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Dispute Resolution in Unfair Dismissal Cases

- a comparison of Industrial Tribunals and the Electrical Contracting industry's exempted procedure.

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ABSTRACT

FACULTY OF SOCIAL SCIENCES
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Master of Philosophy

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The Joint Industry Board for the Electrical Contracting Industry holds the unique distinction of operating an unfair dismissal procedure exempted from the industrial tribunal system under provisions contained in Section 110 of the Employment Rights Act 1996. The exemption dates from 1979, when an exemption order was signed by the then Secretary of State, Sir Patrick Mayhew.

Both the former Conservative government and the present Labour administration have considered the necessity of reforming the industrial tribunal system, not least because of the substantial growth in the number of cases in the last decade. Alternatives to the tribunals have been proposed, and some innovations suggested in a Green Paper published in 1994 have already been implemented. Although referred to in the Green Paper, the facility to exempt an industry's dismissal procedure agreement under s. 110 has not been widely debated. The central focus for this thesis is the question: 'why has not this avenue been followed by other industries?'

The present study begins by examining in detail the present state of the industrial tribunal system and the alternatives currently available to the UK workforce in general. The JIB's exempted procedure is then comprehensively analysed , and evaluated against the criteria by which the tribunal system is commonly judged; i.e. the so-called 'Donovan' criteria that a system of redress in employment disputes should be 'easily accessible, informal, speedy and inexpensive'. This evaluation draws upon a postal questionnaire survey (the first of its kind to be conducted independently) which attempted to canvass every employer and employee who was involved in a case brought under the exempted procedure during the calendar years 1991 to 1994 inclusive.

The study concludes that the unique character and history of the agreements made in electrical contracting have enabled the industry to resolve the great majority of unfair dismissal disputes with greater expedition and at less cost than the industrial tribunal system. However, for a variety of reasons discussed in the concluding chapter, it is argued that the industry's approach would not transfer easily to most other unionised business sectors. Nevertheless, it must be considered a success according to the four Donovan criteria, and broader concepts of natural justice as enshrined, for example, in the ACAS Code of Practice on Disciplinary Procedures.

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List of abbreviations

ACAS	Advisory, Conciliation and Arbitration Service
AEEU	Amalgamated Engineering and Electrical Union
CA	Court of Appeal
CO	Conciliation Officer
COIT	Central Office of the Industrial Tribunals
COT3	Document used by ACAS to record settlements of cases referred to it
CSEU	Confederation of Shipbuilding and Engineering Unions
DEP	Department of Employment and Productivity
DoE	Department of Employment (now the Department for Education and Employment - DfEE)
DTI	Department of Trade and Industry
EAT	Employment Appeal Tribunal
ECIBA	Electrical Contracting Industry Benefits Agency
EEF	Engineering Employers' Federation
EETPU	Electrical, Electronic, Telecommunication and Plumbing Union
EP(C)A	Employment Protection (Consolidation) Act 1978
ERA	Employment Rights Act 1996
ESI	Electricity Supply Industry
ETU	Electrical Trades Union
EU	European Union
ILO	International Labour Office
IPD	Institute of Personnel and Development (formerly IPM)
IPM	Institute of Personnel Management
IRA	Industrial Relations Act 1971
IRLIB	Industrial Relations Legal Information Bulletin
IRLR	Industrial Relations Law Reports
IRS	Industrial Relations Services
IT	Industrial Tribunal
IT1	Form on which an applicant makes a claim to an IT
IT3	Form on which the respondent notifies intention to contest claim
ITA	Industrial Tribunals Act 1996
JIB	Joint Industry Board for the Electrical Contracting Industry
NAC	National Appeals Committee (sub-committee of JIB National Board)

(continued)

NBPI	National Board for Prices and Incomes
RJIB	Regional Joint Industry Board
ROIT	Regional Office of the Industrial Tribunals
WIRS	Workplace Industrial Relations Surveys (1980, 1984, 1990)

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This study would not have been possible without the co-operation of the Joint Industry Board for the Electrical Contracting Industry, and in particular its Secretary, Ron Allender.

A number of eminent figures concerned in the establishment of the Joint Industry Board and the conduct of its disputes procedures generously gave of their time to answer questions and/or comment upon draft material, and these are acknowledged separately in the text.

I have greatly appreciated the financial and material support of Farnborough College of Technology, and the encouragement my teaching colleagues, in the pursuit of this research.

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PREFACE

Background:

The appeal of two individuals in dispute to a third party is a process of almost primaeval antiquity. Long before monarchs and justices were called upon to adjudicate in the quarrels of society there was a need for elders to decide matters of dispute. Our concept of the 'civil law' is largely the evolutionary outcome of such decisions. There is, perhaps, an underlying assumption that age and experience confer wisdom and objectivity upon an adjudicator, or that the **fairest** way of settling a contentious issue is to appeal to an independent party; yet in most employment situations the most **pragmatic** solution is often the one arrived at by the parties themselves.

There are good reasons for this. Employment skills are generally in short supply, and take time to acquire; and thus an employer will think twice before dismissing a misbehaving employee. Most breaches of discipline are transient and, once tempers have cooled, most employers recognise this. There can, after all, be a sense of achievement for both parties if disputants arrive at a working solution to a matter which has divided them - be it concerned with behaviour, competence, information flow, terms and conditions of employment, or any other topic.

Despite the strong influence of the Advisory, Conciliation and Arbitration Service (ACAS) and its Code of Practice on Disciplinary Procedures, first published in 1977 (ACAS, 1977), employers in the United Kingdom and other advanced industrial societies have not sufficiently developed their internal disputes procedures to the point where they can dispense with outside help altogether. Indeed, as legislation has brought more pitfalls into the employment arena, there has been a growing need for external forms of dispute resolution; the primary example in Britain being, of course, the industrial tribunal, soon to be re-named the 'employment tribunal'.

Objectives of this thesis:

This study begins by exploring the questions of **fairness** and **effectiveness** (two terms which we shall in due course define) in relation to the industrial tribunal system as it has operated for thirty years in England, Wales and Scotland; and then aims to compare these with other external methods of settling disputes between employees and employers over dismissal. The record of ACAS conciliation and individual arbitration will be assessed, since between them

these procedures account for almost all the cases that are initiated yet which do not proceed to a full industrial tribunal hearing. **Almost** all, because there is a further category of dismissal and other individual disputes between employers and employees, which do not fall to the industrial tribunals to decide. They are those which come within the jurisdiction of the Joint Industry Board for Electrical Contracting Industry (hereafter referred to as the JIB). The examination of the background to, and operation of, the JIB procedures forms the most original part of the following thesis.

Under Section 110 of the Employment Rights Act 1996 there is scope for exemption, by Order of the Secretary of State, for voluntary industry procedures that provide remedies to aggrieved employees broadly similar to the statutory unfair dismissal protection. So far only one such procedure has sought and achieved such exemption; that of the JIB, in October 1979. This exemption has now operated for half the 'lifetime' of the industrial tribunals, and it is timely to consider how effective it has been, in the light of the intentions behind the relevant legislation. It is particularly appropriate to conduct such an enquiry at the present time, when the Department of Trade and Industry, which is currently responsible for legislation concerning individual employment rights, has been considering the available options for the reform of the industrial tribunals. Indeed, the Green Paper ***Resolving Employment Rights Disputes; Options for Reform*** (DoE, 1994) (hereinafter referred to as 'the 1994 Green Paper') invited comment on this very question, citing the instance of the JIB exemption (*ibid.*: para. 4.30).

