a licensed residential establishment as an

"hotel, inn, boarding house, guest house, hostel, holiday camp or club which either contains four or more rooms ordinarily available as sleeping accommodation for guests or, if it contains less than four rooms, contains sleeping accommodation for not less than eight guests". In addition, the establishment must have a liquor licence.

A licensed restaurant means

" any place which is used either regularly or occasionally as....a restaurant, dining room, cafe or similar place at which it is lawful to sell....intoxicating liquor for consumption on the premises".

Until the middle of the last century, most "hotel" accommodation was in the form of individually run inns. (14) With the industrial revolution came the growth of travel by the wealthy which, stimulated by the railways, led to an increase in the size and scale of hotels. At around the same time a number of companies began building luxury hotels in the seaside resorts, spas, provincial capitals, and in London. The Savoy was opened in 1889 by D'Oyly Carte and shortly afterwards taken over by Cesar Ritz. A network of Ritz hotels soon spread, including Claridges in 1898. In 1869 the issue of beerhouse licences was transferred to magistrates who began to restrict their numbers so that their value increased. Brewers were thus encouraged to acquire licensed houses, and to enter the hotel and catering industry as large scale operators.

The term "restaurant" was first applied in the latter part of the nineteenth century to the dining rooms of large hotels and to a few large, separate, high-class establishments, which began to cater on a more elaborate scale for the fastidious diner. Its popularity grew with after-theatre suppers and the spread of 'dining out'. The society, which had rarely dined in public before, acquired a new taste. To this time is also attributed the introduction of the common dining-room with separate tables, first in restaurants and then in inns and other establishments. On the other end of the social scale cafes and teashops, designed to provide cheap refreshment and often operating in groups, were soon brought within the reach of all. The first ABC shop was opened in London in 1884

and the first Lyons teashop in 1894 and, within a few years, both companies were operating chains of such establishments.

In the first part of the twentieth century, the growth of motor transport and the rise in living standards made conditions even more attractive for large-scale investment in the hotel industry. In 1903 the Trust Houses were set up to acquire a chain of hotels across the country. The influx of capital into the industry continued in the 1930s despite the depression. Several leading hotels were opened within a few years in London. The Park Lane, the Mayfair Hotel, the Dorchester and the Strand Palace, all opened between 1927 and 1932. Before the Second World War, therefore, most hotels were either of the luxury type in large cities, especially London, or they were tourist hotels situated on the coast or as service adjuncts to the railway system.

Between 1963 and 1967 the number of overseas visitors coming to Britain doubled. Grand Metropolitan, Trust House and Forte consolidated their position as market leaders by buying up a number of smaller companies. In 1967 the devaluation of the pound made Britain even more attractive to foreign visitors whose numbers increased between 1967 and 1969 by another 42% and by the late 1960s the British Travel Association was predicting severe shortages in hotel accommodation. In view of the growing importance of tourism as a source of employment and foreign exchange, the government responded by initiating the Hotel Development Incentive Scheme providing generous grants for each room in every new hotel built. Coupled with the extremely favourable market conditions the result was a massive increase in hotel investment. In the years just before 1969, approximately 2,000 hotel rooms were built each year. Between 1969 and 1974 (the period of the scheme) the numbers increased sixfold. More rooms were built in these five years than over the whole period from 1900 to 1970.

Some new companies came into the industry for the first time, but the bulk of the new hotel building was carried out by the existing large companies, who vastly increased their share of the market. Nearly all the top thirty companies expanded their hotel interests and the market leaders continued to consolidate their position. Trust Houses merged with Forte in 1970, and Grand Metropolitan took over Truman and Watney Mann. The hotel groups formed in the 1960s and '70s through mergers and take-overs now employ a larger proportion of the total workforce than previously. It was this phase that really established a division between the large luxury group hotels in London and the smaller, lower-priced establishments in the resorts and provinces. Most of the hotels built between 1970 and 1973 were large, luxury hotels and 38% of them were built in London. On the other hand, the number of small hotels fell. Urban redevelopment, rising operating costs and the cost of implementing the Fire Precautions Act 1971 drove many small hotels out of business. Hotels in the resorts also suffered as British tourists took cheap holidays abroad or opted instead for self-catering.

The hotel and restaurant sector is labour-intensive with the result that a very high proportion of hotel costs do not vary with the volume of business. In consequence, managers are keen to ensure that the volume of business is as high and as constant as possible, and that existing capacity, including labour, is fully used. The hotel industry is subject to marked cyclical, seasonal and daily fluctuations in demand, and hoteliers have devised various methods for overcoming this problem. For example, they have tried to encourage off-season business like conferences, and invested in areas with stable, all-year demand like London. In addition, claimed Dronfield and Soto writing in 1980, the main way in which employers try to ensure full use of capacity has been to secure maximum control over their workforce:

"Obviously it is in their interest to

hire workers at peak periods of business and to be able to move them around to wherever the need is greatest. This is the reason why about one fifth of hotel workers lose their jobs every year when the summer season is over, why a third of them work part-time and a third work split shifts." (15)

The licensed hotel and restaurant sector is not only the largest but it is also the most varied sector of the hotel and catering industry. In 1971 the number of establishments within the scope of the LRE and LR Wages Council was 20,419. By 1978 it had increased by 25% to 25,532 and at 31st December 1986 it had risen to 33,603 (16). The sector is characterised by a preponderance of small (17), independently-owned businesses scattered over a wide geographical area, a high proportion of female (18), foreign, young, part-time (19) and casual workers and high labour turnover (a national annual average of 70% (20)) - factors which are traditionally associated with low trade union density and low pay. (21) Mars and Mitchell also suggest that

"hotel workers are largely marginal and sub-marginal workers, i.e., workers who bear some social stigma." (22)

The main negotiator for employers on the catering wages councils is the British Hotel, Restaurant and Caterers' Association (BHRCA) which was formed in 1972 on the amalgamation of the British Hotels and Restaurants Association and the Caterers' Association. It represents over 9,000 establishments in direct membership and about 6,500 establishments through the affiliation of about 40 local associations. The bulk of its membership is in the area covered by the LRE & LR Wages Council. It claims to have in membership all the 3, 4, and 5 star hotels and the larger employer groups in the country, but it is less representative of the small independently-owned hotels and restaurants. It offers advice to its members on

industrial relations matters, and has an industrial relations adviser but in 1978/9 ACAS was told that the BHRCA's membership would totally oppose its becoming involved in negotiations with unions.

The two main unions representing the sector are the Hotel and Catering Workers Union (HCWU), part of the General Municipal and Boilermakers Union (GMB - with about 33,000 members in the hotel and catering industry) and the Transport and General Workers Union (TGWU) which represents about 12,000 catering workers, mainly in hotels and restaurants in London. The Union of Shop, Distributive and Allied Workers has members in restaurants run by Co-operative Societies and department stores. The National Union of Railwaymen (NUR) has been recognised as the bargaining agent for British Rail's station catering, train catering and British Transport Hotels for several years, and the union's problem has been more one of consolidation than recognition. Membership is possibly strengthened by the high degree of contact between hotel and catering workers and other highly-unionised railway employees, and by the favourable attitude of management towards trade unionism. A membership of around 7,000 workers was built up by the NUR until 1976-7, when compulsory trade union membership agreements were negotiated to cover all staff, including casuals. This increased membership to 10,000 and further strengthened the NUR's position.

From 1947 to 1972 a national agreement between the former British Hotels and Restaurants Association and the then General and Municipal Workers' Union (GMWU) provided for a National Council for Hotels and Restaurants to establish machinery for the settlement of differences, to discuss matters of mutual interest (including pay and conditions) and for the appointment of staff representatives where the GMWU had a reasonable proportion of staff in membership. In the event, the agreement rarely worked and was largely defunct by the time it was terminated in 1972 by the new BHRCA. Since then there have been no

agreements at national level between any of the unions and any of the employers' organisations.

The Transport Salaried Staffs' Association also has about 1,800 members employed in the hotel and catering industry, largely in British Transport Hotels and railway catering. All of its members are salaried staff, mainly "white collar" but including hotel housekeepers, supervisors etc. Hotels owned by British Transport Hotels and railway catering establishments were excluded from the scope of the LRE and LR Wages Council in 1965 as a result of a recommendation of a Commission of Inquiry. (23)

Both the HCWU and the TGWU find recruitment and organisation in the licensed hotel and restaurant sector extremely difficult. The large number of small units makes it hard for officials to arrange meetings and contact potential members and, to some extent, may dispense with the need to join a union. The large numbers of part-time, shift and casual workers create further organisational problems.

"Trade unions practise economies of scale and tend to devote a large part of their resources to the larger establishments where conditions for organisation are more favourable. It is difficult to imagine that, faced with a recession and falling membership, they will be able to divert much needed support from that organised membership into recruitment campaigns which are not only likely to be resisted by employers but also unlikely to gain many recruits. Even if they are successful, retaining and servicing those members will pose massive problems." (24)

Nor has membership in company-owned hotels and restaurants increased substantially, even though this is an area where,

theoretically, it should be easier to organise workers than the independent sector.

In 1979 union membership in the hotel and catering industry as a whole was 7.3% and in 1986 it was estimated to be about 6%, in spite of the growing number of people working in it. The HCWU has collective bargaining agreements with 15 or so of the major hotel groups but, sometimes, a drop in membership has meant that union recognition has disappeared. Rank Hotels, for example, used to have a negotiating agreement which fell by the wayside when membership dropped.

The diversity of the licensed hotel and restaurant sector does not lend itself to the fostering of a collective consciousness among employees. There are many different types of hotel, ranging from the modest guest house to the luxury five star hotel, and within them, many different types of jobs often arranged in strict hierarchical order. Between the departments of the larger hotels there may be a considerable degree of rivalry or, at least, little co-operation or communication. The Hotel and Catering Economic Development Committee's 1969 Report on Staff Turnover notes how certain chefs referred to waiters as "beggars in uniform." (25)

Mars and Mitchell claim that in the smaller establishments, the employer may offer terms which will solve his immediate staff problem and may be better than those currently enjoyed by other, similarly-graded staff. They maintain that the tradition and extent of this "individual contract" is one reason why hotel workers have not developed a collective consciousness; they concentrate instead on improving the terms of their own contracts and it is in their, as well as management's, interests, therefore, to deter the growth of trade unions. An essential feature of the "individual contract" is its secrecy which gives the worker the impression that his is

receiving better treatment than his colleagues and this in turn inspires a degree of obligation to his employer. (26) In 1971 the Commission on Industrial Relations noted:

"Individualism is encouraged by the competitive nature of hotel work...There is little basis in hotels for the formation of cohesive work groups, and the individualism which pervades hotels poses special problems for management and makes the growth of union organisation difficult." (27)

Davies, Chopping and Bamford state that a similar view is held by many employers;

"namely, that many hotel and restaurant workers distrust the collectivist nature of trade unions and seemingly have no wish to join them. Moreover, they contend that the structure of a general union is unsuited to the hotel and catering industry and that a union for hotel and catering workers with more experienced shop stewards would be better for recruitment and able to represent their interests more effectively." (28)

However, experience has provided no evidence that the formation of the Hotel and Catering Workers' Union has made trade unionism any more attractive to hotel and catering workers.

Trade unions, on the other hand, while recognising some of the factors identified above by Davies et al, cite past intransigence by some employers as a major obstacle:

"They point out that there is a variety of tactics that management can use to discourage employees from joining a trade union; from establishing welfare and benefit schemes that rival those offered by the union, to offering rewards to 'loyal' employees who do not

take part in industrial action and dismissing or transferring active trade union members." (29)

Mars and Mitchell identify some of the hotel industry's distinctive features:

- a) hotel workers are among the country's lowest paid and yet trade unions have made little progress in recruiting employees into membership;
- b) the industry insists that managers have specialised craft training, whereas many other industries recruit their managers with a general managerial background and encourage general management education;
- c) its national institutions appear weak and ineffective in comparison with those of other industries; and
- d) it is renowned for its insularity.

In 1969 the HCEDC too observed that the industry as a whole believed that it differed greatly from others. Employers and employees regarded themselves unrealistically as isolated from other workers and this led to a lack of respect for themselves and their staff. The industry was seen as technically backward, unfairly persecuted, over-dependent on foreign workers and attracting too many nomadic or non-conforming members of society. (30)

According to Mars and Mitchell, the fact that, for the individual hotelier or restaurateur, labour costs represent a high proportion of his total costs,

"can be seen as being the single most important economic influence affecting the relationship between employer and

employee. With the largest share of total costs being fixed and many variable costs being difficult to control, a situation arises where the hotelier's cost control strategy is necessarily largely dependent on the control of wages and manpower ...Labour costs for many hotels are the largest share of their total costs which are to some degree under the control of management. Management has relatively greater freedom in deciding its expenditure on labour than it has in deciding other expenditures...It can use this control in a number of ways - for example, it can reduce the number of staff, pursue a low wages policy, substitute machinery or employ stigmatised labour." (31)

All these methods of control are relevant to the present study. Reduction in the number of staff and the substitution of machinery bring into play the law on unfair dismissal. The pursuance of a low wages policy may involve the non-observance of wages orders issued by the Wages Council. Of importance to both of these areas is the employment of "stigmatised labour" - those who are too weak and vulnerable to fend for themselves and for whom, therefore, the law should provide an important source of protection against exploitation.

At the same time Mars and Mitchell recognise what they describe as the "hotel industry" as

" a large and developing industry of considerable economic importance ...undergoing dramatic changes in response to economic, political and socio-cultural forces from both within and from outside the industry, for as an economy moves into its post-industrial stage of development, its service sector becomes more dominant in relation to its manufacturing sector." (32)

CHAPTER 2.

WAGES COUNCILS

Wages Councils are composed of an equal number of representatives of employers (drawn from employers' associations) and workers (drawn from trade unions) in those industries whose workers have been unable to develop sufficient bargaining power to reach and police their own agreements with their employers. Each Council also contains independent members, one of whom acts as chairman. The function of the independent members has been established by tradition to ensure that decisions are reached in council meetings. Should the two sides fail to agree, the independent members act as conciliators. If this does not work, they may ultimately overcome any deadlock by voting for the proposals of one side or the other. A theoretical advantage of this "pendulum" bargaining is that it encourages both sides to act reasonably and to reach a compromise. Some Councils fix minimum wages for the whole industry, some for only part of it. Their Orders are legally binding.

In 1962 Bayliss wrote:

"Catering is the only major industry where statutory wage regulation is necessary for the protection of most workers' wages and conditions, both because there is an absence of voluntary negotiations and because wages and conditions would be worse without the Councils. It is a trade where conditions of employment, particularly hours of work, need regulation as much as wages. The demand for its product fluctuates widely, not only seasonally, but within very short periods of time. Many employers have very few employees and those they have often work beside members of the employer's family whose

returns from the business are often taken in forms other than wages. It is also a trade which tends to attract workers who are least able to defend themselves, and since tips are an important source of income, control over remuneration passes to some extent from the employer to the customer. Payment in kind in the form of meals and accommodation, which can very enormously in its worth and is entirely under the employer's control, is a necessary feature of employment. It is therefore a trade which, even in a period of full employment, exposes its workers to uncertainty about their wages and conditions, to a relation with their employers which makes it difficult for them to end that uncertainty, and to differences in conditions which have a major effect on the return the worker gets for his labour." (33)

A. History of the Wages Councils

Parts of the hotel and catering industry have been subject to statutory wage regulation since 1945 but the wages council system has its roots in the 1880s when Lord Dunraven headed a select committee to investigate industries in which "sweating" was most serious. "Sweating" was defined by reference to "a rate of wages inadequate to the necessities of the workers or disproportionate to the work done, excessive hours of labour and the insanitary state of the houses in which the work is carried on". The committee concluded that government intervention was impracticable;

"When legislation has reached the limit up to which it is effective, the real amelioration of conditions must be due to an increased sense of responsibility in the employer and improved habits in the employed". (34)

After a while it became apparent that the employer's sense of responsibility could not be relied upon too heavily if conditions in the sweated industries were to improve and the proposals of a House of Commons Select Committee in 1908 resulted in the passing of the Trade Boards Act 1909. The grounds upon which trades were eligible for legal minimum wages were

"that the rate of wages prevailing in any branch of the trade is exceptionally low, as compared with that in other employments, and that the other circumstances of the trade are such as to render the application of this Act to the trade expedient." (S.1(2))

These rather vague criteria were taken to mean that the conditions associated with sweating, including low wages, justified the setting up of a trade board.

Four trade boards were established in an attempt to end sweating in Tailoring, Cardboard Box Manufacturing, Chain Making and Lace Finishing. This was the first time that the state had directly interfered in wage regulation since 1814 but the government was not motivated simply by altruism; the setting up of trade boards for the worst paid industries had the not unwelcome side effect of warding off the growing demand for a national minimum wage for workers in all industries and trades. Although it was willing to risk the loss of jobs in the sweated trades, the government was not prepared to face such a risk across the whole economy.

The initial aim of the trade boards was to fix minimum rates of pay enforceable by law, sufficient to prevent "exceptionally low wages". They had power to set only minimum time rates and piece work rates. In the two years following the Trade Boards Act 1918, thirty five more trade boards were set up; now they were not confined to the sweated industries but could be established wherever voluntary

collective bargaining was regarded as inadequate. The Act gave the Minister of Labour power to make an order setting up a Board in "any specified trade" where he was of the opinion that

"no adequate machinery exists for the effective regulation of wages throughout the trade, and that accordingly, having regard to the rates of wages prevailing in the trade, or any part of the trade, it is expedient that the Act should apply." (S.1(2))

Their powers were extended to fixing fall-back rates for piece workers, overtime rates, and the point at which overtime became payable.

"For a long time"...

said Fisher, writing in 1926,

"many continued to deny that the legislation of 1909 was an effective breach of the tradition of non-interference with the sanctuary of private wage negotiation; it was only the rather super-heated atmosphere of wartime idealism that induced such people to agree to the amending Act of 1918 which made it possible to establish boards, not only in trades where the rates of pay were unduly low but also in all in which no adequate machinery existed for the voluntary regulation of wages". (35)

The architects of the 1918 Act saw sweating as almost conquered and were concerned primarily with the creation of an orderly system of industrial relations. It was hoped that the statutory machinery would provide a stimulus to the growth of voluntary organisation and in time be replaced by voluntary collective bargaining. By 1921 there were 42 trade boards covering about three million workers mainly in the manufacturing industry. However, during the slump

which followed the First World War, the development of an orderly industrial relations system lost its appeal. In 1922 the Cave Committee, set up to enquire into the operation and effects of the Trade Boards Acts and to report what changes (if any) were required, said that the state's coercive powers should be limited to the prevention of the "unfair oppression of individuals and the injury to the national health that results from the 'sweating' of workers".

(36) Whilst recognising the contribution that trade boards had made to regularising wages and conditions and ending the grosser forms of underpayment, it concluded that the 1918 Act had unfairly extended the degree of state interference.

Over the next few years, minority labour governments initiated a number of enquiries into trades where it was thought that trade boards might be needed. In 1929 Miss Margaret Bondfield, Minister of Labour, started a comprehensive enquiry into catering. Bayliss suggests that she would have done better to have chosen another trade. "As it was her efforts did no more than prove that the existing legislation was too narrowly drawn to cover wage regulation in service industries like catering". (37) The draft special order issued in August 1930 which notified her intention to bring catering within the scope of the Trade Board Acts was met with determined and well-organised opposition from the industry's employers. As a result a public enquiry was held by Sir Arthur Colefax who decided that no order could be drafted in such a way as to make the Acts apply to catering, basing his decision upon an obiter dictum of Shearman J. in *Skinner v Jack Breach Ltd.* (1927) KB 220-229:

"A trade board may fix the rate of wages in any specified industry between employer and employed. "Specified" does not mean anything which the Minister of Labour chooses to call a trade; a "specified trade" (38) must be a recognised species of industrial work".

In the 1930s trade boards regained a little of their former popularity. Between 1931 and 1940 eight more boards were created covering the baking, cutlery, furniture manufacturing and road haulage industries (the last under separate legislation). (39) Both employers and unions were growing more amenable to the notion of statutory wage regulation in the hope of introducing order into their particular industries. For the employers, a legally enforceable minimum wage would prevent competitors from being able to produce goods more cheaply by paying their employees lower wages. From the unions' point of view, it would bring an end to the vicious wage-cutting which had been a feature of the past few years. These factors encouraged the larger employers and unions to seek trade boards for retailing but employers in the hotel and catering industry were not so enthusiastic.

Ernest Bevin, Minister of Labour in the wartime coalition government and former secretary of the Transport and General Workers' Union, envisaged an industrial relations system resting upon the primacy of voluntary collective bargaining with the state intervening only to ensure its survival. Then, as now, catering was a large, sprawling industry covering many workers, often in small establishments scattered over a wide area. Employers were unorganised and hostile to trade unions, collective agreements were rare and many workers were low paid, partly because of undercutting and partly because of the incidence of tipping. Despite the size of the industry - even at the end of the war there were 760,000 workers in nearly a quarter of a million establishments - very little was known about it. (40)

"As a result of the experience of the Trade Boards Act 1918, the Catering Wages Act 1943 and the Wages Council Act 1945 were designed by Ernest Bevin to prevent statutory wage regulation from being put into cold storage when it was

most needed as it had been in the 1920s". (41)

The Catering Wages Act 1943 was given priority by the coalition government because of the importance of catering to the war effort and Bevin's fear that ex-servicemen might not be willing to accept jobs in an unregulated industry, an industry which he considered would be vital to the country's social welfare in future years. (42) He hoped that wages boards might encourage employers and employees to group together to protect their own interests, and thereby take the first steps towards full collective bargaining but he realised that he would encounter considerable opposition to the establishment of statutory minimum wage machinery in catering. "I was told from the beginning" he said, "Before I produced the Bill at all, that I was going to be fought to the death". (43) The Bill did not enjoy an easy passage through Parliament. Some employers, according to Chopping (44), thought Bevin's real objective was to nationalise the industry and the Bill was described in the trade press as:

"the most pregnant piece of legislation in modern times for the industry. No other industry in the United Kingdom has ever been forced to surrender its control in such a way to a minister who thus acquires the untrammelled right to interfere in the domestic administration of the whole industry". (45)

Sir Douglas Hacking, who lead the opposition to the Bill's second reading, said:

"The difference between (Bevin's) views, political views if you like, and those of my friends and myself is that he would desire to interfere with private

enterprise in any circumstances while I would say that you should never interfere with private enterprise until you have proved that it is not doing its job". (46)

But the hostility of Conservative backbenchers could not prevent Bevin from winning over the Cabinet.

"I defy any honourable members",
he said,

"to point out one industry that was not improved in efficiency as a result of coming under (a trade board). There is all this talk about ruining and wrecking the industry. Read your debates of 1909. Everything has been falsified. When the two parties have come together under a Board they have contributed to the efficiency of the industry and have never done a single thing that can be shown to be against the public interest at all". (47)

The Catering Wages Commission was empowered, inter alia, to enquire into matters affecting the remuneration, conditions of employment, health or welfare of workers covered by the 1943 Act and to recommend the establishment of a wages board where it was of the opinion that machinery for regulating the workers' remuneration and conditions of employment either did not exist or was not, and could not practically be made, adequate. Having ascertained that there existed no joint negotiating machinery for the regulation of wages and conditions of employment in the hotel and catering industry (except in those establishments owned by the railway companies) it decided that five wages boards were necessary. These were:

- a) industrial and staff canteens;

- b) licensed non-residential establishments;
- c) licensed residential establishments and licensed restaurants;
- d) unlicensed places of refreshment;
- e) unlicensed residential establishments.

Bevin dealt with catering as a separate issue, following it with a general measure - the Wages Council Act 1945. Apart from the change of title. the councils were given the power to deal with all aspects of pay and holidays. No longer were they limited by the Holidays with Pay Act 1938 to fixing no more than one week's paid holiday. (48) The system reached its peak (at least in numerical terms) in 1953, with a total of 66 councils embracing 3.5 million workers. The catering wages boards became wages councils under the Terms and Conditions of Employment Act 1959, subsequently consolidated in the Wages Council Act 1959. The Wages Council Act 1979 (a consolidation of the relevant provisions of the Wages Council Act 1959 and the Employment Act 1975) gave wages councils the power to fix, in addition to minimum remuneration and holidays, "any other terms and conditions (of employment)" for all or any of the workers within their scope.

In March 1985 Mr. Tom King, then Secretary of State for Employment, published a consultative paper, setting out options for the future of the wages councils and inviting comments on the issues raised thereby. At that time there were 26 wages councils covering about 2.75 million workers primarily in service industries (in contrast to the emphasis on manufacturing and industrial processes when the system began). 86% of all wages council workers were in retailing, catering and hairdressing, industries characterised not

only by low pay but also by low levels of unionisation and a high incidence of small firms, female and part-time workers. According to the consultative paper, nearly 400,000 establishments and about 260,000 employers were affected by their operation. Estimates suggested that up to two-thirds of the workers were employed on a part-time basis, and that about four-fifths of the total were female. About 5% of the wages council work force were full-time employees under 18 (approximately 20% of all young people in employment at that time).