The objectives may thus be summed up as follows:

1. To describe and critically analyse the institutions and procedures, external to the employer, which are available to an individual in the UK who alleges unfair dismissal. These include the ACAS conciliation, mediation and arbitration services, and forms of arbitration not involving ACAS.
2. To describe how the JIB came to apply in 1979 for its Disputes Procedure to be exempted under legislation, and how the procedure has operated and developed between 1979 and 1994.
3. To evaluate the current effectiveness of the JIB disputes procedure in respect of unfair dismissal cases, including the use of an original survey of recent participants.

Insofar as there is a policy aim underlying the thesis, it is to discover whether there is any special merit, in an industry procedure exempted under Section 110, which might be effectively incorporated into the statutory provisions applying to all employments.

Design of the research:

It will be shown in the following chapter that the 'crisis' in the industrial tribunals is substantial and urgent. The consultation initiated by the publication of the 1994 Green Paper covered not only the procedure and administration of the existing industrial tribunals, but also addressed the question of alternative means for resolving employment rights disputes. The present study, on the other hand, has a focus that is in one sense more limited - in referring only to the unfair dismissal issue - and at the same time more extensive - in that it will attempt to measure the effectiveness of the JIB procedure from the point of view of users and participants.

There are thus two distinct elements in the overall design of the research. The first element addresses the 'track record ' of industrial tribunals and the other mechanisms already available as alternatives to the tribunals, so far as their jurisdiction in unfair dismissal is concerned. This record is essentially contained in the ever-growing literature on tribunals, conciliation and arbitration. The influential research conducted by Linda Dickens and colleagues, of the University of Warwick Industrial Relations Research Unit (Dickens *et al.*, 1985), is particularly relevant here, since it considered the tribunals from the point of view of those who appear before them as applicants or respondents, and also evaluated the effectiveness of ACAS conciliation from the user's perspective. So far as conciliation and arbitration are concerned, some access for interviews has been granted, by ACAS headquarters and a regional office, to those involved in providing these services. The study of Alice Brown into 'consumer satisfaction' in ACAS arbitration has also been a significant reference point (Brown, 1992).

The second key element in the present research concerns the JIB itself, and its unfair dismissal procedure. The JIB is essentially a private organisation, the creature of its constituent parties, the Electrical Contractors' Association and the Electrical Section of the Amalgamated Engineering and Electrical Union (formerly the EETPU). It therefore presents potential problems with access to archives. In particular, the JIB declined to divulge to the author details of past cases which have been heard under the unfair dismissal procedure (other than the names of the parties and the outcome).

In the circumstances, it was considered likely that the history of the JIB, and the process whereby it obtained its exemption order, would be most effectively established by a mix of personal interviews with those involved, and information contained in such correspondence and minutes as could be obtained from the JIB or the parties. Some of the key events took place about thirty years ago, and some influential participants have since died.

The evaluation of the effectiveness of the present procedure clearly required access to those who had made application for the redress of a grievance; and, fortunately, the JIB was willing to act as a conduit between the author and those individuals whose cases were dealt with in the period 1991 to 1994 inclusive (the reasons for selecting this period are explained in Chapter 5). Personal addresses are confidential to the JIB, so the initial approach had to be made through them. The JIB was reluctant to facilitate the arranging of personal interviews with employee participants in the unfair dismissal procedure, for fear of 're-opening' old cases. It did accept, however, that an invitation to make direct contact with the author could be included with the questionnaire.

The provisional intention was to issue a postal survey to these individuals - who number almost 400 - at the same time inviting them to reveal their address to the author should they be willing to be contacted further. This left the option available to conduct a follow-up interview or issue a second questionnaire to willing participants. It was also planned to conduct interviews with JIB national officers and members of Regional Boards Disputes Committees, who had adjudicated upon, or administered, cases under the exempted procedure. These objectives were largely though not wholly achieved (see Chapter 5).

Structure of the Thesis:

Part One of the thesis examines the primary mechanisms which exist to help resolve unfair dismissal disputes in the United Kingdom. The first chapter describes the formation and development of the industrial tribunal system; and in order to assess its effectiveness it was decided to use the criteria which were suggested by the Royal Commission on Trade Unions and Employers' Associations (the 'Donovan Commission) in 1968. It was this Commission which gave the major impetus to the development of the tribunal system, for in paragraph 572 of its report it called for a dispute settlement procedure which: "is easily accessible, informal, speedy and inexpensive, and which gives [the parties] the best possible opportunity of arriving at an amicable settlement of their differences."

In addition to the four principal criteria of effectiveness (accessibility, informality, speed and cost) we shall explore the highly significant question of whether industrial tribunals do indeed provide the 'best possible opportunity' of arriving at an amicable settlement. It is also important to discuss the all-important matter of whether the procedure is 'fair'; for this is a term that was chosen by the legislators of the Industrial Relations Act 1971 to distinguish those dismissals which were to be deemed lawful. The word is frequently linked, in common

parlance, with 'reasonable' - and this term, too, has come to have a special resonance in relation to the operation of the industrial tribunal system.

The second chapter reviews the achievements of the individual conciliation normally offered by ACAS after originating applications have been registered. The COT3 procedure, which has been applied with varying degrees of enthusiasm by conciliation officers is also examined, in order to draw comparison later with the role of JIB national officers under the JIB procedure.

The third chapter examines the current debate about alternative dispute resolution (ADR) insofar as it concerns mediation and arbitration of unfair dismissal claims. These ACAS, and in some instances non-ACAS, interventions have been examined by others, notably Alice Brown (Brown, 1992), and the present research has consciously endeavoured to allow comparison with her findings.

Part Two of the thesis examines the development and operation of the exempted unfair dismissals procedure of the JIB. Chapter four will describe and evaluate the process by which the JIB disputes procedures came into being and operated from 1966 to 1979, when they were amended so as to allow exemption from industrial tribunal procedure. The objectives of the 'founding fathers' of the JIB will be examined, especially in relation to their aspirations in the resolution of individual disputes.

Chapter five, drawing upon statistical analysis and interview data, describes and evaluates the post-exemption operation of the JIB procedure, with particular reference to the role of ACAS, the function of the national officers, the changing attitudes of the EETPU and the ECA, the enforcement of awards, and related matters.

Chapter six explores the participants' perspective through the analysis of the principal survey results, based upon the questionnaire sent to employee and employer participants in the JIB disputes procedure from 1990 to 1994. This is supplemented by information from some of those who are involved in the operation of the JIB disputes procedure at various levels, including JIB officials, ACAS officials and arbitrators.

Part Three of the thesis, chapter seven, summarises the main findings and attempts to draw conclusions pointing towards improved dispute resolution in the United Kingdom as a whole.