The government believed that wages councils were responsible for inhibiting the creation of jobs, to the detriment of young people especially, and claimed that they "interfere(d) with the freedom of employers to offer, and job seekers to accept, jobs at wages that would otherwise be acceptable". (49) In March 1985, most minimum full time rates for adults ranged from £63 to £72 per week. The consultative paper set out a number of possible reforms of the wages council system but seemed to prefer abolition, arguing that because 1 million or so of the 2.75 million wages council workers were paid little or no more than the relevant statutory minimum rate, "those rates are now higher than would be necessary to recruit and retain workers, with repercussions which may extend through the whole structure of earnings". Over 700 organisations and individuals responded to the consultative paper, the TUC and individual trade unions favouring retention.

B. The Wages Act 1986

The avowed intention of the government in promoting the Wages Act 1986 was to "create employment opportunities, especially for young people...give rights to workers to ensure that they receive the wages

due to them [and] help break down barriers of status and conditions between manual and non-manual workers." (50).

The Wages Act 1986 provides that wages councils are no longer to exercise any functions in relation to workers under the age of 21 (S.12(3)) and all provisions of existing orders ceased to apply to workers under 21 on the day the act was passed (S.24(5) - although workers already in jobs obviously had a contractual entitlement).

The scope of wages council orders are drastically curtailed so they may now fix only a single minimum hourly rate of remuneration (S.14(1)(a), or a single minimum basic rate of remuneration and a single maximum overtime rate (S.14(1)(b)) and a limit on deductions in respect of living accommodation (S.14(1)(c)). The effect of this section is that wages councils no longer have the power to fix minimum holiday entitlement, nor to set separate rates for different occupations. Similarly, wages councils may no longer set premium rates for anti-social working time (such as Sundays or public holidays), or difficult shift work. By contrast, under the 1979 Act, wages councils had powers to fix remuneration, holidays and any other terms and conditions of employment for all or any of the workers within their scope. (WCA 1979, S.14(1)).

S.14(6) introduces guidelines for wages councils in making their decisions. The Government was particularly concerned throughout this act with the ostensible negative effects of minimum wages on employment levels; hence, before making an order, councils shall have regard to "the effect that that rate will have on the level of employment among the workers to whom it will apply and in particular in those areas where the remuneration received by such worker is generally less than the national average for such workers." The statute does not, however, specify how much weight should be attached to these factors, nor whether they should point to an increase or

decrease in the rate set. In any case, under subs.(6)(b), wages councils may have regard to any other appropriate matters too.

The Secretary of State is given a wide discretion to abolish or vary the scope of existing wages councils (S.13). There is no requirement to consult either the Advisory, Conciliation and Arbitration Service (ACAS) or representatives of workers or employers involved; instead there is an open-ended discretion to consult as he or she considers appropriate. By subs.(2)(a) current levels of remuneration must be considered; but there is no requirement that the standards of remuneration must be reasonable (cf. WCA1979 S.5(2)) nor that collective bargaining machinery be adequate.

The constitution of councils and procedure for bringing orders into operation are contained in Schedules 2 and 3 to the Act and are similar to the provisions of the repealed Wages Council Act 1979, with the one addition that the Secretary of State may appoint up to five independent members to councils. The Secretary of State will normally favour employers' associations that are representative of small businesses (Sch.2, para.2(2)) and council members now hold office for a three-year term, instead of a five-year term (Sch.2, para.8(1)).

The decisions of wages councils are embodied in wages orders which have the force of law. Their terms become compulsory terms of the contracts between all the employers and workers concerned. Any order must apply to all workers covered by the wages council, whether they are full-time or part-time. Copies of the orders are sent to employers who are required to keep records to show whether they are being complied with (s.19(1)) and to display them in their establishments. (S.19(2)).

Where an employer pays less than the statutory minimum under the relevant wages council order, the worker is taken to be contractually entitled to the shortfall as additional remuneration. Altogether, if an employer fails to implement an order, it may be enforced in three ways, namely, by civil proceedings for breach of contract (S.16(1)), by criminal proceedings instituted by the Wages Inspectorate (S.16(2) and (3)) and by a claim to an industrial tribunal by virtue of Ss. 5 and 8(3). The right to complain to an industrial tribunal (which was an unintended consequence of the way in which the provisions of the Act relating to deductions were drafted) did not exist under the WCA 79.

The employer who pays less than the minimum commits an offence and on summary conviction may be fined (S.15(3)). If his offence consists of a failure to pay one or more of his employees less than the statutory minimum remuneration, the court may order him to pay each of those employees the difference between what they should have been paid and what was actually paid to them during the period of two years ending with the date of the offence. (S.16(3)). Wages inspectors have the power to enter business premises and to require the production of certain records (s.20). It is an offence to make or produce false records and produce false information to an inspector (S.21(1)), to obstruct an inspector or fail to comply with a lawful requirement which he makes (S.21(2) or to knowingly or recklessly make false statements to him (S.21(3)). Offences by a corporate body may be laid at the door of individual directors or managers (S.23(1)).

The Licensed Residential Establishment and Licensed Restaurant (LRE and LR) Wages Council has three independent members. Six employers' organisations and three trade unions appoint members to the employers' side and employees' side respectively, each side consisting of twenty three members:

<u>Employers' side</u>		<u>Workers' side</u>	
British Hotel, Restaurant and Caterers Association	16	General, Municipal Boilermakers and Allied Trades Union	18
Brewers Society	2	Transport and General Workers' Union	4
National Association of Holiday Centres Ltd.	2	Union of Shop, Distributive and Allied Workers	1
National Union of Licensed Victuallers	1		
Scottish Licensed Trade Association	1		
Association of London Clubs	1		

C. Minimum wages: Britain's International Obligations

Withdrawal of minimum wage protection, from workers under 21 in particular, sets Britain apart from many other countries. In France, Luxembourg and Spain adult minimum pay rates apply from aged 18, with a fixed percentage (ranging from 30-90%) for workers under 18. In the Netherlands and Portugal, similar fixed percentage rates apply for "young" workers (under 23 in the Netherlands and 20 in Portugal).

Similarly the Act removes all statutory holiday entitlement, in contrast with many European countries where workers have the right to minimum holiday periods (e.g., France, Denmark, Sweden, Luxembourg, Spain, Greece, Norway, West Germany, Netherlands, Portugal and Italy.)

An obstacle to this legislation was International Labour Organisation (ILO) Convention No.26 (ratified by Britain and 94 other countries which states that:

"each member of the International Labour Organisation...undertakes to create or maintain machinery whereby minimum rates of wages can be fixed for workers employed in certain of the trades or parts of trades (and in particular in home working trades) in which no arrangements exist for the regulation of wages by collective agreement or otherwise and wages are exceptionally low."

Those members also agree to

"take the necessary measures, by way of a system of supervision and sanctions, to ensure that the employers and workers concerned are informed of the minimum rates of wages in force and that wages are not paid at less than these rates where they are applicable." (51)

Keevash describes how in early 1983 the TUC General Council was so concerned about the impact of cuts in the Wages Inspectorate that it raised the matter with the Secretary of State for Employment. After receiving a reply that the strength of the inspectorate was adequate, the General Council referred the matter to ILO Committee of Experts on the Application of Conventions and Recommendations. In March 1983 the Committee of Experts asked the Government to provide information to enable it to examine the issues which had been raised.

In March 1984 the Committee of Experts reported on the matter and set out in significant detail the observations of the TUC and the Government. It concluded that

"...over the period 1979-82 there has been a reduction in the numbers of inspectors and establishments visited, and an increase in the numbers of complaints and establishments at which illegal underpayment were found." (52)

After noting Government comments about the changes in the pattern and methods of inspection and in the definition of a complaint, and after considering the level of non-compliance, it expressed the hope that

"the Government will be able to take appropriate measures to ensure full observance of the minimum wages set by the Wages Councils." (53)

The Convention itself contains provision for deratification. This can be considered at 5 yearly intervals and it is necessary to give 12 months notice and to consult representatives of employers and trade unions. According to the Consultative Document it was felt that the Convention, as drafted, lacks flexibility and "therefore limits the Government's freedom of action in an area of vital public concern." (54)

Notice of deratification was given in June 1985 and took effect in June 1986.

D. Protecting the Low Paid: Have the Wages Councils been Successful?

At this stage it is appropriate to ask how far the wages councils have succeeded in fulfilling their objective of protecting the low paid.

According to Banks,

"most observers would agree that wages councils have made and still do make an effective contribution to protecting workers from exploitation in low wage sectors". (55)

and Guillebaud waxes quite lyrical:

"The machinery of the wages council has achieved the general purpose for which it was established. It has virtually abolished the evils of sweated labour and the competitive undercutting of wages. It has raised the morale and with it the efficiency of the labour employed in the industries concerned and has diminished in a marked degree the more extreme inequalities in wages between different workers within the same industry". (56)

Certainly the establishment of the wages council system secured some notable improvements in working conditions for hotel workers. Before they were formed, it was quite common for waiters to get no wages at all and rely entirely on tips. The Donovan Commission, however, expressed doubts as to the efficacy of the system

"statutory protection does not result in raising the pay of lower paid workers in relation to other workers...and nor does pay in wages council industries seem to have improved significantly in relation to other industries". (57)

Indeed some critics claim that instead of eradicating low pay, the wages councils have institutionalised their industries' status on the bottom rung of the low pay ladder. Others, however, say that they have "contributed to the inflationary pressures which have been experienced in post-war Britain" because...

"pay improvements gained in voluntary negotiations have been successfully used as a justification for pay increases by the wages councils or the wages council proposals themselves have been used as a lever for pay increases elsewhere. In both instances the wages council machinery has tended to become a mechanism through which pay increases can be spread to a large number of

workers independent of their particular economic circumstances". (58)

The comments of Dennis Hearn (then Group Services Director of Trusthouse Forte) are indicative of the somewhat resentful attitude of many employers in the hotel and catering industry:

"The wages councils are able to impose pay settlements...which have statutory force, backed up by an army of wages inspectors. If businesses are rendered uneconomic, and forced to cease trading, it appears to be of no concern to the wages council. The staff who lose their jobs in the process might well have preferred a smaller wage increase or none at all rather than to become unemployed but of course the increases are imposed on them as they are upon the employers ...These minimum pay awards bear most heavily upon the small businesses and the small units particularly those located outside the major conurbations... wages council awards have been inflationary ...Should businesses be allowed to operate freely, offering rates of pay which they can afford and which will attract and retain the workers they need, or should they be subject to edict backed up by Government-employed inspectors. The basic issue is one of freedom and common sense". (59)

In fact, the Commission on Industrial Relations (CIR) found that although a sizeable number of licensed hotel and restaurant employees were in receipt of the minima, in none of the twenty five hotels which formed the subject of their investigation were the minima paid across the board to all workers. In most of them the statutory rates were said to be of very little relevance. Except for the British Transport Hotels pay and conditions were usually fixed by unilateral management action. (60)

There is no evidence that wages councils have improved the lot of workers within their orbit vis a vis workers in the voluntary sector. No doubt any attempt to do so would be regarded by many as an infringement of their original purpose. However, quite apart from the problem of low pay there is the question of how far wages regulation orders are actually complied with. Armstrong pointed out that:

"full employment in a prosperous city does not ensure full observance of the legal minimum wage (and)...the absolute amount of arrears recovered for many individual workers are disturbing. These infractions constitute another salutary reminder that amid widespread affluence, minimum wages legislation is still a very necessary protection for significant numbers of people". (61)

E. Enforcement of Wages Orders

Enforcement of the wages council legislation in the 390,000 establishments (outside agriculture) which it covers rests with the wages inspectorate. Theoretically, an employer will be liable for prosecution if he fails to display wages orders or pays his employees less than the agreed minimum wage etc. A list of the relevant establishments is kept and a programme of routine inspections is undertaken each year. Inspections are also made in response to complaints of non-observance of the statutory minima.

The aim of the inspection programme for 1983 was to check the pay of workers in 10% of the establishments on the wages council register, including the investigation of complaints. The pay of 332,853 workers at 42,558 establishments (10.9% of the register) was checked and 20,832 workers (6.3%) were found to be underpaid. Arrears totalling £2,416,353 were assessed as due to workers at 9,842 establishments. (62) Civil proceedings for recovery of arrears were

taken against five employers in 1983 and judgement was given in all cases for the Wages Inspectorate. (63) In 1984 10.8% of the register was checked, with about 150,000 workers checked by visit and a further 270,000 checked in other ways (e.g., by questionnaire).

The proportion of inspections arising from complaints by workers in licensed hotels and restaurants has been consistently much higher than the average for all wages council industries, as has the proportion of all inspections which have revealed non-compliance in comparison with wages council industries as a whole.

There have been several reasons for non-compliance generally. First, the

"complexity of provisions...creates a difficulty in enforcement, particularly when they are translated into legal language. The resulting calculations may be too complicated for the busy or not-too-well-educated employer to comply with or for the worker to understand so that he can check the adequacy of the remuneration he receives". (64)

The CIR found that:

"only a very small minority of staff knew anything about the wages council or even that it existed. Few had seen its notices and, of those who were aware of its existence, only one or two were able to make any meaningful comments concerning its functions or performance". (65)

There is no onus on employers to register with the wages inspectorate and estimates vary as to how many firms remain absent from their lists of employers which, in the case of licensed hotels and restaurants, are built up through a variety of sources including

details of members provided by the employers' organisations represented on the LRE and LR wages council and applications for liquor licences. It is quite easy for an establishment to fall through the inspectorate's net but whether offending employers fail to observe their statutory obligations through ignorance or through choice is debatable.

In her study of the attitudes among retailers in DIY and hardware shops to external regulation, Ford asked twenty six retailers to specify those pieces of employment legislation which most affected their businesses at present and their relevance as regards possible future expansion. Their responses ranged from a complete lack of knowledge of wages council and other employment law in one case to a detailed knowledge in five. Most of the interviewees failed to display wages rates, a substantial number exempting themselves in the belief that the people who worked for them were not really "employees" because they were part-timers or family friends.

Ford attributes the retailers' ignorance of employment law partly to the social and organisational characteristics of many small retail businesses. She found that many of the employers had gone into business because they wanted to be independent. As such, they were unlikely to seek out bureaucratic contacts or official literature. There were minimal entry requirements and few of the retailers belonged to a professional organisation. Employer/employee relationships were highly personalised; employees were often known to the employer beforehand and frequently started their jobs by "helping out". Rates of pay were determined on the basis of what seemed "fair" or by asking around to find out what was the going rate elsewhere. The retailers preferred to recruit people whom they already knew and never anyone who belonged to a trade union or was likely to join one.

Those retailers who were well acquainted with employment law and who complied with it voluntarily were mostly second generation retailers whose entry had been through choice or to ensure continuity in a family business rather than dissatisfaction or a desire for independence. They were often "skilled" by virtue of having passed professional institute examinations and regarded their ability to offer expert advice about products and their use as an integral part of retailing. They were members of their professional association and had more frequent business contacts with bank managers and accountants. (66)

There may be parallels between the retailers of Ford's study and employers in the licensed hotel and restaurant sector. In the latter, even though many employers have worked their way up through the ranks to achieve independence, there are many others who enter the industry with little or no first-hand experience or training:

"Entry and exit are easy and...there still appears to be a ready market for small hotels. There is a large number of people with capital wanting to purchase a small hotel...It seems to be assumed by potential hotel proprietors that access to the requisite funds from a gratuity or life savings is all that is required for success in the industry...The trade associations encourage such people to obtain experience and training before buying their own hotel but there is no official constraint as it is not necessary to be professionally qualified or recognised to be able to practise in this industry". (67)

It is estimated that as many as eighty thousand small catering businesses have slipped through the membership net of the BHRCA. Members of the Hotel, Catering and Institutional Management

Association (the industry's professional association) are mainly from salaried management. Small businessmen - those who are particularly in need of information regarding their legal obligations - simply do not come into contact with the institutions which can provide it and since employees tend to be recruited informally it is quite conceivable that they are looked upon as "not counting" for the purposes of the wages council and other employment legislation. In addition, the small businessman, often in search of independence, will not readily surrender what he considers to be his right to absolute control over his business.

The Bolton Committee identified a "malaise" in small firms - a feeling that enterprise goes unrewarded and that the growth of trade unions and government interference conspire to rob him of control over his own destiny:

"There is no official activity, however legitimate or necessary, which will not be resented by some small businessman as an intrusion on their freedom and a waste of their time. Big business may share this resentment but it is particularly acute among small firms for the simple and sufficient reason that almost every manifestation of government is likely to involve extra work for the small firm owner or managing director in person". (68)

A second reason given for underpayment in wages council industries is the inadequate nature of enforcement. In the face of accelerating underpayment a Department of Employment enquiry in 1978 led to a decision to boost the Inspectorate so that 15% of all establishments covered were visited annually. The Labour government's aim was to increase this to 25% annually or once every four years overall. In March 1981 it was announced that the Inspectorate was to be reduced by one third, leaving 216 of whom 120 were "outdoor" inspectors, responsible for

policing the wages of most workers in all wages council industries. On those figures, a business could expect to be visited once every ten years. Nevertheless, Lord Young, the Secretary of State for Employment, announced in the House of Lords in 1986 that the number of inspectors is to be reduced from 120 to 71, and the number of indoor support staff from 104 to 68. The emphasis is to be on inspections by questionnaire, rather than by visit. (69). As the number of inspectors has decreased so the proportion of employers underpaying their employees has risen. (70)

Since 1979, in addition to checks by visit, a number of other methods of checking pay have been used. In the case of smaller firms in retailing and hairdressing, for example, 10% were selected for an initial check by postal questionnaire. If replies to the questionnaire gave no indication of underpayment, no visit took place! (71) The Department of Employment maintains that postal questionnaires have proved to be a very effective method of checking workers' pay. A sample of responses is regularly checked by follow-up visits.

Despite the high incidence of underpayment, the number of employers prosecuted in recent years for offences under the wages council legislation is surprisingly low:

1979 -	12
1980 -	8
1981 -	10
1982 -	7
1983 -	2 (72)

In 1984 there were 2 prosecutions leading to average fines of £107. In the same year, of almost 417,000 workers whose wages were

checked, over 18,000 (4.3%) were underpaid. A total of £1.87m in arrears were paid. The Wages Inspectorate prosecuted 2 employers in 1985 and 3 in 1986. There were 6 prosecutions in 1987. (73)

A third problem is the poor quality, or sometimes complete absence, of wages and time records maintained by many employers (despite the legal duty to keep records under S.20 of the 1986 Act).

"As can be expected records will frequently leave much to be desired in trades which have been unable to reach a high degree of organisation. The standard of records ranges from one extreme to the other. A company owning a large number of hotels will give each worker a card setting out the terms of his contract including his duties and normal hours and obtain from him weekly a written agreement that his hours have been correctly calculated, the calculation being supplied to him. At the other extreme there are employers who keep the scantiest of wages and time records". (74)

Where staff turnover is high and there is heavy reliance on casual workers it is difficult for the wages inspectorate to obtain accurate evidence of time worked or even wages received. The employer's failure to keep adequate records means not only that an inspector must spend valuable time researching particular cases but also that the employee is deprived of essential evidence. A complicated case may keep an inspector in an establishment for several days. Since the employer has no duty to notify the inspectorate that he should receive wages regulation orders, inspectors must devote a disproportionate part of their scarce resources to maintaining lists.

Prosecutions, claims Beaumont, are deliberately minimised on the grounds that they are likely to "tie up" the inspectorate's resources for an unacceptably long time. (75) It will not prosecute first offenders and considers second offences as only "potential" prosecution cases. Few second inspections are ever carried out and -

"in the relatively few cases where they have been undertaken there has been such a long time delay between the inspections that management personnel have often changed so that the two offences are not considered the responsibility of the same employers. This policy towards prosecution largely derives from the belief that the vast majority of offences are due to ignorance or incompetence on the part of management and, hence, inspectors should concentrate on informing and educating management as to their responsibilities rather than invoking sanctions against them". (76)

They rely far more on "tact, good humour and persuasion than on the final sanction of prosecution". (77) Underpayment is frequently blamed on the ignorance of employers:

"Very often the inspector will find that the regulations are being disregarded not because the employer intends to underpay his employees but because he has failed to understand what the law requires of him as a minimum; once the regulations have been explained, the employer, in the majority of cases, is only too willing to set matters right....Inspectors will seek to show also that the wages regulation orders result from proposals submitted by representatives of the employers and workers and are not drawn up by a

government department". (78)

"Wages Councils can only be effective if the law is enforced."
(79) People comply with the law when it is in their own interest to do so or as a response to social pressures or simply because their consciences tell them it is right. Where they are indifferent to a particular legal issue, the state may try to enforce or encourage their compliance by the threat of punishment. There seems to be a sense of unease over the state's attempted interference into what is, after all, the fairly intimate relationship between an employer and his employees. Thus, in keeping with the abstentionist tradition of British industrial relations, where the law has interfered, it has kept a low profile, leaving employers and employees very much to their own devices.

In general, one may assume that employers have not expected the wages council legislation to be enforced. The infrequency of the inspectors' visits negates the deterrent effect of the threat of prosecution. On the rare occasions when prosecutions do occur, the financial penalty is low. The GMB has suggested that all employers discovered to be in breach of wages regulation orders should be prosecuted and, while some would condemn this as being excessively harsh, especially as regards genuinely ignorant employers, it would undoubtedly provide an incentive for employers to acquaint themselves with their legal responsibilities, particularly if the level of fines was increased. This would also necessitate greater publicity of the wages orders.

The Low Pay Unit recommend that provision be made for orders against convicted employers to comply with minimum rates in the future. Currently only arrears can be paid so that it is possible for some employers to make an economic decision to persist in

underpaying until they are reinspected. If they have a high turnover rate of casual staff and keep poor records, their arrears (paid without interest) may, in the long run, save them money. (80)

At present only individual employees can complain to the Wages Inspectorate about their own underpayment. If an employer can put pressure on that employee not to complain then there is no possible remedy. It is suggested that all workers who complain to the Inspectorate are given automatic protection against unfair dismissal, regardless of their length of service. It was proposed unsuccessfully at the committee stage of the Wages Bill that the following clause be included:

- 10(1) A dismissal of any employee to whom a wages council order relates shall be regarded as unfair under S.58 of the [Employment Protection (Consolidation)] Act [1978] if the reason for it (or, if more than one, the principal reason) is that the employee has registered a complaint with the [wages inspectorate];
- (2) Any employee shall also have the right not to have action (short of dismissal) taken against him by his employer in the circumstances described in subs.1 above. (81)

In practice a law is unenforceable if enough people in a sufficiently powerful position have a strong enough incentive to disobey it. Presumably the lure of lower costs and higher profits provides some employers in the licensed hotel and restaurant sector with the incentive to pay their employees less than the statutory minimum. Others are motivated by the desire for independence and autonomy. The hierarchical job structure is -

"Particularly pronounced in the hotel sector and (is) reinforced by the status consciousness of the individual employee. Every employee has an assigned place in the hierarchical occupation structure of the hotel and is aware of the standing of his occupation in the eyes of management and his fellow employees". (82)

As a result, the proprietor - usually unhindered by union interference - is in a good position not only to keep his employees in the dark about their rights (e.g., by failing to display wages orders) but also to suppress any discontent which may arise.

G. Wages Councils and the development of Collective Bargaining

Although the primary purpose of the wages councils is to provide protection for workers whose remuneration would otherwise be liable to fall below a reasonable level, it may be remembered that they were also intended as a means of encouraging the development of voluntary collective bargaining.

"Voluntarism", the basis hitherto of the industrial relations system in this country, is an ideology which necessarily prescribes a limited role for the legislature and judiciary. The Whitley Committee of 1918 saw trade boards as a way of underpinning voluntary collective bargaining by setting basic wages in industries where employers and employees were insufficiently organised to be able to reach and police their own agreements.