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From 1973 to 1978 he was on the staff of the Electrical Contractors' Association, which was and remains a constituent partner in the Joint Industry Board. While employed from 1985 to 1990 as an Industrial Relations Executive with the Engineering Employers London Association, he represented employers in the industrial tribunals, and lectured on management training programmes covering such topics as Disciplinary Procedures, Absence Control and Negotiating Skills.

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PART ONE

Primary Mechanisms for Dispute Resolution in Unfair Dismissal Cases in the UK

CHAPTER ONE:
Individual Dispute Resolution: The Industrial Tribunals in Crisis?

1.1 Origins of the industrial tribunals

There have been provisions in law for the setting up of independent tribunals, to adjudicate upon civil disputes, since the Conciliation Act of 1896, itself partly a consequence of a damaging dispute in the engineering industry. Despite the existence of this mechanism, the prevailing attitude of successive governments until the 1960's was to leave the business of dispute resolution in employment to the parties as far as possible. Voluntary collective bargaining grew to become the cornerstone of the British industrial relations system, and - it might be argued - had some success in resolving many of the kind of issues which now come before industrial tribunals under the unfair dismissal legislation. Indeed, there is some evidence that industrial tribunals have had little or no effect in reducing the proportion of strikes attributable to dismissal and other disciplinary measures (Hepple, 1992: 87).

The industrial tribunals were formally constituted in 1964 in order to adjudicate upon objections raised by employers to the levy payable to Industry Training Boards under the provisions of the Industrial Training Act 1964. They were thus a straightforward extension to the existing range of administrative tribunals, provided under various statutes and operated under the oversight of the Council on Tribunals. In 1957, a Committee of Enquiry under Lord Franks had made proposals for the rationalisation of tribunal practice, and commended their more extensive use due to the special characteristics they brought to the judicial process, *viz.*: 'cheapness, accessibility, freedom from technicality, expedition and expert knowledge' (Franks, 1957: para 406).

There was some evidence of 'civil service thinking' in the efforts of the Ministry of Labour to commend industrial tribunals to the Royal Commission on Trade Unions and Employers' Associations (the Donovan Commission), in the mid 1960's, according to Clark and Wedderburn (1983: 176). The growing influence of the International Labour Office (ILO) and in particular Recommendation 119, agreed in 1963, on the subject of termination of employment, also helped the Donovan Commission to propose the creation of a right of employees not to be unfairly dismissed (1968: para 545). The attitude of the Commission to voluntary procedures is interesting. According to Evans, Goodman and Hargreaves, the Commission: '..concluded that statutory protection was desirable. Amongst other arguments

it suggested that voluntary procedures tended to polarize the remedies as between re-instatement or confirmation of dismissal, and that an additional appropriate remedy, financial compensation, could be provided under statutory machinery' (Evans *et al*, 1985: 4).

This was not so much a party political matter as one might now suppose, for both the Labour Government's 1969 White Paper ***In Place of Strife*** (DEP,1969), and the Conservative policy document ***Fair Deal at Work*** (Conservative Political Centre, 1968) referred to the need for legislation on unfair dismissal, and envisaged some kind of judicial forum to determine claims. When, under the Conservative Secretary of State for Employment Robert Carr, such a right did become part of statute law in 1971, the industrial tribunals were to some extent prepared for their role.

They had already begun to deal with issues touching upon individual employment rights, in that they had been given jurisdiction, under the Redundancy Payments Act 1965, to decide disputes over entitlement to such payments. When first introduced, the redundancy payment scheme was intended to 'level out' the costs of redundancies among all employers, since all paid through the National Insurance contribution into a state redundancy fund, from which they could claim back any redundancy payments made to employees. The redundancy payments scheme is almost unrecognisable thirty years later, but it may perhaps be imagined how such a scheme could be 'milked' by passing off ordinary dismissals as redundancies. On such fertile material did the industrial tribunals cut their teeth in the late 1960's.

Thus the full flowering of the industrial tribunals must be dated to the introduction of the unfair dismissal legislation in 1971, when they were given the responsibility of determining whether dismissals were carried out for an admissible reason, and in accordance with a reasonable procedure. (In fact, though the first cases were heard in 1972, the TUC boycott of all institutions connected with the Industrial Relations Act 1971 limited their role until 1974). The two issues, of the fairness of the reason for the dismissal and the procedural reasonableness involved, have remained at the centre of the debate about the industrial tribunals ever since (Hepple, 1992: 84).

1.2 Jurisdictions of the industrial tribunals

Some fifty-three separate jurisdictions of industrial tribunals are listed in Annex A of the Green Paper (DoE, 1994). Much of this substantial jurisdiction has been brought about since 1980 by successive legislation on trade union and individual rights. Nevertheless, 'unfair dismissal' still accounts for a substantial proportion of the total demand on the industrial tribunals system: in 1993, 62%; in 1994, 57%; in 1995, 44% (ACAS Annual Reports: Table

9). Unfair dismissal, however, incorporates a wide spectrum of occurrences, and there have been attempts to devise a taxonomy of dismissal in order to classify the different approaches that may be taken by industrial tribunals to the disputes that arise from them.

Hugh Collins, in his book ***Justice in Dismissal*** (1992) identifies three principal categories of dismissal which he calls: **discipline** dismissals, **economic** dismissal and **public rights dismissals.** The first category comprises those dismissals that arise out of misconduct or incapability on the part of the employee; and indeed those 'forced resignations' known as **constructive** dismissals which arise from the employee's dissatisfaction with the behaviour of the employer. A critic of Collins, Gwyneth Pitt (1993: 251), argues that this category of dismissals ought to be limited to so-called **fault** dismissal, i.e. where there is an issue of fault or culpability; and should not include the dismissals that arise from sickness and related incapacity.

Collins' second category of dismissals, the 'economic', comprises those which occur because of business changes affecting the capacity of the employer to provide continuing work; in other words, redundancies arising from market conditions, transfer of ownership, changes in technology and so on. Pitt regards these as more properly labelled '**no fault**' dismissals, though the question of whether the redundancy is economically or ethically justified is not, in the present state of the law, a question which industrial tribunals determine. If they did, it might emerge that 'fault' is at times attributable to the less scrupulous employer in such cases!

The third category of dismissal identified by Collins, 'public rights dismissals', relates to those dismissals deemed by society to be carried out for unacceptable reasons. Pitt uses the term '**inadmissible reason**' to classify such dismissals. Dismissals for which the principal reason is race, gender, disability or trade union affiliation (or non-affiliation) are now established by law as automatically unfair. Whether public opinion has yet caught up with the legislators is not the point; the industrial tribunals must interpret the law as it stands in:

Race Relations Act 1975
Sex Discrimination Act 1976, and
Trade Union and Labour Relations (Consolidation) Act 1992
Disability Discrimination Act 1995
Employment Rights Act 1996

The importance of such classification emerges when considering the appropriateness of the constitution and procedure of industrial tribunals to the determination of these three very different types of case. Although this question will be developed later, a hypothetical example may illustrate the point:

The 'lay' members of an industrial tribunal are regarded as providing a degree of expertise in resolving employment disputes; yet the relevance of their expertise will vary considerably. With 'discipline dismissals', their experience of practical industrial relations may give them a special insight into problems of misconduct; whereas with 'public rights dismissal', in which - as previously noted - there is a lag of public acceptance behind the legislative intention of discrimination law, their practical 'experience' may be much less relevant or informing. Tribunal members are expected to undergo training, especially with regard to controversial issues such as harassment, but this may not necessarily be sufficient to help them resolve such complex legal and social matters.