"In the Committee's scheme of things the ideal was a universal system of Joint Industrial Councils resting on

employers' associations and trade unions. Some industries were already capable of supporting JICs; others could do so with encouragement and advice because they had effective organisation on both sides; the rest would need Trade Boards...The Boards were to be substitutes for voluntary collective bargaining until the employers and workers were strong enough to negotiate without the community's aid." (83)

The Committee's attitude epitomised the principle that voluntary collective bargaining on an adversarial basis was the ideal to be aimed for and that it was inherently superior to statutory machinery, the function of which was simply to act as a safety net which could gradually be removed as a voluntary system evolved. "The composition of a wages council is specifically designed to give union and management representatives experience in collective bargaining", said Kahn-Freund, "It should be the highest ambition of such a body to make itself superfluous". (84)

Bayliss noted that "historically, it was the inability of trade unions to establish themselves and to bargain collectively with employers which necessitated the creation of statutory wage-fixing bodies" and "the belief that unions would be helped by recognition given them by Trade Boards was the foundation of the view that statutory wage regulation was a temporary expedient out of which voluntary collective bargaining would grow." (85) In practise the rapid increase in trade union membership which occurred after a Trade Board had been set up usually tailed off after a short while. Bayliss identified two reasons for this. First, although trade union representatives sat on a trade board, there was now more likelihood that an individual employer would recognise a union in the workplace than before. Secondly, the union's part in the increase in wages was

too remote from individual workers to make them identify with the union's power. (86)

The Report of the Royal Commission on Trade Unions and Employers' Associations (the Donovan Report) commented on the relationship between Wages Councils and the growth of voluntary negotiation. It noted the belief of some trade unions that the statutory wage machinery was a hindrance to trade union organisation and concluded that many councils were doing little to fulfil the aim of extending voluntary collective bargaining. It recommended making the abolition procedure easier by empowering the Minister to abolish a council on the application of a trade union alone; using the inspectorate for a limited period after the abolition of a council; making possible the exclusion of individual undertakings from the scope of a council where there was evidence that voluntary collective bargaining arrangements were satisfactory; and enabling councils to establish voluntary disputes procedures for handling grievances raised by workers.

The Report was considered in detail by the trade unions at a specially convened post-Donovan Conference in March 1969 on the wages council sector. (87). The twenty one unions attending were asked to comment on the Donovan proposals for wages councils. The views of individual unions were also sought on the following suggestions from the TUC for improving trade union organisation in wages council industries:-

(i) if wages councils are to continue to exist, is there a case for reducing the number and rationalising their field of operation?

(ii) abolishing the anonymity of wages council representation so that unions become signatories to orders;

- (iii) abolishing the system whereby the Minister appoints workers' sides and substituting selection by the union(s) concerned;
- (iv) could wages councils themselves play a more positive role by actively encouraging trade union membership?
- (v) including a provision that financial aid to unions to expand their membership in wages council industries should be through the Government's proposed Trade Union Development Scheme or through some other means;
- (vi) the establishment of a trade union "recruitment" committee in each group of industries to examine the problems, to set recruitment "targets" and to co-ordinate organising activities;
- (vii) agreements by unions on "spheres of influence" and the withdrawal by unions from industries where their interest is marginal.

The TUC General Council also produced a consultative document, seeking opinions on the desirability of extending the scope of wages councils to deal with a much wider range of issues, such as dispute procedures, and pension, redundancy and productivity schemes. Co-operation with Economic Development Committees and Industrial Training Boards on efficient manpower utilisation, training and safety was also suggested.

The response by the individual trade unions to these proposals was summed up by the Transport and General Workers' Union whose view was that:-

"since Wages councils do not represent an effective means of raising the

standards of lower paid workers, they should be abolished."

The way for the future, as the TGWU saw it, was on the basis of

"the replacement of the Wages Council system with centralised national bargaining on minimum rates, such rates becoming an implied term of contract for all workers. This would require a major campaign for trade union recruitment."
(88)

In 1970 the TUC General Council published a discussion document entitled "Low Pay" which argued that the long-term aim of trade union policy should be to replace wages councils by voluntary collective bargaining machinery competent to tackle the problems of low pay, efficiency, productivity, incomes structures and payment systems. However it went on:

"At the moment the fact is that in the great majority of wages council industries their abolition would effectively remove what is an admittedly inadequate, but is nevertheless the only source of protection for the most vulnerable of working groups."

It concluded:

"Wages councils should be considered not so much as outmoded pieces of machinery to be abolished as and when effective alternatives are established - if ever this happens - but more as pieces of (albeit inadequate) negotiating machinery that need to be reformed and developed in stages towards the achievement of the desired voluntary machinery". (89)

Over the past decade, even though fifteen wages councils covering half a million workers have been abolished, twenty six remain,

covering more than two million workers. More particularly in hotels and restaurants "there is...very little collective bargaining...and the situation has changed little since the establishment of the wages council". (90)

In 1978 the (then) GMWU applied to the Secretary of State for Employment for the conversion of the LRE and LR wages council to a Statutory Joint Industrial Council (SJIC). The SJIC was a new concept in the British system of wage determination which was first put forward by the Commission on Industrial Relations in 1974 in a report on the Clothing Wages Councils. The report records that voluntary collective bargaining between the employers' associations and the trade unions represented on certain clothing wages councils had developed to the point where the council invariably "rubber-stamped" agreements already reached between the parties. It was noted, however, that collective bargaining and voluntary organisation in these sectors of the industry had not reached the stage which would permit the abolition of the wages councils to take place. The report found that "though the statutory machinery for the enforcement of rates is necessary, the present mechanism designed to ensure that agreement is reached is not. Independent members have no role than, arguably, that of a catalyst." In seeking to answer the question of how to encourage the extension of voluntary collective bargaining within the framework of statutory machinery, the report proposed the transformation of a wages council into a SJIC and legislative provision for this transformation was embodied in the Employment Protection Act 1975.

The main organisational difference between SJICs and wages councils was that there was no provision for SJICs to have independent members. Thus a wages council converted to a SJIC would lose its independent members but the organisations nominated by the Secretary of State to appoint employer or worker representatives to

the wages council would continue to make such appointments to the SJIC. A SJIC would be able to make an order fixing minimum remuneration or other terms and conditions of employment which would have the same statutory force as an order made by the wages council. If the two sides of a SJIC were unable to agree, either side could request ACAS to bring about a settlement. If ACAS was unable to do so by conciliation, it would have to refer the matter to arbitration. Any arbitration award would be final and binding on the SJIC which would be required to make an order to give effect to the award. It was also provided that, in the event of the abolition of a SJIC, the Secretary of State should be satisfied that adequate voluntary machinery for the effective regulation of terms and conditions would be established and maintained.

ACAS, to whom the issue of conversion of the LRE and LR Wages Council to a SJIC was referred, felt that if an SJIC was to function effectively it was essential that "the two sides of the wages council have shown that normally they can reach joint agreements without the intervention of independent members". It discovered, however, that this had not been the case in the LRE and LR wages council and had "no reason to believe that conversion would change the attitudes and negotiating behaviour of the two sides so that the intervention of a third party is unnecessary". (91) Minutes of the Council's meetings since 1970 showed that the two sides had taken a different view about the function of the Council in determining the pay and other conditions for workers within its scope:

"This difference appears to have arisen largely because the workers' side has sought to obtain rates of pay and other conditions in line with earnings, conditions and practices in other industries whereas the employers' side has maintained that the role of the Wages Council is to fix the minimum

rates and conditions for the industry it covers. This continuing disagreement has led to an unwillingness to compromise. In spite of the efforts of the independent members they have generally been unable to achieve agreement between the two sides or to narrow the gap to the extent that some compromise could be accepted and eventually they have had to vote in support of one side or the other." (92)

ACAS also considered that the trade unions and employers organisations concerned "should have a level and spread of membership which would enable them to act convincingly and cohesively as representatives of the industry's workers and employers". Whilst acknowledging the efforts made in recent years by the unions (especially the GMWU) to increase their membership in licensed hotels and restaurants and to develop collective bargaining, it noted that organisation was "still very thin and patchy".

With regard to the employers' organisations in the hotel and catering industry, Mitchel and Aston state that employers in the 1940s never reconciled themselves to the existence of the Catering Wages Commission or of the wages boards. They claim that the management ideology operating at that time was "almost pure laissez-faire" which, it seems, prevented trade union development in the industry and, hence, the possibility of a wages board helping to initiate collective bargaining. Since then according to Quest,

"the employers have always given the impression that wages council negotiations are a rather irksome necessity; they certainly haven't wanted to imbue them with a sense of importance by encouraging public debate...(they) have never recognised that there is any kind of national hotel and catering wage negotiating procedure similar to that in other industries". (93)

ACAS found that until 1978 there had been little co-ordination of the views of the various parties on the employers' side in advance of the meetings of the Wages Council, and that nominees from different sectors of the industry had reacted differently to proposals put to them. (94) In 1978, for the first time, the workers' side submitted its proposals in the form of a lengthy written document setting out the claim and supporting arguments in detail. This evoked a researched written response from the employers' side. Even so, no detailed negotiations took place between the two sides and it was only after substantial intervention by the independent members had produced a revised proposal from the employers' side that the deadlock was broken by the independent members supporting the employers' revised proposal. ACAS decided not to recommend the conversion of the LRE and LR Wages Council to a SJIC. By virtue of the Wages Act 1986 the machinery no longer exists for conversion to an SJIC .

In recent years the trade unions' traditional hostility to the wages councils has diminished considerably. Since the 1960s the recession has altered the balance of power in many industries and the unions now feel that the wages councils offer at least some protection to the low paid. The change in attitude can be attributed partly to the experience of unions in sectors where wages councils have been abolished. The paper box making industry failed to achieve any improvements in the level of union organisation after abolition of its wages council; the wage levels of the lowest paid were reduced still further and the well-organised were no better off. It also became apparent that the existence of vulnerable groups in difficult to organise sectors were far more likely to have a depressive effect on pay rates than the statutory minimum wage machinery. Thus, in 1981, six unions joined together in a campaign to maintain the wages councils and prevent government cutting the Inspectorate's resources.

They were the Society of Civil and Public Servants (some of whose members are employed in the wages inspectorate), the TGWU, the (then) GMWU, the Civil and Public Services Association and the Union of Shop, Distributive and Allied Workers. Trade Unions, individually and collectively, were some of the most vociferous opponents to the Conservative Government's Consultative Document.

There is no evidence that the existence of the wages councils, rather than the structure of their industries, has prevented the development of voluntary collective bargaining. Small firms remain the barrier to trade union recruitment which they have always been. A major obstacle to the organisation of workers in small firms is the high cost to the trade unions which consequently prefer to concentrate on larger establishments. Another hindrance is the likelihood of close working relations between employer and employee which, they feel, renders formal collective bargaining unnecessary. The Bolton Committee noted that

"the growth of trade unions and the necessity for collective bargaining have been associated with the concentration of work people in larger and larger units. In a small firm an employee normally may, if he wishes, speak to the owner himself. In a large firm problems of communication arise and some kind of organisation to represent employees' interests is necessary." (95)

Moreover, employers' attitudes to trade unions are rarely welcoming and the hostile employer can prevent union organisation.

The evidence that a number of workers are even unaware of the existence of the wages council system would suggest that union membership is not rejected because workers regard it as unnecessary. The argument that the wages councils impede recruitment fails to account for the difficulties unions face in organising workers in

most areas of the hotel and catering industry, whether or not they are covered by wages councils, eg. the licensed residential and licensed restaurant sector vis a vis the non-licensed residential sector. As the TUC said in response to the Donovan Commission in 1969:-

"Although unions argues that it is the continued existence of a wages council which handicaps the extension of their membership, fragmentation of employment in the industry (and high turnover) is probably more important." (96)

Finally, it should be appreciated that the structural problems of the wages council industries which make recruitment difficult would also make enforcement of collective agreements difficult.

CHAPTER 3

UNFAIR DISMISSAL

A. Introduction

At Common Law, employers possess wide powers to dismiss their employees at will although, in theory, any employee who is not given due notice or payment in lieu of notice when dismissed by his employer can sue that employer for wrongful dismissal in the civil courts. In practice this has rarely happened, the common law of contract being expensive and remote, assuming a unitary basis - for the employer's benefit - to the employment relationship, and treating the contract as freely negotiated between parties of equal standing, thus, as Anderman says,

"ignoring the obvious discrepancy in their bargaining power and the fact that the employment relationship provided income to a family unit for one party and constituted a cost of production or service for the other". (97)

The Donovan Commission too was aware that

"in practice there is usually no comparison between the consequences for an employer if an employee terminates the contract of employment and those which will ensue for an employee if he is dismissed. In reality people build much of their lives around their jobs. Their incomes and prospects are inevitably founded on the expectation that their jobs will continue. For workers in many situations dismissal is a disaster." (98)

Before 1971 employers possessed virtually unlimited powers of dismissal where trade unionism was weak or non-existent. Where, on the other hand, trade unions were strongly organised, they could threaten industrial action if they considered any of their members

to have been dismissed unfairly or in contravention of a collective agreement incorporating a dismissal procedure.

In 1964 the British government accepted in principle the International Labour Conference's Recommendation 119: Termination of Employment (ILO 119), declaring its intention "to discuss with employers and trade unions the provision of procedures to give effective safeguards against arbitrary dismissal".

The report of the National Joint Advisory Council on Dismissal Procedures (1967) commented that

"the law...offers little protection to the worker against arbitrary dismissal, as opposed to dismissal without due notice" (99)

and whilst the Donovan Commission agreed with the Committee's view that voluntary procedures in industry ought to be improved to deal with unfair dismissals, it went further in recommending statutory machinery to safeguard employees against unfair dismissal. Legislation, it said, would have the advantage of making possible an immediate raising of standards to a much more satisfactory level, an advantage which must weigh heavily "in view of the inadequacies of existing voluntary provision, even in well organised areas of industry." (100) It would also afford increased protection for the exercise of freedom of association which would assist the growth of collective bargaining without which "the circumstances in which effective voluntary dismissal procedures can be developed will in some areas of employment not exist." (101)

The Donovan Commission's third point in favour of legislation was that

"there are many areas of industry where voluntary methods are most unlikely to be effective within the measurable future...those which are poorly

organised and will be difficult to organise in the future and where there are many small undertakings. Several million workers are concerned and until statutory provision is made they will be without effective provision." (102)

A prime example of an industry without effective voluntary provision is, of course, hotel and catering.

The Donovan Commission also felt that the practice in existing voluntary procedures of leaving the final decision in the hands of management could not "be accepted as sufficient to ensure that an employee both has fair treatment and is seen to have it." Most procedures laid down by industry-wide agreements did not enable an adequate fact-finding enquiry to be carried out into dismissals" or "a quasi-judicial decision on the merits of the case to be reached." (103)

Legislation was a long time in materialising but, eventually, the Industrial Relations Act 1971 was passed, giving most employees the right to claim compensation for unfair dismissal. (104)

The lapse of time between the government's acceptance of ILO 119 and the introduction of legislation to put it into effect suggests that the unfair dismissal provisions of the 1971 Act were not prompted entirely by considerations of industrial justice. The late 1960s - a period of high employment and trade union strength - witnessed a number of unofficial 'wildcat' strikes which many regarded not only as damaging to the economy but also as an erosion of individual liberty and attributed to the state's traditional abstention from the industrial relations arena. The Industrial Relations Bill Consultative Document stated that:

"Britain is one of the few countries where dismissals are a frequent cause of strike action. It seems reasonable to link this with the fact that in this country, unlike most others, the law

provides no redress for the employee who suffers unfair or arbitrary dismissal, if the employer has met the terms of the contract, e.g., on giving notice. Thus, if an employee is dismissed without reasonable cause, and though this may severely prejudice his future livelihood, the law gives him no right of appeal against his dismissal. Both on grounds of principle and as a means of removing a significant cause of industrial disputes, the Government proposed to include provisions in the Industrial Relations Bill to give statutory safeguards against unfair dismissal". (105)

The unfair dismissal provisions may well have contributed to the creation of a more stable atmosphere in industry generally. As Evans says:

"It has been claimed....that strikes over dismissals have been reduced. Whether this has been the case is unclear, but for some this alleged development confirms the effective curtailment of managers' powers to dismiss arbitrarily. For others, the increasingly legalistic ethos of workplace discipline has benefited managers' authority, in that individual employees increasingly opt for constitutional/procedural and tribunal remedies and consequently unions' ability to apply customary collective sanctions has diminished." (106)

Concern has been expressed in other quarters over the detrimental effect of the unfair dismissal legislation on employers, especially those in small businesses. According to its critics, it seeks to shift the balance of power too much in favour of employees and trade unions; it has made it difficult to dismiss inefficient or troublesome employees and, by adopting an excessively protective approach, has actually made unemployment worse than it otherwise would have been. The employment of labour is more expensive and time-consuming than it used to be and the

effect upon the small businessman is particularly severe as he has insufficient time to keep abreast of legal developments and operates on too small a scale to employ a personnel or industrial relations specialist to do it for him.

Unfair dismissal is the major source of litigation in employment matters and, in 1986-7, accounted for 75% of the industrial tribunals' workload. By 1981 the tribunals had dealt with nearly a quarter of a million complaints although Williams suggested that this probably accounted for less than half a per cent of all employment terminations and less than 3% of all dismissals. The proportion of successful complaints has been falling slowly but surely since 1972; in 1986-7 10.6% of all applications ended in a successful outcome for the applicant. Reinstatement or re-engagement was awarded on 0.4% of all applications, compensation in 7.7%, and the remedy was left to the parties in 2.5% (107). Williams, writing in 1983, regarded the number of applications in which the employee was successful as being surprisingly low.

"Even allowing for the fact that employers have probably become more careful about dismissal than they once were, and that many now operate disciplinary procedures which provide for internal appeal, it does not follow that a majority of the complaints were weak or trivial"

He attributed the decline in the number of successful cases to a variety of reasons "not the least of which is the increasingly complex nature of the legislation itself," (108) He said too that employers enjoy a number of "built in advantages" when it comes to defending allegations of unfairness:

"the majority of complaints are made against small firms with fewer than one hundred workers by non-unionised and poorly paid men in low status jobs whose workmates are frequently disinclined to testify against the employer for fear of jeopardising their own position." (109)

He also commented that -

"women are significantly less likely to complain, a phenomenon only partly explained by the fact that many more women than men work part-time, generally have shorter service, so are less likely to be qualified."

Public sector employees are more likely to be covered by formal joint dismissal procedures. Dickens says:

"Examination of the characteristics of the parties shows that employers in the public sector, and in large and well-organised companies in the private sector, do not generally find themselves having to defend Industrial tribunal claims for unfair dismissal. Rather it is the small, often single-establishment employers who find their dismissal decisions most likely to be challenged at law. Those challenging their dismissals are generally non-union male workers who may have no other opportunity of airing their grievance or seeking redress." (110)

It is also difficult for employees to present an effective case against an employer who is more likely to be legally represented. Williams says that the TUC has opposed the extension of legal aid to tribunal proceedings because of "the tension created by the need for specialist help and the desire on the other hand to keep at bay a creeping legalism." (111)

An attempt is made in this chapter to determine the extent to which the law relating to unfair dismissal has affected the lot of licensed hotel and restaurant workers, most of whom, as has been mentioned already, work in small businesses. To this end, only certain aspects of unfair dismissal will be dealt with. Patterns of work in the licensed hotel and restaurant sector - the high incidence of part-time, casual and seasonal work, together with the increasing use of agency-supplied labour - necessitate an examination of employment status. Fluctuations in demand for the

sector's services mean that reorganisation of his business (and thus his workers' hours, shifts, duties etc.) by the manager or proprietor is not uncommon - so that the topic of "some other substantial reason" becomes relevant. Reluctance on the part of a number of employers in the sector to formalise procedures has important connotations for the issue of "reasonableness" and, finally, it seems appropriate to consider the remedies for unfair dismissal - for without effective remedies, the law offers no meaningful protection, and the size of the employer's business will have some bearing on the type of remedy which the tribunal awards. Other aspects of unfair dismissal are either omitted altogether (such as the other 'fair' reasons for dismissal) or considered in relatively little depth (e.g., the meaning of 'dismissal') because they are no more problematic for workers in the licensed hotel and restaurant sector than they are for those in any other industry.

B. Continuous employment

Before an employee can qualify for the majority of statutory employment rights, he must have the appropriate period of continuous service. Originally this "qualifying period" was two years. It was reduced by the Labour government to one year in 1974 and to 26 weeks in 1975.

By S.8 Employment Act 1980 the qualifying period was extended to two years for employees whose employer, together with any associated employer, did not have more than twenty employees throughout those two years. This latter requirement, introduced by the Conservative government to ease the allegedly harsh effect of employment legislation on small businesses, militated against many hotel and restaurant workers. The two year qualifying period applied to the majority of hotels and restaurants since they have fewer than twenty employees. Now the general rule for unfair dismissal is that the complainant, whose employment began on or after 1st June 1985, must have worked continuously for the same or

an associated employer for two years (112). When the proposed introduction of this universal two year period was announced, Mr. Tom King, then Secretary of State for Employment said:

"The risk of unjustified involvement with tribunals in unfair dismissal cases and the cost of such involvement are often cited as deterring employers from giving people more jobs. This change which now puts all employees on the same basis as that already existing for those in small firms, should help reduce the reluctance of employers to take on more people, while still preserving a fair balance between the reasonable interests of employer and employee." (113)

It has been estimated that of the thirty thousand complaints of unfair dismissal made to industrial tribunals in 1983, nearly six thousand came from those with less than 2 years' service. It is difficult to see how the imposition of a longer qualification period for unfair dismissal protection "should help reduce the reluctance of employers to take on more people" unless those employers intend from the outset to avoid being subject to the law on unfair dismissal by engaging employees and dismissing them just before two years is up so that they can then, if necessary take on a fresh set of workers as replacements. If an employer needs employees for the short-term only he can employ them, quite legitimately, as we shall see, to carry out a particular task. When the task is completed, the employment ceases automatically and no dismissal within the meaning of S.55 takes place (thus preventing the employee from claiming unfair dismissal).

Otherwise, if the fear is of saddling employers with unsatisfactory employees, is a period of two years going to be significantly more valuable than one year (or even six months) in revealing shortcomings in the employee's behaviour or standard of work (especially in the licensed hotel and restaurant sector where so many kinds of work are only semi-skilled or unskilled and it is obvious in a matter of weeks whether an recruit is going to be able

to cope with his work)? The adoption of the longer qualifying period may benefit the employer but, if it does, it must be to the detriment of the employee, especially in an industry like hotel and catering where the very high level of staff turnover means that comparatively few of its workers actually remain with the same employer for the necessary two years.

C. Employees

S.54 Employment Protection (Consolidation) Act 1978 provides that "in every employment to which this section applies every employee shall have the right not to be unfairly dismissed by his employer." S.153 of the Act defines an employee as an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment. This restriction means that many of those who work in the licensed hotel and restaurant sector are unprotected.

(i) Casual workers

Casual workers provide a reserve of labour so that hotels do not have to keep a large permanent complement to cover for sickness, holidays or peaks in business. Dronfield and Soto claim that by the use of casual labour "management can constantly fill vacancies in the most unpleasant jobs instead of having to improve conditions." (114) There are no accurate figures on the numbers of casuals, but the industry does have the only Department of Employment Job Centre dealing purely with casual labour. According to the local manager of this - the Mortimer Street Job centre - about 8 - 9,000 casual jobs are registered with the Centre every week in the autumn, winter and spring. During the summer months the number falls to 6 - 7,000 because many of the casual jobs are taken by students.

There are really two types of casual work in the hotel sector.

Some jobs are so unpleasant that most people cannot tolerate them for long, and Mortimer Street deals mostly with these. The majority of the vacancies are for kitchen porters, unskilled waitresses in cafes and canteens, and chambermaids. To get one of these jobs people arrive at the job centre before 5.30 a.m. and queue. Jobs come in from the hotels during the days and are allocated on a first come first served basis. The only criterion for being accepted is to be sober and relatively clean. (115) The other type of casual labour used by hotels is general skilled and semi-skilled labour employed for special occasions such as banquets. In 1977, some 28,000 workers were registered as "casual banqueting staff" by the HCITB. Since so many hotel staff are casual workers it is pertinent to ask whether they are 'employees' within the meaning of S.153 EP(C)A 1978.

Freedland maintained that the contract of employment has a two-tiered structure. At the first-tier there is an exchange of work for remuneration (for which one set of rules has developed), and at the second tier, there is an exchange of mutual obligations for future performance, i.e., an obligation by the employee to make himself available to render service and an obligation by the employer to enable the employee to earn his remuneration (for which another set of rules has developed - among them, the law on unfair dismissal). (116)

In *Ahmet v THF Catering* (1983) April 250 Income Data Services Brief 10 Mr. Ahmet, a regular casual waiter, had worked in the banqueting department of the Cafe Royal for 17 years (with occasional breaks when no work was available) and, gradually, the job had accumulated certain aspects of a contract of service. Since 1970, following an approach by the Inland Revenue, the company had deducted tax under the PAYE system and national insurance contributions from all the regular casuals' earnings; since 1972 the regulars had received holiday pay; since 1977 they had been given sick pay, when appropriate, and a weekly retainer -

to keep them sweet. Nonetheless the industrial tribunal decided (and the EAT agreed) that Mr. Ahmet was not an employee because he had the freedom to refuse work, and this freedom was "so inconsistent with a contract of service that it would take more than the additional rights given and the altered arrangements made at different times over a long period...to convert what was a contract...for services into a contract of service." Mr. Ahmet was wrong in believing that because the Cafe Royal had never failed to offer him available work in the banqueting suites and he had never refused to carry out the work he was asked to do, his right to refuse no longer existed. In short, there was no mutuality of obligation.