1.3. The composition and organisation of the industrial tribunals

Industrial tribunals normally consist of a legally-qualified chairman* accompanied by two lay members who are appointed from panels of employers and employees drawn up by the Secretary of State for Employment after consultation with bodies such as the Confederation of British Industry (CBI) and the Trades Union Congress (TUC). The chairman, who must be a solicitor or barrister of at least seven years' standing, is appointed by the Lord Chancellor (in England and Wales) on either a full-time or a part-time basis. All lay members are part-time, and generally come from the ranks of retired business people and managers, and retired trade union officials.

The chairmen bear a heavy responsibility for the conduct of the tribunal system, as they make a substantial number of day to day decisions on the eligibility of applications, orders for further particulars, etc. as well as presiding over tribunal hearings themselves. At first sight, the 'productivity' of tribunal chairmen appears to be impressive, and improving. Between 1986/87 and 1993/94, the number of industrial tribunal cases doubled, yet the number of full-time chairmen rose from 74 to only 82 in the same period. Numbers of part-time chairmen rose in slightly greater proportion.

* The term 'Chairman' is used throughout, rather than the currently more acceptable 'Chair' or 'Chairperson', since it is the term used in all official papers about industrial tribunals.

Table 1.1: **Cases Completed, in relation to Numbers of Chairmen**

Year	Cases completed	Full-time Chairmen	Part-time Chairmen
1986/87	12,844	74	134
1993/94	25.659	82	193

Source: DoE, 1994; from Table 3.1

The apparent rise in output has largely occurred because there are now more issues upon which an industrial tribunal chairman is permitted to sit alone. These are normally issues that turn upon legal questions only, having to do with procedure, jurisdictions, exclusions and so on. There are, however, limited provisions for a tribunal to sit on a full hearing with an incomplete complement of members, provided the parties agree (for example, in the case of the illness of a lay tribunal member).

The impact upon 'tribunal productivity' illustrated in the above figures appears to be that more cases could be dealt with if chairmen were permitted to sit alone more frequently. The 1994 Green Paper suggested that there are cases where the 'expertise' of the lay members is of less relevance to the hearing. (DoE, 1994: para 6.38). Whether the effect upon the workload of the industrial tribunals would be significant may be debatable, but there is a more fundamental issue: that by removing lay members from some jurisdictions, the basic notions of justice (for example the test of 'reasonableness', discussed below) which have been established in industrial tribunal practice might be compromised.

In England and Wales the industrial tribunals are organised in eleven regions, each under the supervision of a Regional Chairman, who reports to the President of industrial tribunals. Hearings take place at some two dozen locations spread around the country; usually in specially designed hearing rooms, but very occasionally in hired premises (DoE, 1994: 10). The local tribunal hearings are serviced by a tribunal clerk, an Administrative Officer grade civil servant, who is not legally qualified. At regional office level staff are responsible, among other things, for maintaining case files and 'listing' (i.e. scheduling) hearings in the most cost-effective manner. Care is taken to ensure that lay members are not listed for cases in which they might have a personal interest, and that the duration of a hearing is correctly anticipated in order to avoid lengthy adjournments (*ibid.*: 56).

The ***effectiveness*** of the industrial tribunals system, according to the 'Donovan' criteria set out above, forms the central element of this chapter and will be addressed in some detail.

However, it is appropriate to describe, first, the procedure that an application to the industrial tribunals normally follows.

1.4 Procedure of an unfair dismissal case through the industrial tribunal

The following description is derived from the author's own experience of the industrial tribunals, from various publications of the Department for Education and Employment, the Department of Trade and Industry, and Central Office of Industrial Tribunals, including ITL1, and from ***Industrial Tribunals: Preparing and Presenting your Case*** by John Angel (1984).

1.4.1. Starting the case

In most instances of unfair dismissal there is no doubt as to the ***fact*** of the dismissal, and it thus falls to the aggrieved ex-employee to initiate the industrial tribunal process by submitting an Originating Application, on Form IT1, to the Central Office of Industrial Tribunals (COIT). The application must be received by the COIT not later than three months after the dismissal took place. The form is transmitted by COIT to the Regional Office (ROIT) responsible for the geographical locality where the employer is situated; and a copy of the IT1 is then forwarded by the Regional Office to the employer named therein. Accompanying the originating application is a covering letter (IT2) and a form on which the employer is invited to submit a response to the Application. This form (IT3), when completed, constitutes the employer's Notice of Appearance. At present, fourteen days are allowed to the employer to submit a completed IT3, though, since extensions are frequently granted, it has been suggested that a period of 28 days might be more appropriate, with less flexibility to grant extensions (DoE, 1994: para. 6.83).

From this stage of the procedure, the aggrieved employee becomes known as the **applicant**, and the employer becomes known as the **respondent**. Both may, if they so wish, be represented by another party (for example, a trade union or employers' association official, a friend, or a solicitor) in which case official correspondence about the case is thereafter addressed by the ROIT to the nominated representative.

1.4.2. Conciliation

At this stage, too, the option of conciliation by ACAS is offered to those who are in dispute concerning dismissal. Copies of the IT1 and IT3 are forwarded to the appropriate ACAS office, and a conciliation officer makes contact with the parties in order to establish whether

there is the possibility of a settlement without recourse to a full industrial tribunal hearing. This has been a largely successful procedure, measured by the need to moderate the Tribunals' workload:

Table 1.2: **Proportion of Cases Settled or Withdrawn as a Result of ACAS Conciliation**

Year	Individual Cases referred to ACAS by the Tribunals (A)	Number of cases withdrawn or settled after conciliation (B)	B as a % of A
1978	37,797	21,922	58%
1983	37,123	23,759	64%
1988	44,443	33,874	76%
1993	75,181	47,607	63%

Sources for 1978 and 1983: Dickens et al. 1985: part of Table 6.1: for 1988 and 1993, DoE, 1994: part of Table 3.1

The substantial increase in the number of applications made to industrial tribunals since the early 1990's has evidently placed ACAS under some pressure, in that while striving to ensure that the majority of cases withdrawn or settled, they have not been able to keep pace with the overall rise in industrial tribunal caseload.

Since 1993 it has become possible for an employer and an aggrieved employee to reach a 'compromise agreement', under certain conditions, which will debar the employee from an industrial tribunal application. However, it is too early to say what impact this procedure is having upon the applications statistics. The Conservative government asked, in the 1994 Green Paper, for opinions as to whether persons other than qualified lawyers ought to be deemed suitable to provide the independent advice required to validate a compromise agreement. (This and related issues are discussed further under the general heading of conciliation, which is to form the subject of more detailed analysis in Chapter Two.)