In *O'Kelly v Trusthouse Forte plc* (1983) 3 WLR 605 (concerning three regular casuals at the Grosvenor House Hotel), the employing company's relationship with the applicants possessed many features of a contract of service but it lacked the one important feature of mutuality of obligation. Ackner LJ, whilst acknowledging "that lack of mutuality of obligation is not in itself a decisive factor", admitted nevertheless that it was a factor upon which the members of the Court of Appeal placed "very considerable weight" in reaching their decision. Consequently, they concluded that the applicants were in business on their own account and, as such, outside the protection of the unfair dismissal provisions.

"It is an essential feature of casual work", said the industrial tribunal, "that the worker has the right to choose, without penalty, whether or not to come to work", and a fundamental question, therefore, was whether or not the applicants enjoyed such a right. Mr. O'Kelly and his colleagues gave evidence that the banqueting staff manager, who was responsible for the engagement of casual staff, objected to casuals being absent from work for medical appointments and was unsympathetic towards even certified sickness. If regulars failed to attend, or were guilty of other infractions, their punishment consisted of suspension from a limited number of future engagements, "even if those engagements

had been rostered and therefore impliedly accepted by the worker". It followed that the freedom to choose whether or not to come to work, if the banqueting staff manager wanted a particular person to work, was more apparent than real if that person wished to continue working at the hotel. "In the context of casual work for these or any other employees the expression 'without penalty' had little practical meaning when the consequences of failure to attend can so nearly imply an obligation to attend."

There were only two weeks in the preceding year when Mr. O'Kelly and his colleagues had not worked at the Grosvenor House Hotel. Two of them had worked an average of 31 hours per week, and the other 42 hours per week, and none had any other regular employment. Ackner LJ felt, however, that

"the company, of course, expected the applicants to keep the engagements rostered, but to suggest that a failure to accept amounted to a breach of contract is going too far. They were entitled to choose whether or not to attend, and however irritating it might have been to the company if faced with a refusal, it would have been quite unreal to conclude that either party would have thought it was breach of contract."

The applicants were compelled to accept the company's offer of work when it was made because of its "commanding economic power".

In some instances the casual worker will not be engaged by the employer with the same degree of regularity as Mr. O'Kelly and his colleagues were by Trusthouse Forte in which case the periods between engagements may come under scrutiny. In *Byrne v Birmingham City District Council* [1987] ICR 519 the applicant elected to join a pool of casual workers. He claimed that a month's absence from work was due to a "temporary cessation of work" within the meaning of para. 9(1)(b) of Sch.13 to the EP(C)A 1978 (117) and that, in consequence, he had sufficient continuity of employment under the

Act to bring a claim for unfair dismissal. The Court of Appeal held, however, that where a person belonged to a pool of casual labour among whom the employer distributed available work, a person in the pool who could not be offered work for a period of time because available work was offered to someone else in the pool could not be said to be absent from work for the purposes of para. 9(1)(b). Purchas LJ said:

"the circumstances in which the employee ceased to be employed during the critical period did not arise out of a lack of availability of work for him in the sense that there was a cessation of that work, but merely that the work which was available to him was under the pooling arrangement given to someone else. The expression "cessation of work" must denote that some "quantum of work" had for the time being ceased to exist, and, therefore, was no longer available to the employers to give to the employee." (p.525E)

While a casual worker may have no long-term contract of service, a contract of service possibly comes into being each time the casual worker presents himself for work. Slynn J in *Airfix Footwear Ltd. v Cope* evidently considered it feasible that a casual worker could be engaged under a contract of service on each occasion that he worked:

"If the arrangements between a company and a person are such that work may be provided and may be done at the will of either side - in other words, that the company may provide or not, as it chooses and the other person may accept the work or not, as he pleases - it may well be that it is not properly to be categorised as a contract of employment. If in such a situation the company only delivers work sporadically from time to time, and from time to time the worker chooses to do it, so that there for example is a pattern of an occasional week done a few times during a year, then it might well be that there comes into existence on each of those

occasions a separate contract of service or possibly a contract for services but that the overriding arrangement is not itself a contract of employment, either of service or for services."

In O'Kelly the EAT reasoned that once a regular casual had presented himself for a function, he was under a contractual obligation to allow the work to be done so that the question of mutuality of obligation became irrelevant. Of course, even an independent contractor who undertakes to perform a specific task is under a duty to do so or he will be in breach of contract but, as the EAT pointed out, the argument that each individual contract in O'Kelly's case was a contract for services was difficult to accept, given the degree of control the company enjoyed over the casuals, the nature of payment, the background of recurrence and "the de facto requirement to work for one person only".

In the Court of Appeal, only Ackner LJ thought that the individual contract issue should have been remitted to the industrial tribunal. Fox LJ felt that the industrial tribunal's conclusion that the applicants were in business on their own account was inconsistent with the separate contracts contention, whilst Sir John Donaldson MR considered that "all that could emerge was an umbrella or master contract for not of employment. It would be a contract to offer and accept individual contracts of employment and, as such, outside the scope of the unfair dismissal provisions."

As Hepple says, the Court of Appeal "simply jumped over Freedland's first-tier argument by the question-begging statement that the regulars (who in fact worked for no-one else and contributed no capital of their own) were "in business on their own account.'" (118)

It seems curious that the Court of Appeal did dismiss the separate contracts contention even if it is accepted that there was

no overall contract of service. Non-assignability is the basis of employment and the employee is under a common law duty to present himself for work and not delegate it to others. Had Mr. O'Kelly been an independent contractor, therefore, he would have been under no such duty and would have been perfectly entitled to send a replacement to the Grosvenor House Hotel. The very fact that the banqueting staff manager kept a list of regulars indicates that their services were required rather than anybody else's. But even if the separate contracts argument had been successful, would it have sufficed to bring Mr. O'Kelly and his colleagues within the law's protection, claiming, as they were, unfair dismissal for an inadmissible reason, for which no period of continuous employment is necessary? The answer to this question depends on there having been a dismissal within S.55 of the EP(C)A 1978. (119)

By S.136(1) of the EP(C)A 1978 an appeal may be made to the EAT "on a question of law arising from any decision of, or arising in any proceedings before, an industrial tribunal under, or by virtue of," the Act. S.136(4) authorises an appeal to the Court of Appeal on any question of law from any decision or order of the EAT.

In O'Kelly v Trusthouse Forte, Ackner LJ said:

"it must be axiomatic that whether or not A has entered into a contract with B, whether such contract be in writing or partly in writing and partly oral, or wholly oral, is a question of law involving the true interpretation of a document and/or the conduct of the parties. The facts cannot warrant a determination either way. It is not a question of degree, as in the case of the meaning of reasonableness...or whether a breach amounted to a repudiatory breach. If then it is a question of law, whether on the correct interpretation of a document or whether on the true inference from the facts, parties have entered into a contract, then in my judgement it must be equally a question of law what on the facts

found is the true nature or quality of that relationship." (at p.114)

Sir John Donaldson MR and Fox LJ, however, felt that on the particular facts of O'Kelly much depended on the inferences to be drawn from the primary facts. The precise quality to be attributed to various individual facts was so much a matter of degree that it was unrealistic to regard the issue as attracting a clear legal answer. Reaffirming the principles of *Edwards v Bairstow* (1956) AC 14, Fox LJ said:

"The result, in my view, is that the appeal tribunal was not entitled to interfere with the decision of the industrial tribunal unless that tribunal misdirected itself in law or its decision was one which no tribunal, properly instructed, could have reached on the facts." (at p.121)

Such an approach means that two cases with similar or virtually identical facts can produce two quite different results.

In *Four Seasons (Inn on the Park) v Hamarat* (EAT, 17.5.85 (369/84)) the EAT had to consider the status of another regular casual wine waiter, the factual circumstances of the case being very similar to those of O'Kelly. Basing its case on the decision in *O'Kelly v Trusthouse Forte*, the company argued that Mr. Hamarat was not an "employee" and was not entitled, therefore, to the protection of the unfair dismissal legislation. Both sides compiled a document comparing Mr. Hamarat's contract with the contract in O'Kelly's case and presented it to the tribunal so that they could see which terms were similar in the two cases and which were different. However, the industrial tribunal decided, following a direction of the Court of Appeal in O'Kelly, that they had a duty to look at all the aspects of the relationship between the company and Mr. Hamarat to decide whether or not he was carrying on business on his own account.

The tribunal considered various factors relevant to the question of Mr. Hamarat's status and felt that, most important of all, there was mutuality of obligation between the two parties. If Mr. Hamarat had refused work offered to him by the company, further work would have been withheld and if the company had failed to offer him further work, he would have gone elsewhere. The tribunal concluded that Mr. Hamarat was an employee.

The Employment Appeal Tribunal dismissed the company's appeal. Even though both parties were agreed that there was no mutuality of obligation, the EAT held that the industrial tribunal were correct in making their own findings of fact instead of relying on the document supplied by the two sides. Indeed, they expressed the view that there are grave dangers in presenting tribunals with a comparison between the facts of one case and another "because of the minute differences in circumstances which may be sufficient to bring a particular case across the demarcation line, and the necessity to view each feature of the contract in the particular context of that contract alone."

In *Davies v Presbyterian Church of Wales* [1986] IRLR 194, a presbyterian pastor, dismissed from his pastorate following a disciplinary inquiry, claimed that his dismissal was unfair. On behalf of the church it was argued that the tribunal did not have jurisdiction to hear his complaint since he was not an employee within the meaning of S.153(1) Employment Protection (Consolidation) Act 1978. Ultimately the House of Lords held that whether a pastor is employed and is under a contract of service is a question of law and, therefore, if the industrial tribunal erred in deciding that the appellant was employed under a contract of service, their decision must be reversed by the appellate court.

The matter was considered by the Court of Appeal in *Hellyer Bros. Ltd. v McLeod* [1987]. The Court stated that O'Kelly's case was one in which the relevant contractual relationships had been established by a course of conduct and could not be identified by

reference to a single written document. In Davies, on the other hand, everything turned on the construction of the church's book of rules. Templeman LJ said in that case:

"The question to be determined is a question of law, namely, whether upon the true construction of the book of rules a pastor of the church is employed and is under a contract of service. If the industrial tribunal erred in deciding that question, the decision must be reversed and it matters not that other industrial tribunals might have reached a similar erroneous conclusion in the absence of an authoritative decision by a higher court."

In Hellyer, the Court of Appeal felt that since their Lordships in Davies had made no reference to O'Kelly's case, their decision had not necessarily implied any disapproval of the reasoning of the majority in O'Kelly's case and in the present case they regarded themselves as "entitled and indeed bound" to apply the principles of Edwards v Bairstow. Presumably, this means that future cases with similar facts may still result in quite different decisions. Inconsistencies (such as Hamarat compared with O'Kelly) can only serve to exacerbate the problems involved in establishing the extent of the casual worker's less than tenuous hold on employment protection.

Another way of approaching the question of the casual worker's legal status is via the concept of the 'global' or 'umbrella' contract. A person who has worked under a series of separate contracts for the same employer may, when no more contracts are forthcoming, succeed in a claim for unfair dismissal or redundancy provided that he can establish the existence of a global contract covering the requisite two year period. In cases where the evidence discloses what appears to be a series of contracts of service, or for services, entered into between the same parties and

covering a substantial period of time, the industrial tribunal may infer from the parties' conduct the existence of a continuing overriding arrangement which governed the whole of their relationship and itself amounted to a contract of employment.

In *Airfix Footwear Ltd v Cope* [1978] ICR 1210, a homemaker who assembled shoe parts was held to be an employee, even though the company which used her services was under no obligation to provide her with work and she was not obliged to do any work which she was offered. Here, the deciding factor was the existence between Mrs. Cope and the appellant company of what was described as a "continuing relationship" which, presumably, referred to the fact that she had worked for the company for seven years, usually five days a week (although the quantity of work she was given varied according to seasonal demand).

Slynn J. said

"We consider that in deciding that the overriding contract was a contract of employment in this particular case the (industrial) tribunal must have implicitly decided that there was not on each day that the shoes were delivered to the applicant's house a separate contract of employment. Indeed, whatever may be the position in regard to other facts, a contrary conclusion would appear to be highly artificial on the facts of the present case."

The decision in *Airfix Footwear Ltd. v Cope* was reaffirmed by the Court of Appeal in *Nethermere (St. Neots) Ltd. v Taverna* ([1984] ICR 612. Here, two machinists who worked at home were held to be employees under an "overall" or "umbrella" contract obliging the employers to continue to provide and pay for work and the applicants to continue to accept and perform the work provided. Kerr LJ, dissenting, did not think that even a lengthy course of dealing could somehow convert itself into a contractually binding

obligation to continue to enter into individual contracts or to be subject to some "umbrella" contract. Dillon LJ, however, said that the flexibility which the machinists enjoyed as regards their hours of work, holidays and time off, and the number of garments they were willing to take on at any time, did not as a matter of law negative the existence of a contract of service. There was no reason in law why the existence of such a contract might not be inferred from a course of dealing continued between the parties over several years. It was unreal to suppose that market pressures alone were responsible for the work done by the applicants for the employers over not inconsiderable periods and that no contract at all was involved. There was a regular course of dealing between the parties for years under which garments were supplied daily to the machinists, worked on, collected and paid for. If it was permissible on the evidence to find that by such conduct a contract had been established between each applicant and the employers, there was no need to conclude that it was a contract for services rather than a contract of service. In short, there had developed and interdependent relationship between the parties which reflected the economic realities of the situation.

An essential prerequisite of a global or umbrella contract is mutuality of obligation. In *Nethermere Kerr LJ* said:

"The inescapable requirement concerning the alleged employees...is that they must be subject to an obligation to accept and perform some minimum, or at least reasonable, amount of work for the alleged employer. If not, then no question of any 'umbrella' contract can arise at all, let alone its possible classification as a contract of employment or of service."

The recent cases of *Hellyer Bros. Ltd. v McLeod and Others*, *Boston Deep Sea Fisheries Ltd. v Wilson* [1987] 1 WLR 728 concerned a number of trawlermen who had sailed, some of them exclusively, for their respective employers for between two and thirty years.

The voyages generally lasted for several weeks with short periods in between. Their terms of engagement were regulated by a series of crew agreements beginning at the start of each voyage and ending when the vessel returned to port. The applicants' last voyages all ended on dates between March and December 1983. As part of the general decline in the trawler fishing industry from 1977 onwards the two employing companies reduced the number of their vessels. They decommissioned their entire fleets in January 1984 and the applicants applied to industrial tribunals for redundancy payments.

Because the trawlermen were employed intermittently on a series of separate crew agreements which came to an end by mutual consent at the conclusion of each voyage, their redundancy claims were made on the basis that each man was employed under a global contract which had ended by dismissal when the fleets were decommissioned. Faced with this argument the court had to consider whether the men could be regarded as "employees", i.e., whether there was an overall mutuality of obligation between the parties.

The tribunals, by a majority (the legally qualified chairmen in both cases dissenting), held that there had been a succession of short-term contracts over a very long period and that, in reality, at January 1984, each of the applicants, even though not currently employed under a subsisting crew agreement, was employed under a continuing contract of employment which had been terminated by dismissal when it was announced that the employers' fleets were to be taken out of service. Although there were times when the men were not at sea, that did not mean that they were not employed.

The employers' appeals were allowed by the EAT which held that the Industrial Tribunal had misdirected itself in law in adding up a series of individual contracts to form a global contract; there was insufficient evidence of an obligation on the applicants to do work or on the employers to provide work to amount to a global contract of employment and, therefore, the applicants had not established sufficient continuity of employment.

The Court of Appeal, dismissing the trawlermen's appeals, held that, although the series of short-term agreements had continued in sequence for a very long time, it could not be inferred from the conduct of the parties that, at times when there was no subsisting crew agreement, the parties were still subject to mutual contractual obligations sufficient to found a global contract. Between voyages the men had registered as unemployed and received unemployment benefit. They were free to work for owners other than the employers and the employers were not bound to re-engage them after the completion of a voyage although, in practice, they generally called up the same men and refrained from poaching other owners' men.

A few days after the hearing by the EAT of the Hellyer case, a differently constituted EAT upheld the Industrial Tribunal's decision in *Boyd Line Ltd. v Pitts* [1986] ICR 244, a case which involved what were described as "facts superficially very similar" to those in Hellyer (but which, somewhat curiously, included the fact that between voyages the trawlerman in question registered as unemployed and claimed unemployment benefit). The EAT distinguished the cases on two grounds: First, in Hellyer, "any trawlerman was free to work for an owner other than the one for whom he had sailed in his last voyage, if he wished", and, secondly, "owners had the right, if they wished, not to re-engage any trawlerman after completion of a particular voyage, and that right continued for as long as the ship owner might wish." In *Boyd*, on the other hand, evidence showed that, inter alia, almost as soon as the applicant had earned his skipper's ticket it was deposited in the Boyd Line safe and stayed there for decades, that he had worked for no-one else for 33 years, that when he refused to skipper another man's ship, the employers disciplined the applicant by barring him from a trip with consequent loss of earnings, that a conversation had taken place, six months after the applicant's last voyage, in which Mr. Boyd informed Skipper Pitts that the employing company had not finished with his services and that he or another Boyd Line skipper would captain the employer's

last ship if and when she next sailed, and that, according to the employers, if the fleet had not contracted, the applicant would have stayed with them until his retirement.

The EAT admitted that they had not found their decision in the case an easy one. Moreover, it was probable, they said, that they would have decided the matter differently from the majority of the industrial tribunal. They took into account, however, the words of Sir John Donaldson MR in O'Kelly:

"[The appellate court] may well have a shrewd suspicion, or gut reaction, that it would have reached a different decision, but it must never forget that this may be because it thinks that it would have found or weighed the facts differently. Unpalatable though it may be on occasion, it must loyally accept the conclusions of fact with which it is presented and, accepting those conclusions, it must be satisfied that there must have been a misdirection on a question of law before it can intervene. Unless the direction on law has been expressed it can only be so satisfied if, in its opinion, no reasonable tribunal, properly directing itself on the relevant questions of law, could have reached the conclusion under appeal. This is a heavy burden on the appellant."

Further support has been given to the notion of the global contract by the House of Lords in *Lewis v Surrey County Council* [1987] IRLR 509. Here, the terms of a photography lecturer's employment in the three college departments in which she worked were regulated by three separate and independent contracts with the same employer. Her hours of work in each department varied but in none of them did she work the number of hours necessary to accrue continuous service for the purpose of exercising statutory employment rights. Moreover, each contract lasted for one term only. When her employment finally came to an end, Mrs. Lewis was entitled to claim unfair dismissal and/or a redundancy payment only

if her hours of work in the three departments could be added together for the purpose of calculating her normal weekly hours and if the separate contract could be amalgamated sequentially to give her the necessary period of continuous employment. The industrial tribunal held that such horizontal and vertical amalgamation of the contracts was permissible as a matter of industrial good sense. The EAT allowed an appeal against the decision but the industrial tribunal's decision was restored by the Court of Appeal. The House of Lords held that such aggregation is not permissible; had Parliament intended that it should be, guidance would have been given on how it was to be carried out. However, Lord Ackner said, obiter, that in appropriate circumstances an industrial tribunal might find that, even though there were separate contracts, there was also a unifying contract of employment collateral to the separate contracts, i.e., an "umbrella contract", under which the minimum hours requirement were satisfied.

It appears then that the "global" or "umbrella" contract is a viable proposition in cases where the relationship between the worker and his employer has been such that sufficient mutuality of obligation can be shown to have existed. But it is an approach which must be made with caution, bearing in mind the contradictory decisions in the cases concerning the trawlermen. The courts may be happy to accept global contracts in theory but they have not been quite so enthusiastic about them in practice.

There is also the problem of "whether, and precisely when," (120) workers under global contracts are actually dismissed. The expiry of a contract for a fixed term, where that term is not "renewed under the same contract" is treated by virtue of S.55(2)(b) and S.83(2)(b) EP(C)A 1978 as a dismissal for unfair dismissal and redundancy pay purposes respectively. In general tribunals appear to accept that provided that there was a genuine need for the employment to be temporary, termination on the expiry of a fixed term may be treated as being either for redundancy (if the reason for non-renewal was lack of work) or for 'some other

substantial reason' (Terry v East Sussex County Council). The tribunal must then consider whether the employers acted reasonably.

In Boston Deep Sea Fisheries v Wilson an attempt was made by the applicant trawlermen to amend their answer in the Court of Appeal to allege that they had been employed under a series of a fixed term contracts and that there had been a deemed dismissal under S.83(2)(b). The question was: could the last crew agreement, signed on 10th September 1982, be held to have been for "employment for a fixed term" of 6 months? The agreement imposed an obligation to employ the vessel fishing not for the term expiring on the 9th March 1983 but for a period which should end not later than that date or until the vessel first called thereafter at its port of destination in the UK and, if the agreement had not terminated within 30 days after the period of 6 months, until the first call at port thereafter. It was argued for the trawlermen that these provisions for extension did not prevent the employment being for a fixed term and it did not matter that there was power of prior termination by notice on either side (Dixon v British Broadcasting Corporation [1979 QB 546) or that there might not be work for the employee to do for part of the term (Wiltshire County Council v NATFHE [1980] ICR 455).

The employers argued that the crew agreement did not provide "employment for a fixed term" because it did not comply with the requirement stated by Lawton LJ in the Wiltshire County Council case that a "fixed term" meant a term which has a defined beginning and a defined end (at p.462 B).

An additional factor was that the trawlermen would only amass the two year qualifying period if their absences from work for 4 periods of between 38 and 61 days over 2 years were temporary cessations of work within para.9(1)(b) or (c) of Sch.13 to the 1978 Act.

The Court of Appeal held that the non-renewal of a fixed term contract argument was a new point of law and that upon the established principles applicable to the raising of new points by respondents, the EAT had correctly taken the view that it was right to refuse leave to allow it to be raised; and that in any event neither the Court of appeal nor the appeal tribunal could have disposed of the appeal in favour of the second applicants on the basis of the new ground upon the findings of fact of the tribunal. The Court mentioned the similar approach used in *Boyd Line v Pitts* where the EAT had regarded it as "quite impossible that any of the voyage agreements was a fixed term contract."

One way in which the employer can ensure flexibility in the termination date is to specify that the contract is to last until the particular task for which the person has been employed is completed or until the happening of some specified event. Such a contract is not regarded as a contract for a fixed term, since no termination date is specified (*Wiltshire County Council case*, supra). It nevertheless ends when the task is finished or when the specified event occurs but that termination is not treated as a dismissal for unfair dismissal or redundancy purposes since it fits within none of the categories of dismissal defined in S.55(2) and S.83(2). In the *Wiltshire County Council case* Lord Denning said:

"It seems to me that if there is a contract by which a man is to do a particular task or to carry out a particular purpose, then when that task or purpose comes to an end the contract is discharged by performance. Instances may be taken of a seaman who is employed for the duration of a voyage - and it is completely uncertain how long the voyage will last. His engagement comes to an end on its completion. Also of a man who is engaged to cut down trees, and when all the trees have been cut down, his contract is discharged by performance. In neither of those instances is there a contract for a fixed term. It is a contract which is

discharged by performance. There is no
"dismissal."

No doubt such would have been the position in O'Kelly had the separate contracts contention succeeded. It would not have been enough to have shown that each time a regular casual worked at a function at the Grosvenor House Hotel he was employed under a contract of service since that contract of service would not have been terminated by dismissal but would have been discharged by performance.

In such a situation an entitlement to redundancy pay may be established by the application of S.93 of the EP(C)A 1978. This provides, for redundancy pay purposes only, that a termination of a contract of employment, in accordance with any enactment or rule of law, by an act on the part of the employer or an event affecting the employer is to be treated as dismissal; and that dismissal is to be taken as having been by reason of redundancy if that was the reason why the employer was not engaged.

In *Boyd Line v Pitts* it was argued on behalf of the applicant that his signing off at the end of his last voyage was an "event affecting an employer" which operated so as to terminate the the last individual contract and thus was to be treated as termination by the employer, under S.93(1). The EAT said, however, that it regarded the operation of S.93(1)

"not as a catch-all designed to sweep up any situation which was not already covered by other provisions of the legislation, but as confined to such events as bankruptcy, liquidation and frustration." (at p.252) (120a)

(ii) Agency workers.

The past few years have witnessed an increase in the number of agency staff working in the licensed hotel and restaurant sector. While some aim to recruit staff (usually at managerial or professional level) for permanent positions, others concentrate on recruiting "temps" for a variety of jobs and, very often, not simply to make up for a seasonal shortfall. Again there is a question mark over the agency worker's employment status: Is he employed under a contract of service at all and, if he is, is he the employee of the agency or the hirer? Further, the short-term worker, even when classified as an employee, may slip through the statutory net by not having the necessary qualifying period of continuous service (although it should be borne in mind that the length of the engagement has no direct bearing on whether a worker is employed under a contract of service, a contract for services or some other type of engagement).