1.4.3. Preliminary stages

If conciliation is unsuccessful, or has not been welcomed by the applicant or respondent, the case will be 'listed' for a full hearing. However, there are two other possible courses of action that can precede a Full Hearing: a Preliminary Hearing or a Pre-Hearing Review.

The **Preliminary Hearing** is conducted, if required, by a chairman sitting alone. Its purpose is to decide whether the subject matter of the application is one which falls within the jurisdiction of the industrial tribunals. It can be held on the initiative of the Regional Chairman, or at the request of either party.

A **Pre-Hearing Review**, however, addresses a different question; that is, whether the case of either of the parties is so weak as to render it highly likely that a full hearing will be a waste of time and expense. Again, a chairman will usually - but not always - sit alone to hear brief oral representations by the parties and consider their written submissions on this question. Witnesses are not called. After considering the cases as presented the chairman is entitled, if he or she thinks fit, to deliver a costs warning (whereby a party is made liable for the costs of the other party if the case is pursued by them despite the warning) and/or to require a party to deposit up to £150 with the industrial tribunal as a condition of pursuing the case.

Each party is entitled to seek further particulars of the other's case - over and above that contained in the IT1 or IT3. If a chairman considers the request reasonable and well-founded, an order will be made and sent to the party of whom information is sought. In exceptional cases, a witness order can be served upon an individual who is required to give relevant evidence at the tribunal hearing, but is reluctant to do so.

In the special instance of dismissal (and other) cases involving alleged race or sex discrimination, the Regional Office will normally send to the respondent employer a questionnaire calling for additional information only relevant to that type of case. The answers to the questionnaire will be made available to the applicant or their representative.

1.4.4. The Full Hearing

Industrial tribunal hearings are almost always public, and are conducted in plain office-type rooms without undue ceremony. Evidence is given on oath or affirmation and is subject to cross-examination, but in other respects the atmosphere is informal. The clerk's function is partly to put the parties at their ease before the hearing begins, and to provide assistance in practical ways to the tribunal members and the participants. There is a continuing debate about whether tribunals actually succeed in achieving informality; and this will be discussed in a later section of this chapter.

The nature of the case, and the allegations being made, will determine which party is invited to state their case first. For example, in most unfair dismissal cases, the employee's dismissal is not in dispute - it is the reason for the dismissal that is in question. In such a case, the

employer will be required to present their case first. If, on the other hand, the employee has resigned alleging 'constructive dismissal' (i.e. behaviour of the employer constituting the equivalent of 'gross misconduct') then it will be for that employee to make out their case first.

Each party normally has an opportunity to state their case, in summary, before calling their witnesses. Here again, however, practice differs from tribunal to tribunal. Some chairmen may encourage parties to begin questioning witnesses immediately, since they already have an outline of the case from the case papers. The familiar 'court-room' process of examination, followed by cross-examination, then re-examination is generally followed, and the tribunal members may intervene at any time to pose questions of their own. Indeed, in cases where a party is self-represented, the chairman may take some pains to assist in bringing out the salient points of their witnesses' evidence. There is an important issue here, which will be explored later in this chapter, and that is the 'adversarial' *versus* the 'investigative' style in which tribunal hearings may be conducted. The Green Paper also sought views on whether there should be a formal move towards a more investigative - or at least interrogative - role on the part of chairmen (DoE, 1994: para 6.103).

Documentary evidence, which can be substantial even in straightforward cases, is generally prepared in 'bundles' by each party, with items numbered in the sequence in which they are to be cited. Tribunals expect that sufficient copies of evidence bundles will be prepared to permit each tribunal member, the witness, and the opposing party to have a copy. Thus, six sets, or 'bundles' or documents need to be prepared by each party, including one for themselves.

If a party wishes to make reference to case law thought to be relevant to the issue at hand, the tribunal should ideally be given the detailed case references in advance of the hearing. If this is done, the tribunal clerk will normally have obtained a copy of the case judgement for the use of the tribunal members. The appropriate juncture at which to argue the relevance of a previous decision is when making a closing statement after the examination of witnesses has been completed - though tribunals are flexible on this matter.

In a straightforward unfair dismissal case, the hearing may take only three or four hours, after which the tribunal will retire to consider their decision. If the disputed issues are complex, however, or the number of witnesses substantial, the hearing may extend over more than one working day. Regional Office staff, who are now quite experienced in estimating hearing durations, endeavour to set aside sufficient time and allocate tribunal members who can hear the case continuously without the need for lengthy adjournments.

1.4.5. The Decision

An industrial tribunal will, when possible, give its decision orally on the day of the hearing and confirm it in writing a few days later. The oral decision need not describe the detailed reasoning of the tribunal, but if either party requests it, the written decision must set out the steps by which the tribunal has reached its decision, the evidence on which the decision is based, the evidence that the tribunal has discounted, and its opinion as to the relevance of the cases cited. It is on the basis of the full written decision that either party may wish to consider an appeal to the Employment Appeal Tribunal.

If a decision in favour of the applicant has been delivered orally, the tribunal will need to consider the remedies available. If the applicant has sought re-instatement or re-engagement, this must be considered first. In practice, however, most tribunals are reluctant to order such re-employment options. Even when the period between the dismissal and the hearing is comparatively short, the breakdown in the employment relationship is frequently considered so serious that it is not practical to 'repair' it. At the present time, when delays of several months occur in bringing a case to hearing, the practicality of re-engagement is even further diminished. This is an issue to which we shall return.

1.4.6. Contribution and Mitigation

There are two significant matters that a tribunal must then consider before determining any monetary compensation. First of all, the tribunal will hear argument, or may ask itself, whether the applicant has in any sense contributed to their own misfortune. In unfair dismissal cases it may be the case that the employee's misconduct, for example, is deemed to be insufficiently serious to warrant dismissal, yet not so trivial as to be ignored when considering the 'justice' of the situation as a whole. Awards of compensation can be very substantially reduced if a tribunal considers an applicant to have been the author of his or her own downfall - even though the dismissal may have been 'technically' unfair.

The applicant will also be expected to have mitigated the circumstance of their unemployment by taking steps to find other work. Tribunals have been known to take a dim view of an individual waiting upon a successful outcome of their tribunal application before applying for another job. Here, too, the tribunal is entitled to reduce the amount of the compensatory award by an amount it thinks just in the circumstances.

1.4.7. Appeals

The parties, having received the decision of the tribunal, have 42 days in which to register an appeal to the Employment Appeal Tribunal, a division of the High Court which normally meets in London and Glasgow. The grounds upon which appeals may be considered are that the industrial tribunal has erred in law in reaching its decision. This might occur in one of three ways:

> a) the tribunal might misinterpret or misunderstand the law, and thus misdirect itself,
> b) the tribunal might make its decision on the basis of inadequate evidence to support its 'findings of fact', or
> c) the tribunal might make a 'perverse decision' which no reasonable tribunal would have done given the information available to it.
>
> (Justice, 1987: 52)

The fact that such rigorous tests of legality are liable to be imposed upon tribunal decisions has contributed to the debate on 'legalism'. We shall examine later what effect this has on the readiness of the parties to make use of legally-qualified representatives in the industrial tribunals. Attempts by the EAT, at various times in its short history, to develop guidelines have generally been short-lived (*ibid.*, 1987: 52). On the one hand the EAT itself is anxious not to weigh down the industrial tribunals with case references, yet if it is not to be a court which can decide matters of law, how can it provide a genuine recourse to appeal? We shall return to this issue later.

1.4.8. Summary

These then are the basic steps by which an application to the industrial tribunals is handled. It is now appropriate to consider the extent to which the 'system' currently meets the criteria that were suggested by the Donovan Commission for its suggested 'labour tribunals', i.e. accessibility, informality, speed (expedition), cheapness, and 'the best possible opportunity for an amicable settlement'. The next following sections deal with each of these in turn, and also the over-riding question of fairness.

1.5. Accessibility

In the field of unfair dismissal, the employer's interest might be thought to be best served by there being no complaint at all; and failing that, by their action of dismissal being held to be justified. Employers, therefore, may be expected to have an attitude to the question of 'accessibility' to the industrial tribunals which is significantly different from that of the

applicant. An aggrieved party is likely to be more enthusiastic about initiating a legal process, of course; though even he or she may be daunted by the prospect of continuing argument, personal and family stress, delay, cost and distraction. Thoughts of 'legalism' may not be uppermost in the mind of the applicant as the IT1 form rests under their pen; their concern is to have access to a means of redress. The Department of Trade and Industry too, finding the workload of the industrial tribunals growing in geometric progression, may be thought to have doubts on the question of enhanced access to the tribunal system. Indeed, much of the Green Paper was devoted to exploring means by which intending applicants could either be diverted into other channels of recourse, or have their cases despatched with less ceremony and delay (DoE, 1994: 54).

In fairness, there are more principled objections to ease of access than those of cost, inconvenience or workload alone. It is undoubtedly desirable that any unfair dismissal case be addressed, and preferably resolved, as close as possible to the locus of dispute. It is preferable that established procedures within companies and industries should be fully utilised before the judicial system of the state is brought into play. So the question arises: "should it be **easy** to make and pursue an application to the industrial tribunals?" In their study, Dickens *et al* made their assessment of the effectiveness of industrial tribunals against the yardstick of the Franks Committee, and addressed the issue of accessibility under three headings: knowledge of the right to apply, cost (the absence of, to the parties), and representation (lack of need for) (Dickens *et al*, 1985: ch. 7). The question of cost also arises, of course, under the Donovan criteria. We will ask similar questions, and also ask what grounds there are upon which an applicant may be ***denied*** access to the industrial tribunals.

1.5.1. Awareness of the Applicant's rights

It is a principle of natural justice, enshrined (in this field) in Paragraph 10 of the ACAS Code of Practice on Disciplinary Procedures (ACAS, 1977), that an individual in peril of disciplinary sanction should have the right to be heard, and if they wish, represented in an investigatory hearing. Having received such a hearing, it is also appropriate that they should have a right of appeal to a higher authority.

When the industrial tribunals first had jurisdiction over unfair dismissal cases, they sometimes exercised a discretion, allowed them under the regulations, to admit applications that were time-barred through having been received after the then four-week time-limit. It was believed for several years after the 1971 Act that the 'man in the street' might not be aware of his right to complain of unfair dismissal, and more particularly, that he had to initiate a complaint within a short period of the effective date of termination of employment. After 1974 the

period was increased to three months, and now such discretion to extend the time limit beyond three months is rarely if ever exercised (Dickens *et al.*, 1985: 13). It now thought that every employed person has a general understanding of their right not to be unfairly dismissed and to have recourse to an industrial tribunal. However, it is one thing to be aware of one's rights, and quite another to decide to pursue them.

A person who becomes unemployed is normally expected to register as such with their local Job Centre. It is here that many individuals become aware - through the availability of leaflets (such as the 'PL' series, Department of Employment) - that they may have a right of complaint about their dismissal. As the absolute number of trade union members continued to decline in the nineteen-eighties, it was perhaps not surprising that fewer and fewer employees availed themselves of the internal procedures for appeal that had been established in some industries through collective bargaining. The Donovan Commission believed that the future lay in such joint, internal procedures (1968: para 540). However, although formal disciplinary procedures now exist in a substantial majority of employments (Dickens *et al.*, 1985: Table 8.2) (see also Millward *et al.*, 1992: 187) there is no obligation upon employees to pursue their grievance through internal channels.

It may be thought that tribunal chairmen frown upon an applicant who has wilfully by-passed internal procedures in order to 'have his day in court', but there is little except anecdotal evidence and the occasional ruling of 'failure to mitigate loss' in support. (The author recalls a 1975 industrial tribunal case in London in which the applicant had declined to take part in a 'works conference' under the engineering industry procedure, preferring to submit an industrial tribunal application in which he was represented by his daughter, a trainee barrister. He lost his case). However, the ***employer's*** diligence in following these procedures is, of course, highly germane to the 'reasonableness' of their behaviour; and procedural irregularities can in themselves lead to employers losing unfair dismissal cases in the industrial tribunals.

Another question therefore arises: 'Should an applicant's use (or avoidance of) available in-company procedures be taken into account by an industrial tribunal?' More significantly, perhaps, should an applicant be denied access to the tribunal until they have used available internal procedures? The 1994 Green Paper, again, refers to this issue: 'The Government invites views on whether the industrial tribunals should be more explicitly required to take into account - in deciding cases and the level of any compensation - whether the applicant has sought to take up the issue with his/her employer before making a tribunal claim (para. 4.20). The question is particularly relevant to the present thesis, which seeks to discover *inter alia* whether there is special merit in an industry procedure exempted from the statutory system.

It has occasionally been alleged by right-of-centre politicians that staff at Department of Employment Job Centres actively draw the attention of newly-unemployed persons to their right to complain of unfair dismissal. Such allegations are difficult to prove or deny, since literature explaining individual rights is usually on open display. But if it is considered right to ensure that government and ACAS publications urging 'good practice' in employment be regularly updated and widely distributed (*ibid*: para. 4.11), then it may also be thought right and proper to ensure that information on industrial tribunals is easily available to potential applicants, and even that it be offered to the newly unemployed as a matter of course.

1.5.2. The question of cost

A second significant factor in measuring the ***accessibility*** of industrial tribunals is the fact that they are, in most cases, free of cost to both parties. That is, each party meets its own expenses, and the cost of actually administering the tribunal office and conducting the hearing falls to the State. There is a risk, of course, that this could become a licence to the 'trouble-making' ex-employee to cause maximum discomfiture to their former employer at no real cost to themselves.

The introduction of the basic award in the Employment Protection Act 1975, with a minimum of two week's pay awarded even in cases where the 'unfairness' arose only from a procedural fault, made it even more likely, in the eyes of some, that maverick employees would initiate cases for the least reason - having little to lose, and the possibility of at least a basic award (see, for instance, the opinion of the House of Lords in the case *Devis and Sons Ltd. v Atkins* [1977] IRLR 314).