The Employment Agencies Act 1973 applies to both the "employment agency" and the "employment business". By S.13(2) the former is defined as

"the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of providing services (whether by the provision of information or otherwise) for the purpose of finding workers employment with employers or supplying employers with workers for employment by them.

An "employment business" means

"the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of supplying persons in the

employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity." (S.13(3))

"Employment" is defined for the purposes of the Act to include professional engagements or otherwise under a contract for services and au pair arrangements. This definition is so wide that such workers will not normally rank as employees for other purposes, even where they are employed by an employment business. S.1 of the Act makes it a criminal offence to carry on an employment business or agency without a licence and the Conduct of Employment Agencies and Employment Businesses Regulations 1976 (121) lay down standards for their conduct. Agencies must carry out inquiries into the requirements of a particular job and the qualifications of any particular worker they may supply to fill it, before introducing him to the potential employer. They are forbidden to use inducements to recruit workers and they must provide workers with a written statement of their terms of business and the arrangements regarding fees. (Reg.4.) Employment businesses have to issue their recruits with written statements of terms and conditions of employment and these should specify whether the worker is employed under a contract of service or contract for services. (Reg.9.)

Often, however, the nature of the temporary worker's relationship with the employment agency or business is not clear and the 1973 legislation does nothing to resolve the difficulties underlying his legal status. There are a number of possibilities. First a contract of service between the hirer and the worker may come into being through the agency of the supplier - the hirer may decide to recruit him formally. Such a worker will be fully protected under the unfair dismissal legislation provided, of course, that he accumulates the necessary period of continuous service.

The second possibility occurred in *Construction Industry Training Board v Labour Force Ltd.* (1970) 3 All ER 220, which concerned liability for an industrial training levy. Clients would contact Labour Force Ltd. when they wanted temporary workers. Labour Force Ltd. charged such clients a fee and then paid the workers their wages. The Divisional Court held that Labour Force Ltd. did not have contracts of service with the workers. Cooke J said that

"where A contracts with B to render services exclusively to C, the contract is not a contract for services (or of service) but a contract sui generis, a different type of contract from either of the familiar two".

If the agency has a duty to provide workers but need not provide a specific person, then it would be agreeing only to provide services and the worker in question would not be an employee of the hirer. Furthermore an agency which simply acts as a placing bureau does not exercise any of the supervisory functions by which an employer normally controls his employees, thus precluding the existence of a contract of service between it and the workers whose services it provides.

The incidence of mutuality of obligation is particularly important if a contract of service is to be created between supplier and worker. In *Wickens v Champion Employment* (1984) ICR 365 a temporaries controller working in an employment agency who was dismissed before she had completed two years' continuous service, complained of unfair dismissal. On the issue of whether, for the purposes of S.64 Employment Protection (Consolidation) Act 1978, the agency employed the temporary workers on its books under what it referred to as 'contracts of service', the Employment Appeal Tribunal held that, although there was no evidence that the temporaries were in business on their own account, they were under no obligation to accept bookings offered by the employers and the employers had no

obligation to find work for them. The contracts between the agency and its temps did not create a relationship which had the elements of continuity and care associated with the relationship created by a contract of employment. It was argued for the applicant that there was no evidence of the temps being self-employed in the sense that they were carrying on a business of their own. The Employment Appeal Tribunal felt, however, that this was irrelevant. Just because a casual worker was not carrying on his own business, it did not follow that he was employed under a contract of service.

Fundamental to the tribunal's finding of self-employment appears to have been the wording of the employment documentation. This stated, *inter alia*, that the agency would provide suitable bookings for temps, but that it could not guarantee to do so. The temps for their part were under no obligation to accept offers of a booking. As a result, mutuality of obligation was lacking. The EAT failed, however, to appreciate that quite possibly the offer of a booking by the agency and the acceptance of that booking by the temp. brought into existence a contract. The documentation required temps to "observe and comply with all reasonable rules and obligations in force at the premises where they are performing their duties". Would this not have satisfied the control test, recognised by Nolan J. in the present case as having validity and requiring application in a broad way if it were to be relevant here?

These issues were particularly pertinent in the case of *Harris v Reed Employment* (20.12.84 EAT 330/84). Mr. Harris joined Reed Employment as an accountant, his contract providing that he was to work for Reed's clients and they would determine his hours of work. Other aspects of his engagement, e.g., the payment of tax and national insurance, the method of payment, luncheon vouchers and travel expenses, were the same as other Reed employees and Mr. Harris claimed that he too was an employee. Three factors in the

relationship between the parties led the industrial tribunal to conclude that he was not an employee. First, the ordinary obligations of master and servant were not present. Secondly, there was no mutuality of obligation between them and, thirdly, Reed Employment exercised no control over the way in which Mr. Harris carried out his work.

Allowing Mr. Harris's appeal, the EAT held that the tribunal may have misdirected themselves and remitted the case for a re-hearing. The EAT said that the tribunal should have considered the nature of the relationship which the parties intended to create (which should be discernible from the parties' description of their relationship unless this was contradicted by the terms of the agreement) and also whether there was anything in the terms of the agreement incompatible with a contract of employment. On the issue of mutuality of obligation the EAT said:

"It seems to us that the true question for the tribunal in considering the nature of the first engagement is whether, when the respondents offered to the applicant and the applicant accepted the offer to work for a particular client of the respondents, the respondents were bound to continue to use the applicant to provide that service to their clients so long as he was satisfactory to them and whether he for his part was bound to continue work for the respondents providing those services (subject, of course, to reasonable notice on each side)."

Applying that test the EAT suggested that the following were not necessarily inconsistent with the existence of a contract of service:-

- a) that Mr. Harris worked for Reed's clients (since many accountants work for clients of their employing firm);

- b) that the client should indicate what tasks were required;
- c) that neither Reed Employment nor their client actually told Mr. Harris how to do the work;
- d) that Mr. Harris might be free to decline to do the work for a particular client or that a particular client might not wish to use his services;
- e) that the employers under the terms of the contract might not be bound to offer or provide work for Mr. Harris.

The EAT could see no reason why Mr. Harris could not be an employee of the agency (although the case had to be remitted to investigate the terms of the agreement between the parties.)

Agency workers encounter several problems in work and not just those connected with their employment status. They often have irregular working patterns, with breaks from work and changes of agency which prevent their establishing continuity of employment. Sometimes - but by no means always - they receive good weekly or hourly earnings but they suffer severe handicaps in terms of employment benefits such as sick pay, holiday pay, maternity and pension benefits as well as many employment protection rights.

(iii) Seasonal Workers

Employment of workers for the summer season is common in hotels and restaurants in seaside resorts and other holiday areas. Such workers are rarely in employment long enough to acquire most employment rights and if the seasonal employment is under contract for a specific task the termination of the contract is unlikely to be

a dismissal because it does not fit in with the definitions of dismissal in Ss.55 and 83 EP(C)A 1978.

An employee may return regularly every year to a particular seasonal employment but continuity is likely to be lost during the off seasons in all but exceptional cases. In *Ford v Warwickshire County Council* [1983] IRLR 126 the House of Lords held that Sch.13 of the EP(C)A 1978 applied equally to fixed term contracts of employment as to those where there was no fixed length of service. It was also held that when used in para.9(1)(b) of Sch.13 the word 'temporary' is equivalent to 'transient', and that a cessation will be temporary if it lasts only a short time relative to the surrounding periods of employment. An interval which cannot be characterised as relatively short will break continuity. Lord Diplock specifically referred to hotel work during the summer season as an example of employment which would only qualify as continuous employment if the breaks between contracts are so short in comparison with the length of the season during which the employee is employed to be regarded as temporary or transient. In *Ford's* case itself the cessation concerned was the summer holiday in between successive academic years, and the employers conceded that this was a temporary cessation.

A feature of *Ford's* case was the regularity of employment. In *Flack v Kodak* [1986] 2 All ER 1003, a case which concerned a claim for a redundancy payment, the House of Lords held that where an industrial tribunal has to consider the effect of gaps in employment of employees engaged in work where the seasonal demand varies, the proper course is not to conduct a mathematical exercise such as determining the percentages of gaps and employment over the two year period of Sch.13 but rather to examine and consider the whole period of employment, looking at all the circumstances.

The gaps between most 'seasonal' jobs will be too long to rank as temporary so that Sch.13 para.9(1)(b) will be of no assistance but the worker may be able to count his spells of absence from work as periods of employment under Sch.13 para.9(1)(c) on the grounds that he is

"absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for all or any purposes."

Here there is no express or implied upper limit to the period of absence which will qualify so long as it is covered by an "arrangement or custom". An arrangement must be made at the start of the absence and cannot be made retrospectively by the parties. When the existence of an arrangement is disputed a tribunal has to look at the evidence as to what was agreed at the start of the absence and at whether it could be said that the employee was continuing in his employment during his absence. In *Tongue Hotel Co. Ltd. v MacKay* (EAT 461/83) a waitress/barmaid in a seasonal hotel was paid off in October and expected to start work full-time again in April. However, unlike most of the staff, she was not give her P45 and was asked to stay available for relief work during the winter. The hotel barman left in January (his departure had been half anticipated by the employers) and the applicant took over from him on a part-time basis. The EAT held there was evidence sufficient to deduce the existence of an arrangement whereby she was regarded as continuing in employment after October. The EAT doubted her alternative claim that continuity was preserved under para.9(1)(b) and would have remitted the case had it depended on this argument. Certainly it is doubtful that a three month break would fit the House of Lords' definition of 'temporary' as 'transient', even bearing in mind the overall period of employment as required by the *Flack v Kodak*.

Of course the temporary worker is not entirely without legal protection. S.78 Race Relations Act 1976 and S.82 Sex Discrimination Act 1975 define "employment" as employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour. A similar definition of "worker" applies for the purposes of the workplace balloting exemption. When applying either of these exemptions, therefore, it may be necessary to include among those affected certain self-employed people provided that they are personally executing work or labour for the employer in question.

While the use of casual and agency-supplied labour grows, the legal status of casual and agency workers remains nebulous, hovering on the periphery of protective employment legislation. There is no easy solution; it has proved virtually impossible for the courts to devise a satisfactory test to determine the difference between an employee and an independent contractor and over the years the distinction between a contract of service and a contract for services has, in the words of Lord Wedderburn, "taxed the ingenuity of judges". (122).

Certainly the test of mutuality of obligation seems less than satisfactory and the two way aspect of 'obligation' seems to have escaped one of the largest employers in the licensed hotel and restaurant sector. In Trusthouse Forte Hotels' "Handbook for Casual Workers" the company is at great pains to point out to its casuals that although they may have worked for it before, their engagement "is that of a casual worker on a contract for services and not under a contract of employment". The Handbook continues:

"As a Casual Worker you undertake specific engagements and have the right to choose, without penalty, whether or not to accept the offer of an engagement, but having accepted you have a responsibility to come to work. Your engagement automatically terminates whenever the function/

event/session may end and the Company has no obligation to offer you any other engagements in the future."

The Handbook explains that the company will only pay for hours actually worked but then goes on to say that

"if a function/event/session is cancelled or the number of workers required is reduced, even at the last moment when you have already arrived for work, the company has no obligation to compensate you."

Leighton says:

"the consequences of a decision regarding employment status can be considerable, and where, for example, the corollary of a finding of self-employment is leaving a badly injured worker uncompensated or a long serving homeworker without redress when dismissed, the pressure to adopt an instrumental approach to the issue is great, and often irresistible. How else, might one ask, can the apparently widely differing decisions in, for example, *Ferguson v John Dawson (Partners) Ltd.* [1976] IRLR 346 and *O'Kelly* be explained? The willingness of the Court of appeal in *Ferguson* (where a building worker was badly injured) to overturn clearly expressed intentions to be self-employed has to be contrasted with their notable reluctance to find employee status for casual workers trying to (merely?) assert trade union rights in *O'Kelly*." (123)

Sometimes, of course, the worker deliberately chooses the relative freedom and flexibility of casual or agency work, making, in theory at least, a conscious decision to run the financial risk of injury, illness and shortage of work. There are many, however, who have no real choice and are forced, by economic necessity, into the

uncertainty and lack of security associated with casual or agency work. Recent cases such as *Boyd Line v Pitts* and *Hellyer*, and *Wickens v Champion Employment* "highlight the increasingly apparent limitations of traditional employment law analyses for atypical and new work patterns" (124) although, as it has already been pointed out, such work patterns are far from "atypical and new" in the licensed hotel and restaurant sector. Surely the time has come, therefore, for Parliament to legislate on the legal status of such workers, clarifying the rights to which they are entitled.

Interestingly, ILO 119 was stated to apply to "all branches of economic activity and all categories of workers" although it provided that those which may be excluded from its scope included "workers engaged on a casual basis for a short period" together with

"workers engaged for a specified period of time or a specified task in cases in which, owing to the nature of the work to be effected, the employment relationship cannot be of indeterminate duration."

Hepple, however, suggests that:

"the contract of service should be replaced by a broad definition of an 'employment relationship' between the worker and the undertaking by which he is employed. That relationship would, of course, be based upon voluntary agreement between the worker and the undertaking to work in return for pay. The insistence on agreement makes it appropriate to describe this as a 'contract' rather than a 'status', but it would be a 'contract' of a new kind, one that encompassed both the intermittent exchange of work for remuneration, and the single continuous contract." (125)

Thus, there would be a unified definition

"while allowing for specified exceptions and extensions as to the scope of application of particular rights and obligations..."

At the same time Hepple accepts that for those who ascribe to the analysis that labour law is the law of "dependent labour", legislation should obviously exclude genuine independent workers, those "in business on their own account." While it would be difficult to frame legislation to differentiate between independent and non-independent workers, such legislation will become increasingly important. As technological change accelerates, patterns of work throughout industry are bound to alter (the start of this process can be seen already) and more people will work from home and/or on short-term contracts. What has hitherto been regarded as the rather peculiar work patterns of the hotel and catering industry will be the norm in the not-too-distant future.

(iv) Part-time workers

"The overwhelming majority of part-timers are women, generally doing relatively unskilled work and paid at lower rates than full-timers....However, this picture is changing with advancing home-based technology and a growing preference for flexible work patterns among wider and more skilled groups, partly reinforced by changes in union attitudes." (126)

All questions relating to the computation of a period of "continuous employment" are to be determined by reference to Schedule 13 of the EP(C)A 1978. By Para.3

"Any week in which the employee is employed for sixteen hours or more shall count in computing a period of employment."

By Para.4

"Any week during the whole or part of which the employee's relations with the employer are governed by a contract of employment which normally involves employment for sixteen hours or more weekly shall count in computing a period of continuous employment."

Since 1975 this sixteen hour threshold (which was then 21 hours a week) has become for many employers the definition of full-time working. If they are to avoid the full range of statutory duties they have to watch the threshold. However, an employee may be able to claim under para.3 only where the contract is specific and states a number of hours below sixteen but, in practice, the employee works more than sixteen hours. In *Corton House Ltd. v Skipper* 1981 IRLR 78 the employee worked four hours on alternate evenings, so that she normally alternated weeks of 12 and 16 hours, but she often worked overtime during the 12 hour weeks, bringing her actual working hours to more than 16. During her final 26 weeks (the then period for bringing a claim of unfair dismissal) there were only three weeks, excluding holidays, in which she worked less than 16 hours. The EAT held that she could count all those weeks in which she had actually worked 16 hours or more - but continuity was broken by the weeks in which she worked less than 16 hours.

If an employee is relying solely on para.3 it may be difficult for him or her to show that every week counted, as the *Corton House* case illustrates, but there is a presumption of continuity in his favour. Sch.13 para.1(3) states that "a person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous." This means that where the issue is in doubt, the employee should be given the benefit of it (*Nicoll v Nocerode* [1981] ICR 348). An employee has to show that he was employed under a contract of service and was dismissed and that there was at least one

week which counted under Sch.13. He can then rely on the presumption of continuity to cover subsequent weeks - unless the contrary is shown by the evidence. An employee may also be able to count under para. 3 hours which he cannot count under para. 4, e.g. regular, non-contractual overtime.

The hours which a contract "normally involves" within the meaning of para.4 are the hours which the employee is obliged to work by the contract and not, e.g., voluntary overtime (*Lake v Essex County Council* [1979] IRLR 241) nor, presumably, purely gratuitous overtime. The EAT have implied in *Fitzgerald v Vernons Pools* (EAT 424/79) that overtime will count if there is a contractual obligation on the employee to work overtime although there need be no corresponding obligation on the part of the employer to provide it. Hours which fluctuate from week to week add an extra complication where there is no written contract. The general approach of the tribunals and courts has been to say that where the contractual hours are not expressed, the number of hours normally involved by the contract must be ascertained from looking at what happened in practice. In *Dean v Eastbourne Fishermen's Protection Society Ltd.* [1977] IRLR 143, a regular part-time barman worked in practice the hours the bar manager asked him to work. He worked more than 21 hours (then the qualifying period during 86 of his last 104 weeks before being made redundant. The EAT held that his contractual obligations, in the absence of a written statement, had to be implied from the conduct of the parties. They concluded that his contractual obligation was to work all the hours he was required to work and it was clear that this normally involved more than 21 hours a week. (127)

The expression "normally involves" contemplates only an occasional shortfall and an employee will fail in a claim based on continuous employment if the facts show a preponderance of weeks in which he worked less than 16 hours. No doubt the same principle will apply

where the variation is a seasonal one and the employee is working e.g. 40 hours a week in the summer but only 15 hours a week off season.

The Employment Protection Act 1975 introduced the concept of a week which may count once an employee has worked for 5 years under a contract normally involving between 8 and 16 hours a week. The effect is that such an employee is then treated for employment protection purposes as a "full-time" employee. The basic right is now conferred by Sch.13 para.6 EP(C)A 1978.

D. Fair and unfair dismissal

By S. 55(2) EP(C)A 1978 "an employee shall be treated as dismissed by his employer if, but only if, -

- (a) "the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice, or
- (b) "where under that contract he is employed for a fixed term, that term expires without being renewed under the same contract, or
- (c) the employee terminates the contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct."

If there is a dispute as to whether a dismissal has taken place, it is for the employee to show that it has. Dickens claims that this places a heavy burden on the applicant, particularly where constructive dismissal is alleged. (128)

There are many cases where employers do not sack workers by straightforward termination of the contract. The employer may behave in such a way, or harass the worker to such an extent, that he leaves. Alternatively, the employer may try to change the employment - so that

he is dismissed from his old job and hired for a new one - by altering his duties, hours, place of work, wages etc. In the usual course of events the employee will seek assistance from his trade union - if he has one - as the first line of defence. But, if that approach fails, subs.3(c) provides a definition of dismissal which allows him to claim, or threaten to claim constructive dismissal.

The courts have adopted different approaches in deciding whether the conduct of the employer entitled the employee to terminate the contract. Did it have to amount to an actual breach of contract by the employer, or could any unreasonable conduct by the employer be sufficient to entitle an employee to resign? Some took a broad view ,e.g., Phillips, J. in *George Wimpey & Co. Ltd. v Cooper* [1977] IRLR 205 (EAT) who said that conduct justifying termination is "of a kind which, in accordance with good industrial relations practice, no employee could reasonably be expected to accept"; or Kilner-Brown, J in *Gilbert v Goldstone Ltd.*[1976] IRLR 257 (EAT) who declared that the test is "what is reasonable in the circumstances, having regard to equity."

However, in *Western Excavating (ECC) Ltd. v Sharp* [1978] IRLR 27, the matter was settled by the Court of Appeal which held that the common law rules governing repudiatory breach of contract were the correct test for the tribunals to apply when hearing claims based upon constructive dismissal. The employee has to show that the employer's conduct, which led to resignation, amounted to a fundamental breach of contract; that the employer acted in such a way that he or she demonstrated an intention no longer to be bound by one or more of the essential terms of the contract. Only then is the employee entitled to treat himself as dismissed.

Although constructive dismissal involves a breach of contract on the part of the employer, it does not automatically follow that the dismissal is unfair. In *Genower v Ealing, Hammersmith and Hounslow* AHA [1980] IRLR 297 a reorganisation of a health authority led to

an employee's transfer to another post and place of work. This other job, he felt, was far below his special skills so he resigned. A finding of constructive dismissal by fundamental breach was upheld but so was the finding that it was fair for "some other substantial reason", the employer having the right to reorganise for a "sound good business reason."

Problems arising from the Western Excavating case were outlined by Browne-Wilkinson J in *Woods v W.M. Car Services (Peterborough) Ltd.* [1981] IRLR 347:

"employers who wish to get rid of an employee or alter the terms of his employment without becoming liable either to pay compensation for unfair dismissal or a redundancy payment have had to resort to methods of "squeezing out" an employee. Stopping short of any major breach of the contract, such an employer attempts to make the employee's life so uncomfortable that he resigns or accepts the revised terms. Such an employer, having behaved in a totally unreasonable manner, then claims that he has not repudiated the contract and therefore that the employee has no statutory right to claim either a redundancy payment or compensation for unfair dismissal." (129)

Once it has been established that a dismissal has taken place, it must then be determined whether or not the dismissal was unfair. By S.57(1) "it shall be for the employer to show -

- (a) what was the reason (or, if there was more than one, the principal reason) for the dismissal, and
- (b) that it was a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held."

The reasons falling within subsection (2) -

- (a) relate to the employee's capability or qualifications for performing work of the kind which he was employed by the employer to do, or

- (b) relate to the employee's conduct, or
- (c) are that the employee is redundant, or
- (d) are that the employee could not continue to work in the position which he held without contravention (either on his part or on the part of his employer) of a duty or restriction imposed by or under a statute.

S.57(1)(b) is worthy of special comment. If it has not been possible to categorise it under one of the headings of S.57(2), the employer's description of the reason for dismissal has sometimes been slotted into the category of "some other substantial reason". The inclusion of this particular category goes beyond the ILO 119 recommendation and, curiously, was ignored by parliament both when it was first enacted and at the time of its subsequent re-embodiments. In 1981 Bowers and Clarke argued that it had become an "employers' charter" providing a "ragbag of gateways to fair dismissal" (130) for, in addition to allowing a range of reorganisation and non-contractual duty dismissals, it has been held to include reasons relating to breakdown in relationships at work, what Dickens et al describe as "the employee's personal characteristics" (131) (*Saunders v Scottish National Camps Association* [1980] IRLR 174, and the ending of temporary contracts (*Terry v East Sussex County Council* [1976] ICR 537)).

It is the aspect of reorganisation of work which is particularly relevant in the context of this study. Even in large hotel companies, contracts are often very vague. Some include flexibility clauses giving the employer the right to e.g., "transfer employees to suitable alternative work according to the needs of the business." But the nature of suitable alternative work often causes disputes, as the hours, tips, amount of work and perks vary considerably between apparently similar jobs. This type of flexibility clause is often used by employers as a pretext for dismissal or to provoke employees into leaving. Dronfield and Soto claim that management's variation of terms and conditions is a main reason why so many Industrial tribunal applications are made by

people in catering jobs. (132) But what degree of success are such applicants likely to enjoy? To this end it is worth considering S.57(1)(b) in greater detail.

Where an employer unilaterally insists on a change in an employee's existing contractual terms and conditions following reorganisation of a business, the employer is regarded at Common Law as repudiating the contract and the employee has a remedy for wrongful dismissal. Alternatively the employee may affirm the contract despite the breach and apply to the High Court for a declaration as to the wrongful nature of the repudiation. In *Creswell v Board of Inland Revenue* [1984] ICR 508, the plaintiff employees failed to obtain a declaration that their employer, in introducing new technology, had breached their terms of employment. Walton J held that employees were expected to adapt to new methods and techniques provided they received adequate training and that their work did not bring it totally outside their contractual obligations. The decision would appear to make it easy for employers to facilitate the introduction of new technology by relying on a general contractual duty on employees to adapt to changing work methods. Walton J also found that the employer in the case could withhold pay from employees without suspending them where they refused to perform their work in accordance with the new methods required of them under the terms of their contract. The *Creswell* case demonstrates how difficult it is for employees to curb managerial prerogative powers by reliance on contractual principles.

In *Burdett-Coutts v Hertfordshire County Council* [1984] IRLR 91 (QBD) the employees were school dinner ladies whose terms of employment provided that the minimum period of notice required to terminate their employment was 12 weeks. The employing local authority, who wished to reduce their pay, wrote each a letter giving them 12 weeks notice that their contracts of employment were to be amended accordingly and ending with an expression of hope

that they would continue in the school meals service. The employees made it clear that they would not accept the new terms and after the expiry of the 12 week period they continued to work but began proceedings for breach of contract and damages in the form of arrears of wages. It was argued for the employers that the effect of the letter was to give 12 weeks notice of termination of employment and to offer new employment on the new terms as from that date. The court held, however, that it was an attempt by the employers to vary unilaterally the terms of the contracts and, as such, it was a repudiation of them. The court also held that the employees had not waived their right to treat the contracts as having been brought to an end by continuing to work, since they had made it abundantly clear before the expiry of 12 weeks that they were not prepared to accept the amendments. Therefore, a declaration was made that the employers had acted unlawfully and judgement was given for the arrears of wages.

A recent case on this particular topic was *Rigby v Ferodo Ltd.* [1988] ICR 29. The House of Lords held that, in the absence of the employer seeking to terminate the contract of service it had with the employee, the employer had sought to compel the employee to accept a wage which was less than he was entitled to under the contract. The employee in continuing to work and receiving a reduced payment under protest had not accepted a variation in the terms of the contract and, therefore, he was entitled to recover the difference between his contractual entitlement and the amount paid by the employer either in damages for breach of contract or in debt.

Even so, such cases have been regarded as potentially fair dismissals for some other substantial reason under S.57(1)(b). Similar cases, where an employer has re-organised a business by dismissing employees with the correct period of notice and offering contracts on new terms, have also fallen within S.57(1)(b) (*Gorman v London Computer Training Centre* [1978] IRLR 22, EAT). Such dismissals, maybe involving a change in hours or wages, do not

amount to redundancy under S.57(2)(c) because there is no reduction in the employer's need for a number of employees or changes in the kind of work within the meaning of S.81.

In RICS Components Ltd. v Irwin [1973] ICR 535, the industrial tribunal had interpreted the phrase "some other substantial reason" as being ejusdem generis with the other "fair" reasons for dismissal now contained in S.57(2) of the 1978 Act. The National Industrial Relations Court (NIRC) rejected this, saying

"there are not only legal but also practical objections to a narrow construction of "some other reason". Parliament may well have intended to set out...the common reasons for a dismissal but can hardly have hoped to produce an exhaustive catalogue of all the circumstances in which a company would be justified in terminating the services of an employee."

The NIRC also accepted the possibility that a dismissal for a refusal to accept a unilateral variation in a contractual condition which restricted an employee from acting in competition should count as "some other substantial reason".

The EAT first gave its unreserved support to the notion that an employer's repudiatory insistence upon a change in contractual terms could under certain circumstances qualify as "some other substantial reason" in *Ellis v Brighton Co-operative Society Ltd.* [1976] IRLR 419:

"Where there has been a properly consulted-upon reorganisation which, if it is not done, is going to bring the whole business to a standstill, a failure to go along with the new arrangement may well - it is not bound to but it may well - constitute "some other substantial reason".

In *Ellis v Brighton Co-op* the EAT seemed to suggest there might be certain finite limits to the extent to which an employer could impose a change in contractual terms as a result of re-organisation. The tribunal found that the re-organisation was prompted by "business necessity" and seemed to imply that this would be a strict requirement for a dismissal in the course of a re-organisation to be reasonable. It was possible too that "a properly consulted upon reorganisation" was also a condition, so that a reorganisation unilaterally imposed without negotiation or proper consultation could be regarded as unreasonable in most circumstances.

In *Hollister v NFU* [1979] IRLR 238 the Industrial Tribunal's decision that the dismissal was for "some other substantial reason" and was fair was reversed by the EAT on the basis that consultation with the employee had been inadequate. The Industrial Tribunal had considered that consultation was unnecessary because there was no recognised trade union representative. The Court of Appeal found that the EAT's insistence upon consultation "nearly always before a person was dismissed" was, as Lord Denning put it:

"going too far and putting a gloss on the statute. It does not say anything about consultation or negotiation in the statute. It seems to me that consultation is only one of the factors. Negotiation is only one of the factors which has to be taken into account when considering whether a dismissal is fair or unfair." (at p.240)

The suggestion in *Lowndes v Specialist Heavy Engineering Ltd.* [1976] IRLR 246 that

"as a general rule a failure to follow a fair procedure whether by warnings or by giving an opportunity to be heard before dismissal will result in the ensuing dismissal being found to be unfair"

was, Lord Denning said, "putting the case far too high".

The Court of Appeal also indicated in *Hollister* that in looking at the reasonableness of the decision to dismiss for a refusal to accept a change in contractual terms, the industrial tribunal had to consider not so much whether the employer's reason for the organisation was substantial, but rather whether, given the employer's reason for the re-organisation, it was reasonable for him to dismiss the employee for refusing to accept the variation in the contract, or to dismiss the employee and offer a contract on changed terms. Lord Denning suggested that

"it must depend in all the circumstances whether the reorganisation was such that the only sensible thing to do was to terminate the employee's contracts unless he would agree to a new arrangement."

In *Hollister's* case, it was enough for the tribunal to find that there was a sound, good business reason for the re-organisation ([1975] IRLR 238 at 280)

"and by that we do not mean a reason which we think is sound but a reason which management thinks on reasonable grounds is sound."

And indeed in subsequent cases, the EAT formulated this test of substantiality in increasingly less stringent terms, e.g., in *Bowater Containers Ltd. v McCormack* it was enough that "the reorganisation was beneficial to the efficient running of the company." [1980] IRLR 50, while in *Banerjee v City and East London Area Health Authority* [1979] IRLR 147, it was sufficient to show that there were "discernible advantages to the organisation."

To justify changes in terms of "sound, good business reasons" or "commercial necessity" carries the risk of overlooking the employees' interests. An attempt to include these interests was made in *Evans v Elementa Holdings Ltd.* [1982] IRLR 143, in which

Mr. Evans, alone of all the employees concerned, refused to accept a new contract offered by his employer, because of what he regarded as an excessive new obligation to work overtime. He was, therefore, dismissed. Browne-Wilkinson J. said that the question under S.57(3) as to whether the employer's conduct in dismissing Mr. Evans was reasonable, necessarily required the industrial tribunal to find whether it was reasonable for Mr. Evans to decline the new terms of his contract. If it was, then obviously it would have been unreasonable for the employers to dismiss him.

"It was therefore a necessary part of the Industrial Tribunal's decision on this point that the terms of the contract were not objectionable or oppressive. So far as we can see, at no stage do they analyse what is, or would have been, the effect of this alteration in the contractual position....If it had been shown in this case that there was some immediate need for the employers to increase the overtime worked or to require mandatory overtime as opposed to voluntary overtime, that might have fundamentally altered the position. But there was no evidence of any kind directed towards a need to change the provisions as to overtime for the current working needs of the company ...This case turns on the imposition of a new contract of employment, not new working practices. If he had accepted the new contract, he would have bound himself for the future to perform the contract in its revised form. Managements change and, if in the future, a new management were to require substantial overtime, he would have had no answer.

This passage was disagreed with by another division of the EAT in *Chubb Fire Security Ltd. v Harper* [1983] IRLR 311. The approach proposed by Balcombe J in that case was to ask:

"was [the employer] acting reasonably in deciding that the advantages to them of

the proposed re-organisation outweighed any disadvantage which they should have contemplated [the employee] might suffer."

Even this did not go far enough for another division of the EAT in *Richmond Precision Engineering Ltd. v Pearce* [1985] IRLR 179, in which Beldam J. said:

"The task of weighing the advantages to the employer against the disadvantages to the employee is merely one factor which the Tribunal have to take into account when determining the question in accordance with equity and the substantial merits of the case. Merely because there are disadvantages to the employee, it does not, by any manner of means follow, that the employer has acted unreasonably in treating his failure to accept the terms which they have offered as a reason to dismiss."

However, the Court of Appeal did not decide that procedure was irrelevant to the question of reasonableness so that where an employer imposed a unilateral variation of his employee's contract using an improper procedure, this could in certain circumstances provide the basis for a tribunal to decide within its discretion that he did not act reasonably under S.57(3). Indeed the substantive issue of fairness in the general law of unfair dismissal has been decided by the judges in the interests of the employer desiring change and the main restrictions so far placed by the courts are procedural ones. Accordingly, the employer should adopt certain procedures in introducing the change - otherwise the dismissal will be for a "fair reason" under S.57(1)(b) but may be unreasonably implemented and thus fall foul of S.57(3).

In *Ladbroke Courage Holidays Ltd. v Asten* [1981] IRLR 59 the EAT indicated that an employer relying on business organisation as a reason for dismissal had to produce some evidence of the

reorganisation or of the need for economies, as appropriate. Mr. Asten was first employed in 1978 by the appellant company as a seasonal bars manager in one of its holiday villages. When the season ended, he was kept on to do maintenance work and he became a member of the permanent staff. He worked as a bars manager again during the next summer season and again carried on at the end of the season cleaning up the bar area and doing general maintenance work. The following January he was dismissed summarily and without warning with one month's pay in lieu of notice and an ex gratia payment of two weeks' pay. The day after his dismissal he applied for the job of bars manager for the 1980 season but was eventually told that the company had decided to appoint a head barman rather than a bars manager and that he was considered too experienced for the new post.

The evidence presented to the Industrial Tribunal indicated that there was continuing pressure from within the appellant company's organisation for economies to be effected at the holiday village and the wages bill to be kept down or reduced. The Industrial Tribunal criticised the quality of that evidence since it failed to indicate the reason why the instructions to economise were given. The EAT held that there was no error in law in the Industrial Tribunal's statement that

"if an employer seeks to rely on business reorganisation or economic necessity as a reason for a dismissal, it is incumbent on them to produce some evidence to show that there was a reorganisation or that there was some economic need for economy. In deciding whether a dismissal was fair or unfair, we consider it very material to know whether the employer was making profits or losses."

In *Orr v Vaughan* [1981] IRLR , however, the EAT said:

"At the end of the day, it is largely for the employer to decide, on the material which is available to the employer, what is to be done by way of

reorganisation of the business...If an employer acts on reasonable information reasonably acquired, then that is the test and no more."

Anderman points out that the attempt by the Court of Appeal to restrict the tribunals' role in examining the employer's motivation for the re-organisation

"will eventually have to be reconciled at some stage with the wide discretion they have over the question of reasonableness generally under S.57(3). Thus, whilst an industrial tribunal cannot say that a dismissal was unfair because the employer's reason for reorganisation was inadequate in the tribunal's view, it probably has the discretion to decide that a dismissal in the course of certain types of reorganisation may be unreasonable because it was beyond the pale of reasonable employer decisions."

He opines that this could extend to procedural mistakes by the employer, to a test of the employer's factual basis for his decision to re-organise and to his judgement on the merits of deciding to dismiss employees for the refusal to go along with the organisation.

As has been mentioned already, there may well be considerable fluctuations in demand for the services of any licensed hotel or restaurant. This necessitates

"managers who must be able to adapt immediately to any problem that may limit the provision of their hotels' services. Responses to particular situations tend to be on an ad hoc basis...Adaptation by management...must be flexible enough to co-ordinate the hotel's resources so that it can cope with the varying demands of its

customers."

Sometimes these demands can be accommodated by the engagement of casual staff. Often they will necessitate changes in the duties, shifts, overtime etc. of permanent staff because they

"cannot be anticipated or planned for in anything but the very short term. In this kind of situation the rigidities imposed by formalized personnel procedures are viewed by managers as being counter-productive...Many managers argue that formalized procedures reduce their ability to cope with the essentially unanticipated crises that so often occur but which are difficult to regulate and which are characteristic of hotels." (133)

The Burdett-Coutts and Rigby cases appear to contradict the view that changes which result from economic pressures upon the employer must be accepted, even where they involve breaches of contract but, as Whincup says,

"the employer still has the whip-hand. If his employees refuse to accept such changes and claim damages, it is for him..., as Lord Oliver said in Rigby, 'dismiss them out of hand and face the consequences.'" (134)

Furthermore, the argument that "some other substantial reason" has to be directly referable to the employee's work failed in *Bouchaala v Trust House Forte Hotels Ltd.* [1980] IRLR 382 in which the employer had been wrongly informed by the Department of the Employment that the applicant, a Tunisian national, could no longer be employed legally in Gt. Britain. The EAT decided that S.55(2) did not extend to the situation where the employer believed, however genuinely, that continued employment was illegal but it did constitute "some other substantial reason".

"There is nothing"...

said Waterhouse J

"in S.57(1)(b) to justify a restrictive interpretation ...the limiting words 'substantial' and 'justify' in S.57(1)(b) protect the position of the employee adequately and are further strengthened by S.57(3)."

Benedictus and Bercusson maintain that

"the statutory framework of unfair dismissal is misleading. The classification of a few generalised categories and one miscellaneous category conceals the fact that the latter will include every other conceivable reason for dismissal, and yet affords no indication of the different considerations that must be applied in such individual cases." (135)

E. Reasonableness

Under S.57(3) EP(C)A 1978, as amended by the Employment Act 1980, when a complaint of unfair dismissal is heard by an industrial tribunal, the tribunal has to decide whether or not the employer acted reasonably in treating the the reason for dismissal as sufficient to dismiss the employee:

"...The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case."

In *Iceland Frozen Foods Ltd. v Jones* [1982] IRLR 439 the EAT summarised the correct approach for industrial tribunals to adopt



in applying S.57(3) as follows:-

- a) the starting point should always be the words of S.57(3) themselves;
- b) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;
- c) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
- d) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
- e) the function of the industrial tribunal, as an industrial jury, is to determine whether, in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band then the dismissal is fair; if the dismissal falls outside the band it is unfair.

Essentially, questions of "reasonableness" depend on the facts of particular cases. The Court of Appeal has frequently indicated, since 1980, that it is unwise for the Appeal Court or EAT to set out guidelines, and that the appellate courts should be slow to find that the decision of a tribunal on this issue is perverse. (136) Nevertheless the cases provide some guidance on the questions which it may be relevant for the tribunal to ask.

I. Did the employer, after a reasonably careful investigation, have adequate factual grounds upon which to base his belief, which must itself be genuine?

An Industrial tribunal must consider whether the employer acted reasonably in forming his view of the facts, e.g., in concluding that an employee in a misconduct case had committed an act of misconduct it need only satisfy itself that the employer carried out as much investigation as was reasonable in the circumstances and, having done so, that he had reasonable grounds for forming his factual conclusions. In *British Home Stores v Burchell* [1978] IRLR 379 the test was stated to be: did the employer entertain a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time?

The employer does not have to prove beyond all reasonable doubt that the offence was actually committed - nor on the balance of probabilities. Thus, where an employer is proved to have been mistaken in his judgement of the facts, he may nevertheless be found to have acted fairly in dismissing an employee. His decision must be judged only on the information available to him at the moment of dismissal.

The decisive factor need not be the facts which led to the decision to dismiss but rather may be only what was in the employer's mind. The employer must show that he had a fair reason in his mind at the time when he decided on dismissal (*Devis & Sons Ltd. v Atkins* [1977] I.R.L.R. 314 (H.L.)). This might be to allow a stupid, careless or bad-tempered employer to dismiss for a reason which he genuinely believes to be fair within the Act, but which is in fact wrong, i.e., his belief is not, in fact, correct. The judges have allowed employers to get away with this: in *Trust Houses Forte Leisure Ltd. v Aquilar* [1976] IRLR 251 an employee was accused of defrauding customers in the sale of drinks. The employer conducted an investigation which included a hearing monitored by a trade union representative, and an identification

parade at which the customer made a positive identification of the employee. After the hearing the employee, the tribunal indicated that it was in real doubt whether the employee was guilty and found the dismissal unfair. The EAT held that:

"it was impossible for the tribunal, in those circumstances, to say that the management, in reaching a decision which was hostile to the employee, had acted in a way which made the dismissal unfair: there was plenty of evidence and material upon which, if the matter was properly investigated, the management could reasonably dismiss Mr. Aquilar. The error of the tribunal was that it paid too much attention to the fact that it, itself was not satisfied that Mr. Aquilar was not guilty of the misconduct alleged."

The Employment Appeal Tribunal decided that whilst the employer's description of the reason for dismissal is by no means conclusive and the tribunal must look into the matter and determine what was the real reason, there is no burden on the employer to prove that the reason was well-judged and justified. In Aquilar's case, the reason for dismissal was the employer's belief in the employee's misconduct and it was held that the industrial tribunal had been wrong in putting themselves in the position of deciding whether they, in the employer's shoes, would have used dismissal.

II Did the employer adopt a reasonable procedure?

The tribunal must determine whether the employer's decision to treat the grounds for his belief as a sufficient basis for dismissal was reasonable in the circumstances. This issue has been interpreted to include a test of whether he adopted a reasonable procedure.

The ACAS Code of Practice on Disciplinary Practice and Procedures in Employment gives practical guidance. Para. 10 lays down certain standards which disciplinary procedures should abide

by, e.g., (a) be in writing; (c) provide for matters to be dealt with quickly; (f) give individuals an opportunity to state their case before decisions are reached; (g) and be accompanied by a trade union or other representative of their choice; (i) ensure that disciplinary action is not taken until the case has been carefully investigated, etc. Para. 11 describes how the procedure should operate: facts should be established promptly through an investigation by management. If a serious case, a brief period of suspension with pay might be considered. Before decisions are made as to guilt or penalty, the employee should be given the opportunity to state his case, having been advised of his rights, including the right to be accompanied by a representative. Para. 12 outlines the procedures which should normally be observed where disciplinary action is decided upon - warnings, oral and written, including a final written warning, possible other penalties short of dismissal - though , e.g., suspension without pay should not be prolonged. All penalties are subject to the test of reasonableness in the circumstances (para. 14). Finally, there should be a right of appeal of which the employee should be informed (paras. 10(k), 13, 16 and 17). Special procedures are needed for, e.g., shift workers or isolated workers, or trade union officials - shop stewards and staff representatives who should never be disciplined until the case has been discussed with a senior official or full-time trade union official. Records of discipline should be kept, but provision made for them to be disregarded after a specified period of satisfactory conduct.

The significance of these standards is that the tribunals must, where they are relevant, take them into account in any unfair dismissal claim. And if the employer has not abided by them in one or more ways, this may lead to a finding that he has acted unreasonably under subs. (3), even where he may have a fair reason under subs. (1) or (2). Dismissals for incapability may be unfair if the employer fails to show he has adequately investigated the alleged incompetence, or has not given adequate opportunity for improvement. Dismissals for misconduct may be unfair if there is

no preceding warning, incidents are not investigated, hearings are not conducted fairly, or penalties are inappropriate to the offence. Dismissals for redundancy may be unfair if consultations are not carried out or the procedure for selection is unsatisfactory.

It should be noted, however, that the need for employers to follow fair procedures is limited. First, the Code of Practice is not law - only guidance which the industrial tribunals must take account of where relevant. There can be circumstances in which the facts are so clear that they present an open and shut case and no procedure at all is required, but such cases will be rare. In *Bailey v BP Oil (Kent Refinery) Ltd.*, Lord Lawton said:

"In most unfair dismissal cases Industrial Tribunals are likely to be critical and justly so of an employer who has dismissed a man without giving him an opportunity of explaining why he did what he did; but cases can occur where instant dismissal without any opportunity for explanation being given would be fair, as for example, when on the shop floor a worker was seen by the works manager and others to stab another man in the back with a knife. The dismissal in such a case would not be any the less fair because the employers did not follow a disciplinary procedure"

Secondly, where the employer has failed to comply with the proper procedure, the tribunals have nonetheless held the dismissal to be fair where, it is said, the procedural omission or defect was insignificant; the procedure is said to be an unnecessary formality.

Earl v Slater and Wheeler (Airlyne) Ltd. [1973] 1 All ER 145, [1972] IRLR 115 established two propositions:

1. an Industrial Tribunal could decide that a dismissal which was fair in substance could be found to be unfair because of its unfair procedure;
2. where an employer omitted a procedural step, the guideline concerning the degree of proof required to justify such an omission was that there was no possibility that if the procedure had been followed it would have made a difference.

In *Lowndes v Specialist Heavy Engineering Ltd.* [1976] IRLR 246 (EAT) the employee was dismissed for incompetence following five serious and costly errors, without a written warning or an opportunity to answer the complaints against him or to be represented. The Industrial Tribunal found that the omission of a hearing was justified on the grounds that there was no reasonable possibility that the result would have been different had the procedure been fully observed. The employee appealed arguing that at the time of the dismissal the reasons could not have been sufficient for dismissal until the results of a hearing were known because an unexpected explanation could have been forthcoming. The EAT upheld the dismissal as fair, because "though an explanation might conceivably have been produced, it was wildly unlikely that it would be", Phillips J re-affirming that

"as a general rule, a failure to follow a fair procedure, whether by warnings or by giving an opportunity to be heard before dismissal will result in the ensuing dismissal being found to be unfair. But there will be exceptions..."

In *Devis & Sons Ltd. v Atkins* [1977] IRLR 314. Viscount Dilhorne delivering the principal speech declared:

"It does not follow that non-compliance with the Code necessarily renders a

dismissal unfair, but I agree with the view expressed by Donaldson J. in *Earl v Slater and Wheeler (Airlyne) Ltd.* [1972] I.R.L.R.115 that a failure to follow a procedure prescribed in the Code may lead to the conclusion that a dismissal was unfair, which, if that procedure had been followed, would have been held to have been fair." (para.37)

In *Charles Letts & Co. v Howard* [1976] IRLR 248 the EAT put the onus on the employer to satisfy the tribunal that even if the proper, fair procedure had been carried out, it would not have made any difference. *Cumming-Bruce J* held that

"the employers had failed to show that, if they had followed the appropriate procedure when contemplating a dismissal, the result would inevitably have been the same." (para.25)

In *British Labour Pump v Byrne* [1979] IRLR 97, *Slynn J.*, while acknowledging that the *Charles Letts* case was often cited in appeals, doubted that the EAT in that case was "really laying down as an absolute rule that an employer cannot succeed unless he can show that inevitably it would have made no difference", and sought to modify its impact by proposing his own standard in the form of two questions:

- a) Have the employers shown on the balance of probabilities that they would have taken the same course had they held an inquiry, and had they received the same information which that inquiry would have produced?
- b) Have the employers shown that in the light of their information which they would have had, had they gone through the proper procedure, they would have been behaving reasonably in still deciding to dismiss?

This apparent "change of view of the EAT in those cases where there has been a failure of procedure" was commented upon in *W & J Wass Ltd. v Binns* [1982] IRLR 283. Here, the Court of Appeal upheld the Industrial Tribunal's decision saying that "the British Labour Pump case provides useful guidelines". It did not see that case as conflicting with *Devis v Atkins*.

In *Sillifant v Powell Duffyn Timber Ltd.* [1983] IRLR 91, Mr. Justice Browne-Wilkinson said that in those cases where the "procedural error" consists of the failure to give the employee an opportunity to give an explanation of his conduct or draw attention to mitigating circumstances

"the British Labour Pump principle causes great evidential problems. The Industrial Tribunal has to make a decision as to what facts would have emerged if a proper investigation had taken place and what would have been the employer's attitude in the light of those facts. Such hypothetical findings of fact as to what would have happened in a hypothetical event have given rise to a number of appeals before us. In practice, it is difficult in such a case to distinguish between fair inferences drawn from evidence and pure guesswork. What evidence is required to prove what would have happened if an event had occurred which, *ex hypothesi*, did not occur?"

In *Siggs v Chapman (Contractors) Ltd. v Knight* [1984] IRLR 83 (EAT), the Industrial Tribunal found that the dismissal was unfair without explicitly applying a British Labour Pump test. On appeal Mr. Justice Waite, presiding, said:

"The decision in *British Labour Pump* certainly decided that in certain cases the hypothetical exercise is a permissible one...But it would in our view be wrong to elevate it to some rule or principle axiomatically applicable to every case, making it mandatory upon every tribunal to address its mind deliberately to a consideration of what

the hypothetical result would have been if a fairer procedure had been followed."

In *Polkey v Edmund Walker (Holdings) Ltd.* [1987] IRLR 13, the Court of Appeal have given the "no difference" rule fresh approval. In that case, the employing company followed no procedure at all. It needed to take action to stem financial loss and, having assessed its needs, decided to make three of its four van drivers redundant. This decision, although made on the 16th August, only came to the applicant's notice on the 27th August when he was handed a redundancy letter and dismissed with immediate effect. The manner of his dismissal was sharply criticised by the Industrial Tribunal who found that "there could have been no more heartless disregard of the provisions of [the ACAS] Code of Practice." But the tribunal thought they were obliged to question whether the result would have been any different had the employers afforded the applicant proper consultation before dismissing him. They concluded that it would not and reluctantly dismissed his complaint. The EAT dismissed the employee's appeal because they felt bound by the Court of Appeal's decision in *Wass v Binns*. In the Court of Appeal the employee contended that the "no difference" rule should not apply to make an otherwise unfair dismissal fair by getting the tribunal to speculate on what action the employers might have taken had they conducted proper consultations. Such an enquiry, he argued, offended against the well-known principle in *Devis v Atkins* that employers cannot seek to justify a dismissal by relying on anything other than facts and events known to them at the time they dismiss. In support of this, he relied on the EAT's decision in *Sillifant*.