In fact, of course, no industrial tribunal hearing is without some cost to both of the parties involved. Whether or not professional representation is used, there may be expenses and inconveniences (other than travelling costs, subsistence and loss of earnings up to a limit, which are recoverable from the tribunal office) which may influence the parties in their decision to contest the case. Every case is so different that it is probably impossible to generalise about the 'accounting' that goes on in the minds of participants at various stages of the tribunal process. Nevertheless, it is unquestionably desirable for the public purse not to have to meet the cost of cases that have no merit, or which are pursued solely for frivolous or vexatious reasons. The principle of 'no cost' was therefore modified progressively by Conservative administrations in the 1980's and 1990's, to the point (after 1993) where, following a pre-hearing review, a deposit of up to £150 can be required of a party whose case is thought to be decidedly weak or ill-founded (DoE, 1994: 38).

Furthermore, since 1980 there has been provision in the regulations whereby the party with the poor case can also be put on warning that, should they lose their case at a full hearing, they will be liable to pay the expenses of the other party. In extremely rare cases, a person who persists in making unwarranted applications to the industrial tribunals can be declared a 'vexatious litigant' by the High Court, and their civil rights effectively withdrawn; a substantial 'cost' indeed! The Warwick investigators found (Dickens *et al.*, 1985: 184/186) that neither applicants' nor respondents' views on the outcome of their case was significantly affected by the costs they incurred. In other words, the cost of fighting the case did not on its own determine their level of satisfaction with the tribunal's decision. The major determinant was, naturally, whether they won or lost; a fact which itself brought costs and/or financial benefits!

1.5.3. Representation

Ever since industrial tribunals have been adjudicating on individual employment rights, it has been considered appropriate for parties to have the right to represent themselves at hearings. The first industrial tribunal regulations in 1965 made this clear. Access is thus not denied to those who cannot afford the services of a solicitor or barrister, nor those who are not members of trade unions or employers' associations and hence cannot have the assistance of experienced officials. This feature has remained a key element of industrial tribunal practice, despite considerable misgivings about the effect of the presence of lawyers upon the formality and length of proceedings. Some commentators have attributed the supposed evils of 'legalism' in the tribunals largely to the effect of professional representation (for example, the ACAS Annual Report for 1984, quoted in Leslie, 1985: 385). The meaning of 'legalism' is explored further in the next sub-section.

For several years in the 1980's there were signs of a growing trend for parties to retain the services of lawyers for preparation and advocacy; indeed, the evidence was that such a tactic brought a good chance of a successful outcome:

Table 1.3: **Success Rate (%) by Type of Representation, in the Industrial Tribunals 1989/90 and from 1993-1995**

Representation: Applicant v Respondent	**1989/ 1990**		**1993/ 1994**	**1994/ 1995**
Self v Self	48.8		60.3	56.7
Self v Legal	30.4		32.3	26.7
Self v Other	39.8		56.3	55.2
TU v Self	61.4		50.5	46.3
TU v Legal	35.6		34.9	27.7
TU v Other	46.4		42.6	61.6
Legal v Self	59.2		64.1	60.5
Legal v Legal	39.8		49.0	48.8
Legal v Other	51.7		63.9	54.5
Other v Self	58.3		66.6	63.9
Other v Legal	38.2		38.8	32.5
Other v Other	41.7		51.4	44.9

Source: IRLIB, 1991: 14, and 1996: 15

This data illustrates how a significantly higher success rate occurs for applicants in cases where they are legally represented; yet the success rate is always diminished when the respondent is legally represented. The consequence has inevitably been a gradual rise in the proportion of participants making use of legal representation - at least until the last five years. According to the 1994 Green Paper there was a substantial ***drop*** in the percentage of applicants who were legally represented, from 33% in 1987/88 to 19% by 1992/93 (para. 6.3). However, the absolute number of applicants who were legally represented grew over the same period by 13.5%; demonstrating how the very rapid growth in industrial tribunal application numbers in recent years has confused the picture. Clearly there is a limited number of persons capable of providing appropriate legal representation, and they are not keeping pace with growing demand. One may conclude that the bogey of 'legalism' (if measured in terms of the trend in absolute numbers for parties to be legally represented) is not in fact on the retreat.

If, therefore, access to the industrial tribunals is inhibited by a perceived need for applicants to have legal assistance, we must acknowledge that there is a problem to be addressed. People are bound to be discouraged from seeking redress for their grievance if they believe (and the

data seems to support this) that their application will be stand less chance of success without costly legal representation. There may be a case here for the legally-qualified specialists in industrial tribunals to adopt the 'no win - no fee' approach used in the United States.

The underlying question is whether applicants (or, indeed, respondents) have a right to expect that their case will be objectively and fairly examined regardless of their own skills of advocacy. Should tribunal chairmen be encouraged to take a more pro-active role in teasing out the evidence in a hearing? Should they receive licence to adopt an interrogatory approach themselves, rather than leave the parties to pursue an adversarial course, as at present. Since this touches upon the matter of procedural informality, we will return to this issue in the following section.

Finally, on the issue of access, a few words about ***denial*** of access are appropriate. Rule 7 of the current Industrial Tribunal Regulations provides the basis upon which cases may discouraged at a pre-hearing review. Such reviews may be conducted by a chairman sitting alone, and it is conceivable that an applicant may be prevented from pursuing a ***justified*** case after a stern warning from such a chairman. A denial of the applicant's rights could thus be perpetrated. Yet the Conservative government, in the 1994 Green Paper, suggested that such pre-hearing reviews be given power to formally strike out claims thought to have no prospect of success (para. 6.21). This would, perhaps, involve a chairman sitting alone, making a decision not on purely legal matters but on the presented facts at issue; and there could be an even greater risk of a miscarriage of justice as a result.

1.5.4. Legalism.

Writing in the ***Employment Gazette*** in September 1985, William Leslie, a Scottish industrial tribunal chairman suggested that 'legalism' was a word which 'would have delighted Humpty Dumpty, because it means just what the user chooses it to mean' (Leslie, 1985: 357). It is certainly a term that is open to wide interpretation, though in the present thesis it is taken to encompass **all the complexities and trappings of legal formality which the lay individual perceives and experiences in the process of law.** Thus it may include the issue just examined, of whether it is prudent to use the services of legally-qualified advocates, as well as the issues of procedural formality and the excessive recourse to case law and appeals to higher courts.

There is no avoiding the fact that the industrial tribunals are part of the legal system. As Leslie comments: 'Even if all lawyers were banished from industrial tribunals, the law would still remain' (Leslie, 1985: 358). And since industrial tribunals are bound to follow the

decisions of the Employment Appeal Tribunal and higher courts, it will inevitably be necessary for applicants and respondents to conduct research into relevant precedent, and draw it to the tribunal's attention (see Munday, 1981). Two points are made by Leslie, however, which have a bearing upon the present research; namely that industrial tribunals can and should be 'flexible' and, at times, prepared to find a 'necessary compromise' (Leslie, 1985: 359). It is one of the hallmarks of an internal disputes procedure that the parties are attempting to restore a broken relationship and find a means of 'living together'. As we shall see, the JIB procedure is substantially more successful than the industrial tribunals in achieving re-employment of a dismissed person (Rico, 1986). Leslie - as a practising chairman - seems to be making the point that industrial tribunals don't have to be legalistic or rigid; he argues that tribunals should not treat EAT guidelines, or Codes of Practice, as 'rules of law' (Leslie, 1985: 361).