The Court of Appeal decided, however, that it was necessary to distinguish between ascertaining the reason for dismissal and the manner by which it is carried out. The first was governed by the *Devis* rule and the second by the "no difference" rule. In Neill LJ's view, a failure to observe a proper procedure could not of itself make a dismissal unfair under S.57(3) - but it could do so

if the tribunal concluded that the employer acted unreasonably in treating the reason for dismissal as a sufficient one. Tribunals would, therefore, be expected to evaluate the practical consequences of a failure to follow a fair and proper procedure when determining whether the employer's conduct was reasonable. The Court of Appeal confirmed that, although tribunals might be required to take into account facts not known to the employer at the time of dismissal, this would not offend against the rule in *Devis v Atkins*: that rule merely prevents post-dismissal evidence from being admissible if it is unconnected with the reason which the employer gave for the dismissal. Information obtained after the dismissal which has a bearing on the issue of reasonableness of the employer's decision to dismiss for the reason given to the employee at the time can be taken on board. This was confirmed by the House of Lords in *West Midlands Co-operative Society v Tipton* [1986 ICR 192. Applying their reasoning to the facts of the case, the Court held that it had been open to the tribunal to conclude that the employee's dismissal was nevertheless fair because the result would have been the same even if a proper procedure had been adopted. Moreover, like the EAT, the Court of Appeal considered that they were in any case bound by the decision in *Wass v Binns* which, in their opinion, upheld the "no-difference" principle.

The House of Lords adopted a different approach. Lord Mackay said:

"...The subject matter for the Tribunal's consideration is the employer's action in treating the reason as a sufficient reason for dismissing the employee. It is that action and that action only that the Tribunal is required to characterise as reasonable or unreasonable. That leaves no scope for the Tribunal considering whether, if the employer had acted differently, he might have dismissed the employee. It is what the employer did that is to be judged, not what he might have done."

The reasoning of the Court of Appeal in the present case, supporting the "no difference" principle, involved an impermissible reliance upon matters not known to the employers before the dismissal, and a confusion between unreasonable conduct in reaching the conclusion to dismiss (a prerequisite of an unfair dismissal), and injustice to the employee (which is not a necessary ingredient of an unfair dismissal although relevant in relation to a compensatory award). The British Labour Pump principle and all decisions supporting were stated to be inconsistent with the relevant statutory provisions and thus overruled.

The Court of Appeal, said the House of Lords, had also erred in distinguishing between the reason for dismissal and the manner of dismissal as if they were mutually exclusive, with the Industrial Tribunal limited to considering only the reason for dismissal. The statutory test shows that at least some aspects of the manner of dismissal are to be taken into account in considering whether a dismissal is unfair, since the action of the employer in treating the reason as sufficient for dismissal will include at least part of the manner of dismissal."

Despite the reversal of *British Labour Pump Co. Ltd. v Byrne* and all supporting cases, there may still be a loophole if it can be shown that a reasonable employer would have thought that following a dismissal procedure would have made no difference to his decision to dismiss. According to Lord Mackay,

"in judging whether what the employer did was reasonable it is right to consider what a reasonable employer would have had in mind at the time he decided to dismiss as the consequence of not consulting or warning. If the employer could reasonably have concluded in the light of the circumstances known to him at the time of dismissal that consultation or warning would be utterly useless he might well act reasonably even if he did not observe the provisions of the code. Failure to observe the requirement of the code

relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the Industrial Tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee."

III. Was the sanction of dismissal within the band of reasonable responses?

Finally, Industrial Tribunals must satisfy themselves that the employer acted reasonably in concluding that dismissal was warranted in the circumstances; they must determine whether he acted reasonably in treating his reason as sufficient for dismissal. Anderman says that:

"as long as the tribunal does not clearly indicate that it was imposing its own view of what the employer should have done and ignoring the need to acknowledge the band of reasonableness principle, the precise words used to describe the tribunal's conclusion are not to be subject to a fine tooth comb by the EAT." (137))

S.6 Employment Act 1980 requires the industrial tribunal to have regard to the employer's size and administrative resources in deciding whether or not the dismissal was fair. This was inserted as a result of the fear that the unfair dismissal provisions were placing undue burdens on small firms and inhibiting the engagement of new workers (138).

Further, by S.6, the onus of proof in the present context is said to operate "neutrally", i.e., the onus is not placed specifically on either the employee or the employer, but the tribunal has discretion to require evidence from either party according to the circumstances. Williams claims that, in practice, the onus of proof now "bears down" upon the employee. The general test of fairness is satisfied so long as the employer's conduct can be said to lie "within the range of reasonable responses possible."

In its extreme form, this "subjective and management-oriented formula" requires that there should be no finding of unfairness unless the employer's behaviour was "not merely wrong....but so wrong that no sensible or reasonable management could have arrived at that decision." (139)

"Exceptionally the emphasis on employer autonomy has led tribunals to ask not how a reasonable employer might behave, but rather how a body of employers might behave, the assumption being that this embodies the standard of fairness."
(140)

Elias points out that the concept of fairness then reflects prevalent attitudes instead of setting a good example so that it can "result in reasonableness being defined by the attitudes of employers rather than by the tribunal's perception of how an enlightened employer might behave." (141)

As was mentioned earlier, the ACAS Code of Practice gives practical guidance. The Act itself sets out only a broad standard of reasonableness and places no emphasis on the use of a disciplinary and dismissal procedure. Collins says that:

"the courts obviously chose to stress this dimension of fairness because it fitted into the main purpose of the legislation from their point of view.....It was hoped that if employers were induced to adhere to more elaborate procedural norms then there would be opportunities for second thoughts and conciliation and thereby the incidence of industrial conflict might be reduced". (142)

He suggests that this emphasis on the importance of procedure was also attractive to the courts because -

"it minimised the extent of the departure from the traditional policy of legal abstentionism in the relations

between capital and labour....the emphasis on procedure avoided introduction of more penetrating interventionist reviews of managerial discretion to test whether their decision accorded with broader details of industrial justice"...

so that it was a -

"temporary method of reconciling the aims of the legislation with the judicial unwillingness to impose rules upon the workplace". (143)

Elias agrees that "the courts are generally far more confident in setting procedural standards than they are in reviewing the substance of the decision itself". (144)

It is this notion of fairness embodied in the ACAS Code by which the law on unfair dismissal seeks to constrain the right to fire - a key area of managerial prerogative.

"The aim is to see that the standards of responsible, progressive management are applied to dismissals, both procedurally and substantively. No longer can management simply dismiss at will, restrained only by the minimal threat of a claim for a contractual period of notice; nor can it apply arbitrary or unreasonable standards; moreover the dismissal procedure must itself be fair and should really be agreed with recognised unions; it should provide for warnings and appeals and so on. The very fact that there should now be a procedure is indicative of how far the law has travelled and how far it had to travel". (145)

Elias states that:

"the concept of fairness is located within a framework which accepts that the employer has in principle the right to dismiss when this is necessary to protect his business interests. To that

extent unfair dismissal adopts an employer perspective. But this is not to say that managerial prerogative has been left unaffected. The law requires that employers should not remorselessly pursue their own interests. They must also take into account the interest of the worker whose dismissal is under consideration. The function of fairness is to reconcile these various and conflicting interests. It obliges employers to adopt a pluralist rather than a unitary perspective." (146)

Forrest disagrees with this contention, maintaining that the Code of Practice is still ultimately conditioned by the requirements of management and the firm's interests. He says that even though ACAS may have adopted a pluralist approach to the solution of problems involving unfair dismissal, the courts have fallen back on the traditional unitary approach. He suggests that

"one factor contributing to their blind retention of a unitary perspective in this area may be the very form of the legislation; in order to compensate employees, employers must be held to have acted unfairly. A pluralist view would hold that both parties were acting reasonably in insisting on their own divergent interests; and award compensation to the party injured". (147)

Both the Industrial Relations Act 1971 and the Employment Protection Act 1975 provided that complaints of unfair dismissal should be brought before industrial tribunals rather than before the common law courts. It was thought that -

"the comparative informality of industrial tribunals, with their emphasis upon common sense and the realities of industrial relations rather than upon the formality and legal pedantry associated with the civil courts, together with their speed and relative cheapness from the employee's

point of view, was a more suitable vehicle for hearing cases involving unfair dismissal". (148)

Elias says that -

"the tribunals, largely influenced by the codes, have been willing to assert that certain management styles are unacceptable and will not meet the standard of the reasonable employer. For example, they favour a corrective as opposed to a punishment-centred view of discipline"

but it is questionable whether they have in fact emphasised "common sense and the realities of industrial relations". (149)

Farnham and Pimlott describe unfair dismissal as probably the most important of the recent statutory rights for employees, responsible for "major improvements in certain employment practices such as the recruitment and appointment of new employees and in the development of equitable disciplinary rules and procedures at work." (150) Despite some misgivings, Elias too regards the way in which the courts can make their greatest contribution to improving personnel practices as being "through the development of procedural standards, particularly the manner in which the decision to dismiss is reached and the need to warn employees whose jobs are in jeopardy." (151)

Dickens et al discovered, however, that even though S.1 EP(C)A 1978 requires employers to provide all employees within thirteen weeks of their commencing employment with written particulars of the terms of employment, including the firm's dismissal procedure, and are supposed to follow such a procedure when dismissing staff, there were a number of firms which possessed no procedure at all. (152) Evidently, small firms are less likely than large ones to have disciplinary and dismissal procedures, a fact which is particularly significant given that they also manifest a greater propensity to dismiss. (153)

Evans et al found that on the whole the introduction of the unfair dismissal laws made little difference to an employer's behaviour. An exception to this, however, concerned formal disciplinary procedures. Most, introduced as a direct result of the legislation,

"had induced more care and caution, and sometimes had the effect of slowing down the process of dismissal. Many small firms regarded formal disciplinary procedures as alien to their preferred informal style of management, and had not introduced them, though some of these took care to act 'procedurally' when dismissal appeared very likely or inevitable." (154)

In the vast majority of commercial catering enterprises, disciplinary and dismissal procedures - where they actually exist - are drawn up unilaterally by the proprietor or manager because there is no union representative with whom to consult. Often, the procedure, such as it is, will be informal and applied on an ad hoc basis. Even in those cases where the worker is employed in a hotel or restaurant which forms part of a chain or group, the unit manager will often possess considerable autonomy and it will be left to his discretion to hire and fire staff. No doubt, however, in common with other small employers, many hoteliers and restaurateurs have adopted a more procedural approach to dismissal.

F. The remedies for unfair dismissal

Once an industrial tribunal finds that an employee has been unfairly dismissed, it must consider the appropriate remedy. The remedies for unfair dismissal are reinstatement, re-engagement and damages. The statutory provisions emphasise reinstatement as being the primary remedy, followed by re-engagement. From the outset, however, both of these (together referred to in this study as "re-employment") have been very much under-used. In 1986-7,

29,392 complaints of unfair dismissal were made to industrial tribunals and 9,287 proceeded to a tribunal hearing. Of those which did so proceed, 0.4% resulted in reinstatement or re-engagement, 7.7% in compensation and in 2.5% the remedy was left to the parties. (155)

When unfair dismissal was introduced there was concern at the prospect of an employer being forced to take back an employee. The Industrial Relations Act 1971 only enabled a tribunal to "recommend" re-engagement when it considered "that it would be practicable and in accordance with equity". (s.106(4)(b)) Failure to comply with the recommendation could lead to an increase in compensation, but within the standard limits. No provision was made for the recommendation of reinstatement in the 1971 Act but the Trade Union and Labour Relations Act 1974 extended a tribunal's power by allowing it to make a such a recommendation. (Sch.1 Para.17(2) and (3) These remedies were rarely used not as a result of any inherent shortcomings, but simply because the industrial tribunals failed to apply them.

The Employment Protection Act 1975 attempted to shift the balance away from compensation by empowering tribunals to order - not merely recommend - re-employment (S.71) and, in the event of the employer's non-compliance with the order, to award compensation over what would normally be awarded. Such emphasis on re-employment is more in keeping with ILO 119 where it was recommended that the bodies given the task of pronouncing on the justification of a termination of employment

"should be empowered, if they find that the termination of employment was unjustified, to order that the worker concerned unless reinstated, where appropriate with payment of unpaid wages, should be paid adequate compensation, or afforded such other relief as may be determined..." (156)

Donovan, however, felt that compensation was an important remedy:

"At present the outcome of an appeal through a voluntary procedure is either reinstatement (or re-engagement) or the confirmation of the dismissal. Often however reinstatement does not offer a satisfactory solution when an employee is found to have been unfairly dismissed, because the circumstances of the dismissal have opened a permanent rift between employer and employee. Compensation can be provided under statutory machinery, but without the stimulus of legislation it is unlikely to find a place in many voluntary procedures." (157)

The relevant provisions are now contained in the EP(C)A 1978. By S.69(2) of the 1978 Act an order for reinstatement directs the employer to treat the complainant in all respects as if he had not been dismissed. An order for re-engagement directs the employer to engage the complainant in comparable employment or other suitable employment (S.69(4)). To promote these re-employment remedies the tribunal is obliged to explain the relevant law to the complainant and to ask him if he wants an order to be made. (S.68(1))

In exercising its discretion under S.69 whether to make an order of reinstatement, the tribunal must take into account the complainant's wishes, the practicability of the employer being able to comply with the order and the justice of such an order in the light of the complainant's contribution (if any) to his dismissal. In fact, the contributory fault of the employee does not appear to be a major obstacle. The legislation may have envisaged that this provision would prevent reinstatement where dismissal was only procedurally unfair, although as has been mentioned already, since it has become apparent that the ACAS Code of Practice can sometimes be dispensed with, fewer dismissals have been unfair through lack of procedure. In practice, reinstatement depends on whether it is regarded as practicable. The legislation does not give guidance as

to when it will be practicable other than saying that engagement of permanent replacements should not generally be taken into account. (S.70)

If the tribunal decides against reinstatement it must consider an order for re-engagement taking into account the same three factors (s.69(6)) If an order is not fully complied with, the tribunal has the power to award compensation (s.71(1)). If the employer completely fails to comply with an order, the employee will be entitled to an additional award, unless the employer satisfies the tribunal that it was not practicable to comply (s.71(2)). The award is between 13 and 26 weeks additional pay unless the dismissal was an act of sex or racial discrimination when it is increased to between 26 and 52 weeks pay (S.71(2),(3)). There is a "special award" entitlement on grounds of trade union membership or activities or non membership. (s.70)

Relatively few employees actually choose re-employment. Dickens felt that this was because they were unaware of the options open to them (158). In a survey of one thousand complainants and employers Dickens found that 24% expressed a preference for re-employment in the originating application form IT1 which asks what remedy is being sought. The phrasing of the question, she says, assumes that applicants can make an informed choice but the typical applicant is "unrepresented and often unadvised". The Department of Employment's booklets, which applicants are advised to consult, do not explain that re-employment is intended to be the principal remedy nor that applicants are not necessarily bound by the preference stated at the time of application and that employer opposition does not necessarily mean that re-employment will be seen as impracticable. Furthermore, form IT1 presents the remedies as an either/or choice and it is possible that some applicants may fear that if a request for re-employment fails, they will get nothing.

Lewis, however, doubted that it was the attitude of the tribunals which caused the problem, nor the unwillingness of applicants to be re-employed. Instead he attributed the low incidence or re-employment to the "nature of the tribunal system itself, with its considerable delays." (159) He found that, whilst many people opted for re-employment when completing their originating applications, they had decided to ask for compensation by the time the hearing took place. During the intervening period,

"the applicant begins to realise just what the employer's attitude towards him is - how he feels towards him, the degree of hostility etc. This has the effect of dissuading the employee from going back because he realises that the employment relationship has irretrievably broken down or because he fears victimisation". (160)

He also has time to appreciate how objectionable his employer really is or to obtain another job or his former job may no longer exist; attitudes have time to harden. Lewis attributes, therefore, the low number of re-employments to the administrative delay which cannot be avoided by "tinkering with the legislation".

Even where complainants do select re-employment, the tribunals often seem reluctant to award it. Rideout says that from the refusal of the common law to grant specific performance in respect of a contract of employment -

"derived an attitude of mind which was to the effect that enforcement was so obviously not possible that the making of anything more than an unenforceable recommendation was valueless. This attitude inhibited the consideration of available remedies when statutory provision was first made for claims in respect of unfair dismissal in 1971. Inevitably it means that the only remedy as of right continues to be monetary compensation. Though this was

made much more substantial than damages under the common law the result remained that the law still failed to afford the ultimate job security. This reasoning, however, ignored the fact that no law is enforceable if a sufficient number of those subject to it refuse to obey it but that most laws are accepted and obeyed even by those reluctant to do so....most employers will accept an order (of re-employment) rather than opting for the monetary penalty which is, in the last resort, the price of disobedience". (161)

Theoretically, as Dickens points out, employer opposition should have no legitimacy at the tribunal stage because "the matter is not one of voluntary agreement but of compliance with a judicial order". (41) In practice, however, the views of the employer are accorded considerable importance. This, says Dickens, may owe something to "notions of employer prerogative in deciding whom to employ but it is linked also to the more pragmatic contention that re-employment which has to be imposed by a tribunal 'will not work'". (162) The likelihood of friction between supervisors or other employees and a re-employed worker can be taken into account even where there is no prospect of collective action.

In *Coleman Stephenson v Magnet Joinery* [1974] IRLR 343, the court said that "practicable" means not merely "possible" but "capable of being carried into effect with success". The case concerned two employees who refused to be members of a union in a closed-shop situation. The National Industrial Relations Court (NIRC) said that when deciding whether a recommendation was practicable, the tribunal ought to consider the consequences of re-engagement "in the industrial relations scene in which it will take place". Re-engagement was rejected as it would only promote further industrial strife. At the Court of Appeal it was argued that if re-engagement was "possible" then a recommendation should be made. The court rejected this argument and agreed with the NIRC decision. Lord Salmon said that re-employment would lead to

greater industrial unrest and strife and added:

"to say that, in those circumstances, it could have been practicable and in accordance with equity" to recommend their re-employment, seems to me to be a travesty of the English language and common sense".

In *Meridian v S. Gomersall and V Gomersall* [1977] IRLR 425, Kilner Brown J tried to ascertain what was meant by "practicable". He said that the practicability of an order should be looked at in a pragmatic and subjective sense, bearing in mind the particular consequences. He added that a tribunal should not analyse in too much detail the application of the word "practicable" but take a "broad common-sense view".

Dickens maintains that the industrial tribunals "tend to adopt a definition of success which is the employer's one of whether the applicant on return would make a satisfactory employee and cause no managerial problems, rather than considering the employee interests which might be served by re-employment". (163) In *Lancaster v Anchor Hotels* [1973] IRLR 13 the tribunal concluded: "In view of all the circumstances and the fact that the respondents have obviously lost all confidence in the abilities of Mr. and Mrs. Lancaster we do not consider it would be practicable to recommend re-engagement."

Because the tribunals view the practicability of re-employment through the eyes of the employer, employees in small businesses are treated less favourably than their counterparts in large concerns where there is more room for manoeuvre. In *Enessy Co. SA t/a The Tulcan Estate v Minoprio and Minoprio* [1978] IRLR 489 a husband and wife were dismissed from their jobs as cooks at the applicants' small hotel. The industrial tribunal held that they had been unfairly dismissed and ordered reinstatement to be effected by a certain date. The applicants agreed to treat the respondents as remaining in employment to that date but declared them redundant as

from then. At a subsequent hearing, the industrial tribunal said it was practicable for the appellants to comply with an order of reinstatement and, accordingly, awarded additional compensation. The EAT confirmed the tribunal's decision but Lord McDonald said, obiter dicta, that it is one thing to make an order for reinstatement where the employee concerned works in a factory or other substantial organisation. It is another to do so in the case of a small employer with few staff:

"Where there exists a close personal relationship....reinstatement can only be appropriate in exceptional circumstances and to enforce it upon a reluctant employer is not a course which an industrial tribunal should pursue, unless persuaded by powerful evidence that it would succeed".

The tribunals' lack of enthusiasm for re-employment seems to have remained unaffected by the extension of their powers under S.71 Employment Protection Act 1975. Indeed it has been suggested that it may have made them more unwilling to use them. (164) Employers in most cases may feel themselves obliged to accept an order rather than opt for the financial penalty but the tribunals, seemingly loth to interfere with the employer's prerogative to employ whom he wishes, have frequently chosen the soft option of compensation rather than try to implement the aims of the legislation.

It seems that more union members than non-union members seek reinstatement in unfair dismissal cases. It is the usual remedy where dismissals are challenged successfully within voluntary procedures and may be seen, therefore, as the unionist's natural choice. Respondents in unfair dismissal cases generally work in small, non-unionised businesses and may have less confidence in the remedy of re-employment than their unionised counterparts whose return to work will be "supervised" by the union so there is "less likelihood or fear of unpleasantness or victimisation." (165)

CONCLUSION

In Britain, industrial relations generally have been dominated by the abstentionist philosophy, a philosophy which has been supported by employers and employees alike:

"It is where trade unions are not competent, and recognise that they are not competent to perform a function, that they welcome the state playing a role in enforcing minimum standards: but in Britain this is recognised as the second best alternative to the development by workpeople themselves of the organisation, the competence, the representative capacity to bargain and to achieve for themselves satisfactory terms and conditions of employment. In general, therefore, because this competence exists, the state stands aside, its attitude being one of abstentionism, of formal indifference".
(166)

In the licensed hotel and restaurant sector, where the small business abounds and employees are imbued with "respect for the establishment traditionally associated with domestic service and hotel operations" (167), collective bargaining is the exception rather than the rule. Here, as with other low-paid, non-unionised industries, the law has confined its intervention to the specification of -

"minimum requirements on a narrow range of issues....leaving the rest to individual employers, whose discretion is not usually fettered by workplace bargaining because no workplace organisation exists, or because whatever organisation there is lacks the strength to bargain". (168)

Unfortunately, however, the statutory determination of "minimum requirements" in licensed hotels and restaurants has not been very successful. In common with other wages council industries, the

sector is characterised by a disproportionate number of small firms with a high level of staff turnover and low levels of union organisation which means that enforcement cannot be left to the unions as is the case with other national agreements.

Of course, the enforcement of wages orders is as much a duty of the state as any other criminal law and the approach of successive governments to the non-observance of minimum conditions contrasts sharply with their usual attitude to the "rule of law". As the Low Pay Unit points out -

"in other areas of the law, ignorance is no defence. Just as employers have a responsibility to understand the law relating to the payment of VAT and National Insurance, so they should be aware of their commitments under the minimum wage legislation." (169)

Until the wages inspectorate can adequately police such a large number of small firms or rely more confidently upon the ability of the system to be self-enforcing, large-scale non-observance of the statutory minima will continue. Meanwhile not only has the government "legitimised" this non-observance by declaring the wages councils to be outmoded and irrelevant institutions which it would have liked to have done away with (170) but it has facilitated contravention of the law by reducing the size and resources of the inspectorate. Now that wages council orders are limited to fixing a basic minimum hourly rate, overtime entitlement and a limit on deductions from pay which an employer can make for living accommodation (S.14 WA 1986), all other matters previously dealt with in the orders, such as holiday pay and other entitlements, will be left to collective bargaining or individual negotiation.

"Ironically, this deregulation applies to the very area where it was presumably thought, for good reasons, that collective bargaining needed, through lack of strength, to rest on a firm

statutory floor of minimum rights."
(171)

In keeping with the tradition of abstentionism, the state has fought shy of interfering with the employer prerogative (in non-unionised industries) of fixing wages and conditions.

Many see the post 1974 legislation as a departure from the abstentionist principle. According to Anderman, for example,

"in almost all cases, the new legal rights are given to employees and trade unions whilst the legal restrictions and liabilities are applied to employers and employing organisations...In part this may reflect an appreciation that legal restrictions on industrial action are not always effective. However, it may also be viewed as an indication that both elements of the Employment Protection Act have a common purpose, notably the creation of wider restrictions on the exercise of unilateral managerial prerogative and the provision of an alternative source of rule which is fairer to the ordinary employee." (172)

He points out that -

"neither the common law of the employment contract nor the economic forces of the labour market have ever provided an assurance that employment decisions would be jointly taken by parties with equivalent bargaining power" (173)

and suggests that the rights contained in the Employment Protection Act have put employers and employees on a more equal footing.

Collins agrees that the unfair dismissal legislation is different from that which preceded it in that it "upsets the established liberal and pluralist patterns which ascribe a meagre role to the state in the management of industrial relations" but he

feels that far from placing employers and employees on a more equal footing, it is a general attempt to subject "capitalist discipline" to the rule of law. (174) He argues that the Industrial Relations Act 1971 was a "revolutionary form of legal intervention involved in the legal review of managerial decisions" and dismisses the popular view it was accorded of being just "another flagstone in the employee's floor of rights". No longer do the rules which influence behaviour in the workplace consist merely of "a combination of contract and the exercise of discretionary power by management in the form of works rules"; now they include "rules imposed from outside the workplace by independent industrial tribunals". Collins maintains that -

"in order to minimise the disruption to the national economy caused by the explosive tendencies within pluralist systems, the state succumbs to the temptation to regulate the employment relationship through law, thus bypassing the structures of joint regulation by management and union".

He criticises the law of unfair dismissal as having been

"sterilised to such an extent that it is reasonable to conclude that, far from controlling management discretion and therefore protecting the interests of employees in job security, the law generally endorses and legitimises a strong conception of managerial authority". (175)

Certainly the unfair dismissal law has failed to ensure job security for employees. Its remedies do not prevent dismissal (by way of a deterrent) nor, since compensation is the most frequently ordered remedy, do they guarantee re-employment. As Anderman says:

"One factor that undoubtedly influences the great majority of non-unionised complainants of unfair dismissal is that they may be isolated and vulnerable where there is no organisation at workplace level that could help them

face up to the day to day pressures of being back at work after a reinstatement or re-engagement order.

At all events, the statistics puncture the myth that the statute offers a form of job security by providing an effective remedy against an employer who is unwilling to abide by an order of reinstatement. With the statute in practice providing so few reinstatements, it is inaccurate to characterise it as providing security of employment. Rather at most it provides a form of compensation for loss of employment." (176)

The law on unfair dismissal regards the commercial objectives of a business as paramount and where it has caused employers to review their practices and procedures on dismissal (and there are still plenty of hotels and restaurants where no formal procedure exist) they have not necessarily been amended in the employee's favour.

Opponents of trade unionism criticise the constraints which it imposes on individual rights but -

"even in non-unionised companies such rights may have little reality because in practice management determines the terms and conditions of employment, or because employees find the prosecution of their own grievances a somewhat invidious process". (177)

As Weekes et al state, "where unions are not recognised there is no protection through collective bargaining and therefore the need for legislative protection for the employee is more acute". (178) Well organised unions can offer a greater degree of security for their members against unfair dismissal: they can get involved in the rule-making process at the workplace and thereby influence the decision on what type of behaviour constitutes a disciplinary matter; when an employee allegedly behaves in such a way, the dispute may be resolved through the application of voluntary

procedures reached through the process of collective bargaining or, ultimately, through the threat of industrial action. If the issue cannot be resolved at workplace level, the union can advise and assist the aggrieved employee in preparing and presenting his case. Dickens says:

"Collective organisation may provide a qualitatively different kind of employment protection from that offered by individual rights. For example,...it may affect the definition of what constitutes a disciplinary issue in the first place. Even where the legal route is used to challenge a dismissal, the ability to call upon union assistance in case preparation and presentation confers a benefit on the union member. In some ways a certain degree of union organisation appears necessary to make individual legal rights effective. This is to some extent the case with the unfair dismissal provisions (in providing information and supervising any re-employment as well as giving advice and assistance) but it is perhaps particularly the case where the individual rights are exercisable by those in employment because the protection from, and redress for, unfair dismissal is weak the force of any argument that trade union protection is no longer necessary is obviously reduced." (179)

As Kahn Freund said, "the law seeks to restrain the command power of management. How far it succeeds in doing so depends on the extent to which the workers are organised". (180)

The law has endeavoured to encourage the development of collective bargaining not only through the establishment of the wages councils but also through statutory recognition provisions which, whilst giving substance to "the public policy commitment to collective bargaining as the preferred method of conducting industrial relations" still do not reduce the need for trade unions to build up and maintain a viable membership base" without which

"unions can gain little from even the most favourable legislative support". (181)

Perhaps, as hotel and restaurant businesses expand, their employees will have both opportunity and motivation to join a union. Currently only an estimated 5% of the sector's workforce belongs to a union but the past decade - a period of mergers and takeovers - has witnessed signs of increased interest. Hotel groups now employ a larger proportion of the workforce than they used to and their managers who, it is claimed, are "more professional than the more narrowly based managers typically found at plant level whose experience and training tend to have been limited to the hotel industry" (182) may be more amenable to trade unionism. Any hope, however, of trade union membership extending significantly in this sector presupposes the eradication of those inherent problems which so far have impeded recruitment and organisation.

Individual employment law has advanced considerably over the past fifteen years. Unfortunately, many employers have not kept pace with it and the tribunals - for whatever reason - have often failed to apply it in the spirit in which it was intended. Perhaps too much has been attempted too quickly and it is unreasonable and unrealistic to expect employers in an industry like hotel and catering with little or no experience of a pluralist ideology to do anything but resent, and to try to resist, legal intervention. It seems that the unfair dismissal law - which promised so much to employees in the weaker industries - has not affected the balance of power between employers and employees any more than the wages council legislation. If the aims of the legislature are to be realised, those who apply, interpret and enforce the law must adopt a far more positive approach to the non-unionised employee.

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- (2) M. Ginsberg (ed.) : Law and Opinion in England in the Twentieth Century, p.12.
- (3) O. Kahn Freund : Law and Opinion in the Twentieth Century, p.224.
- (4) Lord Wedderburn : The Worker and the Law, p.5.
- (5) See e.g. A. Westrip : "Effects of Employment Legislation on Small Firms" in Stimulating Small Firms, pp.44-49.
- (6) R. Clifton and C. Tatton-Brown : Impact of Employment Legislation on Small Firms, pp.31-33.
- (7) P. Davies and M. Friedland : Labour Law : Text and Materials, p.41.
- (8) Department of Employment : Consultative Paper on Wages Councils, para.12.
- (9) S. Medlik : Profile of the Hotel and Catering Industry, p.3.
- (10) F. W. Bayliss : British Wages Councils, p.48.
- (11) These were
 - (a) industrial and staff canteens
 - (b) licensed non-residential establishments
 - (c) licensed residential establishments and licensed

restaurants

(d) unlicensed places of refreshment

(e) unlicensed residential establishments

- (12) Medlik, op.cit., p.1. It may be noted, however, that as early as 1926 Sir A. D. Steel-Maitland decided against the establishment of a trade board for the "catering industry".
- (13) A. Rajan : Personnel Management, April 1987, p.40.
- (14) See Medlik, op.cit., chs.1-5, E. Dronfield and P. Soto, Hardship Hotel, pp.10-13, and the Encyclopaedia Britannica for a history of the hotel and restaurant sector.
- (15) Dronfield and Soto, op. cit., p.6.
- (16) Department of Employment.
- (17) Of the 30,000 or so hotels in Gt. Britain, about 20,000 are owned by individuals : Hospitality, October 1985, p.5.
- (18) Women constitute nearly 60% of the licensed hotel and restaurant sector's labour force. The hotel and catering industry is the country's largest employer of unskilled female labour.
- (19) According to the Hotel and Catering Industry Training Board, less than 20% of men are employed part-time but the proportion of women employed part-time in hotels is almost 50% and, in restaurants, over 60%.
- (20) Hotel Catering and Economic Development Committee (HCEDC): Staff Turnover.

- (21) See J. Marquand : Which are the Lower Paid Workers? (1967) V BJIR 365
- (22) G. Mars and P. Mitchell : Room for Reform, p.14.
- (23) The Commission found that rates of pay and conditions of employment were generally, though not always, above the minimum rates laid down by the wages council and the provisions for collective bargaining were better than in the rest of the sector.
- (24) S. Keevash : (1985) 14 ILJ 217, at p.226.
- (25) HCEDC, op. cit., p.4.
- (26) Mars and Mitchell, op. cit., p.26.
- (27) Commission on Industrial Relations (CIR) Report No. 23: The Hotel and Catering Industry, Part I: Hotels and Restaurants, para.145.
- (28) C. Davies, B. Chopping and R. Bamford: Employment Legislation and Trade Union Growth, p.1.
- (29) Ibid.
- (30) HCEDC, op.cit., p. 1.
- (31) Mars and Mitchell, p.14,15.
- (32) Ibid. p.7
- (33) Bayliss, p.75,76
- (34) Fifth Report of the House of Lords Select Committee on the Sweating System H.L. No.62 1890.

- (35) A.G.B. Fisher: Wages and their Regulation in Great Britain since 1918, p.178.
- (36) Committee appointed to inquire into the working and effects of the Trade Boards Acts of 1909 and 1918, Report, Cmd. 1645 (1922) p.26.
- (37) Bayliss, op.cit., p.25.
- (38) Within the meaning of S.1(2) Trade Boards Act 1918.
- (39) In a number of industries the government extended protection to employers either by subsidies or by using licences to limit the number of producers, and in return the employers had to pay decent wages. Under the Road and Rail Traffic Act 1933, 3 categories of licence were introduced; public carriers (A), limited carriers (B) and private carriers (C). Categories A and B were intended to be restrictive with the Traffic Commissioners granting licences where there was evidence of sufficient trade to sustain them. There was no restriction on the number of C licences. Fair wages were payable to workers on vehicles with an A or a B licence (or the licence would be withdrawn) but not to workers on C licensed vehicles. Since 60% of the $\frac{1}{2}$ million road haulage workers worked for private carriers the protection extended to only a minority. In 1934 the Minister of Labour, recognising that if the fair wages provision was to operate successfully there would have to be some voluntary agreements to set the standard, set up a National Joint Conciliation Board for the Road Motor Transport Industry (Goods) in England and Wales. After 2 years it gave up because its agreements were not being observed and the Minister appointed a committee under the chairmanship of Sir James Baillie (who had been a chairman of trade boards) to recommend changes in

the law. Supported by the organised employers and trade unions the Committee recommended statutory wage regulation for workers on vehicles with A and B licences. It suggested that there should be a national central board which would propose minimum wages to the Minister of Labour after consulting Area Boards. These recommendations were implemented in the Road Haulage Wages Act 1938. All C licensed workers were covered by the fair wages procedure but with the Central Wages Board's wage rates as the standard of fairness.

- (40) Bayliss, op. cit., p.50.
- (41) Ibid., p.45.
- (42) B. Chopping: Unionisation in London Hotels and Restaurants, p.140.
- (43) H.C.Debs. 388. 5s. 1627, April 2, 1943.
- (44) Chopping, op. cit., p.143.
- (45) Caterer and Hotelkeeper, 1st January 1943.
- (46) H.C.Debs. 386 5s 1212, Feb. 9, 1943.
- (47) H.C.Debs. 388 5s 572, April 6, 1943
- (48) By S.1(1) Holidays with Pay Act 1938
"...a wage regulating authority may direct that any workers for whom a minimum rate of wages or statutory remuneration is being or has been fixed by them shall be entitled to be allowed holidays of such duration as may be directed by the authority."

By S.1(2) "no direction shall provide for a worker whose rates of wages are fixed under the Trade Board Act 1909 and 1918...being entitled to be allowed holidays for periods exceeding in the aggregate one week in any period of twelve months..."

- (49) Para.7.
- (50) Minister for Employment, Second Reading.
- (51) ILO Convention 26, Article 4.
- (52) Keevash, op. cit.,
- (53) Report of the Committee of Experts on the Application of Conventions and Recommendations, March 1984, p.69.
- (54) Department of Employment, op.cit., para.23.
- (55) R. R. Banks : Wages Councils and Incomes Policy. 1967 V BJIR p.344.
- (56) C. W. Guillebaud : The Wages Council System in Great Britain, p.31.
- (57) Royal Commission on Trade Unions and Employers' Associations, (Donovan) Report 1965-68, para.259.
- (58) Banks, op.cit., p.345.
- (59) Catering Times, 1982
- (59) CIR Report No.23, op. cit., para.78.
- (61) E. G. A. Armstrong : Wages Councils, Retail Distribution and the Concept of the Cut Off.

- (62) Employment Gazette, October 1984, p.452
- (63) Ibid.
- (64) E. Hawtrey: The enforcement of statutory minimum wages in Great Britain, 1959 International Labour Review p.382.
- (65) CIR, op.cit., para.80.
- (66) J. Ford: Who breaks the rules? The response of small business to external regulation. 1982 IRJ pp.40-50.
- (67) J. F. Pickering, J. A. Greenwood and D. Hunt: The Small Firm in the Hotel and Catering Industry, p.11.
- (68) Report of the Committee of Inquiry on Small Firms (Bolton Report) 1971 Cmnd. 4811 p.97.
- (69) Hansard 1986 H.L. Vol.478 No.136, cols.249 - 250.
- (70) Illegal underpayment: proportion of workers found to be underpaid and employers underpaying*

Proportion of establishments where under-payment found	1971 %	1974 %	1978 %	1979 %	1980 %	1981 %	1982 %
	14.8	21.9	33.4	31.5	35.1	41.3	**
Proportion of workers found to be under-paid.	4.7	7.5	14.3	11.8	13.5	13.3	14.8

* These figures are only for workers for whom arrears were paid and employers who paid arrears.

** No figures available.

Hansard 1983 Vol.40 Cols. 53-4 and 21.3.83 Vol. 39 Col 325.

- (71) Employment Gazette, October 1984, p.452.
- (72) Employment Gazette, December 1984.
- (73) Department of Employment.
- (74) Hawtrey, op. cit., p.385.
- (75) P. B. Beaumont: The extent of compliance with minimum wage regulations: the West of Scotland record (1978) 9 IRJ 12.
- (76) Ibid.
- (77) Hawtrey, op. cit., p. 385.
- (78) Ibid.
- (79) Keevash, op. cit., p.218.
- (80) Low Pay Unit: Who Needs the Wages Councils?, pp.45,48.
- (81) Such a provision could have provided an important source of protection for employees who are being underpaid but are too frightened to notify the Inspectorate for fear of losing their jobs. The Department of Employment says that although it has little evidence of reluctance to complain, it knows that the problem exists. However, workers who enquire are always advised that their complaint will be dealt with in strictest confidence and no employer is told that a visit is in connection with a complaint unless the worker has consented (usually where the employment has terminated.)

- (82) HCEDC : Staff Turnover.
- (83) Bayliss, op.cit., p.14.
- (84) O. Kahn-Freund: Legal Framework, in the System of Industrial Relations in Great Britain (Blackwell, 1954), p.73.
- (85) Bayliss, op. cit., p. 138.
- (86) Ibid., p.139.
- (87) Trade Union Congress (TUC) : Collective Bargaining and Trade Union Development in the Wages Council Sector.
- (88) Ibid. p.35.
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- (90) CIR, op. cit., para.99.
- (91) ACAS Report No. 18 : Licensed Residential Establishment and Licensed Restaurant Wages Council, para.7.10.
- (92) Ibid., para.4.9.
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- (94) ACAS Report, op. cit., para.4.11.
- (95) Bolton Report, op. cit., para.2.50.
- (96) TUC, op. cit.

- (97) S. D. Anderman: The Law of Unfair Dismissal, p.3.
- (98) Para.526
- (98a) ILO 119 recommends that:
- "A worker who feels that his employment has been unjustifiably terminated should be entitled, unless the matter has been satisfactorily determined through such procedures within the undertaking, establishment or service, as may exist or be established consistent with this Recommendation, to appeal, within a reasonable time, against that termination with the assistance, where the worker so requests, of a person representing him to a body established under a collective agreement or to a neutral body such as a court, an arbitrator, an arbitration committee or a similar body." (II.4.)
- By para.5(1) those bodies
- "should be empowered to examine the reasons given for the termination of employment and the other circumstances relating to the case and to render a decision on the justification of the termination."
- (99) Ministry of Labour: Dismissal Procedures, para.13.
- (100) Para.539.
- (101) Para.540.
- (102) Para.541.
- (103) Para.542.

- (104) By S.22(1) Industrial Relations Act 1971 "in every employment to which this section applies every employee shall have the right not to be unfairly dismissed by his employer; and accordingly, in any such employment, it shall be an unfair industrial practice for an employer to dismiss an employee unfairly,"
- (105) Industrial Relations Bill Consultative Document, para.52.
- (106) S. Evans, J. Goodman and L. Hargreaves: Unfair Dismissal Law and Changes in the Role of Trade Unions and Employers' Associations, (1985) 14 ILJ, at p.92.
- (107) Employment Gazette (October 1987), p.498-502.
- (108) K. Williams : Unfair Dismissal: Myths and Statistics (1983) 12 ILJ 159.
- (109) Ibid. The Department of Employment stopped publishing analyses of the characteristics of the parties to unfair dismissal applications in 1976. The last analysis suggested that women made up to 25% of applicants (See Employment Gazette Nov. 1977, pp.1214-1216).
- (110) L. Dickens, M. Jones, B. Weekes and M. Hart : Dismissed: a study of Unfair Dismissal and the Industrial Tribunal System, p.43.
- (111) Williams, op.cit., p.160.
- (112) S.I. 1985 No.782.
- (113) Employment Gazette (1985) p.91.
- (114) Dronfield and Soto, op.cit., p.7.

- (115) Ibid.
- (116) M. Freedland : The Contract of Employment, p.20.
- (117) Para.9 provides:
- "(1) If in any week the employee is, for the whole or part of the week...
- (b) absent from work on account of a temporary cessation of work or
- (c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for all or any purposes...
- that week shall... count as a period of employment."
- (118) B. Hepple : Restructuring Employment Rights (1986) 15 ILJ 69, at p.71
- (119) See pp.79-82 for discussion of dismissal in the cases of global contracts and task contracts.
- (120) P. Leighton and R. Painter : (1986) 15 ILJ 127, at p.129.
- (120a) In *Brown v Knowsley Borough Council* [1986] IRLR 102 (EAT) the applicants had been employed as temporary lecturers in colleges of further education from 1979 to 1984. From 1982 they had been employed "only so long as sufficient funds are provided by the Manpower Services Commission or by other firms/sponsors" to teach on youth training schemes. When their contracts ended the EAT held that they had not been dismissed and S.93(1) did

not apply. Their contracts had been consensually terminated upon completion of a task determined by reference to an extraneous factor, i.e., financial support.

- (121) S.I. 1976 No.715
- (122) Lord Wedderburn: *The Worker and the Law* (1971) p.53
- (123) P. Leighton : (1985) 14 ILJ 54.
- (124) Leighton and Painter, *op. cit.*, 127.
- (125) Hepple, *op.cit*, p.74.
- (126) Incomes Data Services Ltd. : *Part-timers, Temps and Job-sharers*, p.1.
- (127) See also *Larkin v Cambos Enterprises (Stretford) Ltd.* [1978] ICR 1247.
- (128) Dickens et al : *Dismissed*, p.98.
- (129) This decision was reversed on the facts by the Court of Appeal [1982] IRLR 413.
- (130) J. Bowers and A. Clarke: *Unfair Dismissal and Managerial Prerogative: a study of "other substantial reason"* (1981) 10 ILJ 34, at pp.35 and 43.
- (131) Dickens et al : *Dismissed*, p.99.
- (132) Dronfield and Soto, *op.cit.*, p.8.
- (133) Mars and Mitchell, *op.cit.*, p.25.

- (134) M. Whincup : Terms and Conditions of Employment: Part 2 [1987] 85 LS Gaz 27.
- (135) R. Benedictus and B. Bercusson : Labour Law: Cases and Materials, p.299,300.
- (136) See also R v Hertfordshire County Council ex. p. National Union of Public Employees where judicial review of the decisions of a local authority were sought. Dillon LJ said that "the proper tribunals to decide whether the councils acted reasonably are the Industrial Tribunals, which, with their lay members, have a special expertise in this field."
- (137) Anderman, op.cit., p.151.
- (138) It would seem that the specific reference to size and administrative resources is unnecessary inasmuch as the EP(C)A 1978 S.53(3) refers to the "circumstances" surrounding the dismissal. Thus, tribunals have in the past taken the employer's circumstances into account when determining the reasonableness of a dismissal and, incidentally, the appropriateness of the remedy. In Royal Naval School v Hughes, for example, the EAT said that the ACAS Code of Practice was "not necessarily apt" in the context of an independent school with a staff of forty because it is "drafted with industry and large enterprises in view".
- (139) Cumming-Bruce, J in Vickers Ltd. v Smith [1977] IRLR 11
- (140) Williams, op. cit., p.161.
- (141) P. Elias: Fairness in Unfair Dismissal: Trends and Tensions (1981) 10 ILJ 211 at p.212.

- (142) H. Collins: Capitalist Discipline and Corporatist Law (1982) 11 ILJ 88.
- (143) Ibid.
- (144) Elias, op. cit., p.211.
- (145) H. Forrest: Political Values in Individual Employment Law (1980) 43 MLR 361.
- (146) Elias, op. cit., p.211.
- (147) Forrest, op. cit., p.378.
- (148) D. Farnham and J. Pimlott: Understanding Industrial Relations (Cassell, 1979) p.252.
- (149) Elias, op. cit., p.211.
- (150) Farnham and Pimlott, op.cit., p.278.
- (151) Elias, op. cit., p.213.
- (152) Percentage of establishments with discipline/dismissal procedure
- | | <u>Number of Employees</u> | | | | |
|-----|----------------------------|-------|-------|--------|------|
| All | -10 | 10-19 | 20-99 | 10-499 | 500+ |
| 72 | 51 | 59 | 78 | 94 | 99 |
- L. Dickens, M. Hart, M. Jones, B. Weekes: A response to the Government Working Papers on Amendments to Employment Protection Legislation, para.10
- (153) Ibid., para.11.

- (154) S. Evans, J. Goodman, L. Hargreaves : Unfair Dismissal Law and Employment Practice in the 1980s, p.71
- (155) Employment Gazette October 1987, at p. 500.
- (156) para.6.
- (157) para.542.
- (158) L. Dickens, M. Hart, M. Jones , B. Weekes: Re-employment of Unfairly Dismissed Workers: The Lost Remedy. (1981) 10 ILJ 160.
- (159) P. Lewis: An analysis of why legislation has failed to provide employment protection for unfairly dismissed employees (1981) XIX BJIR 316.
- (160) Ibid. Dickens commented on Lewis's findings in (1982) 20 BJIR 257 and Lewis replied in (1983) 21 BJIR 232. First, they disagreed over the validity of their respective data. Secondly, Dickens et al argued that only a minority of applicants thought the time period between application and hearing too long. Lewis responded that his contention was not based on the perceptions of applicants but rather upon the reasons put forward by applicants for choosing compensation, the main reason being the breakdown of the employment relationship. Thirdly, Dickens et al argued that the small extent of re-employment at the conciliation stage is only possible because of a low percentage expressed desire for re-employment. Lewis found this to be a "surprising argument" since Dickens et al themselves had criticised ACAS's lack of positiveness about re-employment. Further, he argued, since ACAS's remit is to pursue re-employment only where "practicable" and the Service does not see it as practicable if the employer

resists, the applicant's expressed wishes for re-employment are unlikely to be met. Fourthly, there was a disagreement about whether tribunals award re-employment in the majority of cases in which it is sought. Lewis's own research (1981) provided a figure of 57% and there is no other statistical evidence. Finally, Dickens et al suggested that a third of their applicants said that they had not been asked by the tribunal whether they wanted their jobs back. Lewis commented that this was data based on memory which conflicted with the general situation indicated by his own examination of the written decisions of the tribunals. However, he did wonder how adequately the tribunals explain the remedies and ask applicants which remedy they are seeking.

- (161) R. W. Rideout: Principles of Labour Law, p.119.
- (162) Dickens et al : Re-employment of unfairly dismissed workers: the lost remedy (1981) 10 ILJ 160.
- (163) Ibid., p.167.
- (164) C. Baker: Employment Protection: Industrial Rights (1976) 5 ILJ 65.
- (165) Dickens et al, (1981) op. cit., p.163.
- (166) Trade Unionism; the Evidence of the TUC to the Royal Commission on Trade Unions and Employers' Associations (TUC, 1966).
- (167) Hotel, Catering and Institutional Management Association Yearbook 1973, p.112.

- (168) H. A. Clegg: The Changing System of Industrial Relations in Great Britain, p.33.
- (169) Low Pay Unit: Who Needs the Wages Councils, p.23.
- (170) See Hansard 8/2/83, Vol.36, col.335.
- (171) J. McMullen : (1986) 15 ILJ 270
- (172) S. D. Anderman: Employment Protection: A New Legal Framework, p.3.
- (173) Ibid.
- (174) Collins (1982) 11 ILJ 78. at p.82.
- (175) Ibid., p.177.
- (176) Anderman : The Law of Unfair Dismissal, pp.320,321.
- (177) B. Weekes, M. Mellish, L. Dickens, J. Lloyd: Industrial Relations and the Limits of the Law, p.220.
- (178) Dickens et al : A response to the Government Working Papers, op. cit., para.9.
- (179) Dickens et al : Dismissed p.251
- (180) O. Kahn Freund : Labour and the Law, p.9.
- (181) Dickens et al : A response to the Government Working Papers, op. cit., p.39.
- (182) Mars and Mitchell, op. cit.

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