1.6. Informality

The industrial tribunals were always intended to be informal, and from the outset have eschewed the visible trappings of other law courts - such as the wearing of wigs and gowns, the exclusion of witnesses until they give testimony, and the verbatim recording of evidence. Nevertheless, almost half of all applicants surveyed by Dickens *et al.* found the tribunal hearing to have too much legal jargon, and disagreed with a statement that the hearing was 'relaxed and informal' (Dickens *et al.*, 1985: table 7.2). Formality is suggested not just by outward appearance but by the comparative inflexibility of procedure, the language used (or forbidden!), the technicality of case law, the attitude of the tribunal members, their readiness (or lack of readiness) to admit humour, the swearing of oaths, and so on.

It is appropriate at this point to emphasise one of the key differences between an industrial tribunal and other forms of law court; that is, the standard of proof called for in tribunal proceedings. Whereas a court determining a criminal case has to establish ***beyond reasonable doubt*** that the accused is guilty, an industrial tribunal is concerned with equity, the 'balance of probability', and - most of all - the ***reasonableness*** of the employer's actions (see, for example, the case of *Monie v Coral Racing* [1979] IRLR 54). In deciding whether the employer acted within the so-called 'band of reasonableness' (*British Leyland (UK) v Swift* [1981] IRLR 91, CA) to the situation, the industrial tribunal inevitably has a degree of flexibility that a criminal court does not have. The very justification for the presence of the lay members is to provide the tribunal with experience and practical wisdom so as to clarify what constitutes the reasonable response of a reasonable employer. The issue of formality in proceedings is bound up with the debate about the 'industrial relations' standard that is said to apply in the industrial tribunals. How even-handed is this standard, some have asked, if it

serves to judge 'reasonableness' essentially from the employer's standpoint? Lewis and Clark argue that the 'historical social function of the employment contract has been to legitimate managerial power' (1993: 8). We shall return to this issue later.

Dickens *et al.* made their assessment of the 'efficiency' of industrial tribunals against the slightly different yardstick of the Franks Committee's definition of the ideal characteristics of a tribunal, i.e. that they should offer: 'cheapness, accessibility, freedom from technicality, expedition and expert knowledge'. The term 'freedom from technicality' is broadly comparable to the notion of informality, which this section addresses. There is an inevitable tension between the need to avoid intimidating participants (especially those representing themselves) and maintaining the dignity of the judicial process. Perhaps the fear of intimidation is overstated, however. Leslie emphasises the efforts that most of his colleagues make to ensure that tribunal procedure is not unduly daunting (Leslie, 1985: 359); but he also comments that, for example, the placing of witnesses on oath can have a salutary effect upon some (though not the determined liar). The formality of an industrial tribunal may therefore have a certain 'face validity' in convincing the applicant that his or her complaint is being taken seriously; is being treated with appropriate solemnity.

A proper sense of order need not be inimical to flexibility, provided there are safeguards encouraging a consistency of practice among chairmen. The regulations do allow considerable flexibility to the chairman in the ordering of tribunal procedure, and the admissibility of evidence. Even in such mundane matters as the recording of evidence, the author has seen widely varying practice - from the chairmen who insist on recording virtually every word in longhand, to the chairman who tapped away continuously on a laptop computer!

Yet there have been growing efforts over the years to increase the extent to which tribunal chairmen 'sing from the same hymn-sheet'. In England and Wales, the Council of Industrial Tribunal Chairmen exists both to promote the professional interests of chairmen and also to encourage exchange of experiences, consistency of practice and understanding of new jurisdictions. There is an equivalent organisation in Scotland; and, of course, the Presidents of industrial tribunals - north and south of the border - have a responsibility to ensure consistency and fairness in the conduct and administration of industrial tribunals.

To some applicants the daunting formality begins with the paperwork that precedes a hearing. The problem of legal jargon has long been recognised in the advisory booklets published by the Department of Employment to explain industrial tribunal procedure. The conservative government believed, however, that there was further to go in this regard. The Green Paper indicated (DoE, 1994: para. 6.49) that there would be more 'user-friendly' literature made

available, and a training video commissioned. A telephone helpline, already available to applicants and respondents, was to be more widely publicised.

The overall conclusion that may be drawn from this brief discussion is that, in terms of informality, such problems as may exist are well-recognised and are stimulating continuing effort to simplify and clarify procedure without losing the ***gravitas*** which must inevitably surround the process of adjudication.

1.7. Speed, or 'Expedition', of the Tribunal Process

Here we turn to a factor on which the industrial tribunals are now clearly vulnerable. According to the 1994 Green Paper, the proportion of cases in England and Wales that reach the stage of a first hearing within 26 weeks of the originating application had fallen from 80% in 1991/92 to 54% in 1993/94 (DoE, 1994: para. 3.12). The figures varied very substantially from one Regional Office to another, but the overall picture was depressing. In view of the extensions of the industrial tribunal jurisdictions, and the recent growth in numbers of applications, however, the change is hardly surprising. When, in the late 1980's, the writer was professionally engaged in industrial tribunal representation work, a typical case would be listed for a hearing within three or four months of the originating application. Even then, it was unusual for an applicant to be re-employed if successful at the tribunal. The industrial tribunal statistics for 1992/93 show that only 1.6% of successful applicants are re-engaged or re-instated. (DoE, 1993: 528). It could be argued that a major factor in the reluctance of industrial tribunals to order re-employment is the fact that the delay in deciding the case has allowed the employer-employee relationship (such as it was) to break down completely (for a full treatment of the issue of re-employment, see Dickens *et al*, 1981). Advocates of alternative methods of dispute resolution frequently argue that dealing with a dispute ***close to the scene and quickly*** will provide the best chance of a repaired relationship between the employer and the employee. Clark and Lewis, for example, in an article in 'Personnel Management' write '.. arbitrated claims would be more likely to be processed speedily, economically, informally and - insofar as the remedy of reinstatement might be given a more realistic chance - with greater justice to the individual' (1992: 39).

Another consequence of delay is that the entire process is almost unavoidably more costly, to the parties involved and to the state. The parties may be retaining costly legal advisers, ACAS will be retaining the file on the 'active list' of a conciliation officer, the staff at the regional office of industrial tribunals will have the case-file open for a longer period, and the applicant may well be unemployed and receiving benefit for an extended period. Memories will fade, yet emotions may well become entrenched and attitudes polarised by delays in bringing a case

to hearing. The interests of justice can hardly be served by such a state of affairs, and it ill behoves an industrial tribunal to criticise an employer (as sometimes occurs) for a tardy or inadequate disciplinary procedure, when its own processes are unduly prolonged.

The Conservative government's response to the problem, outlined in Chapter 3 of the 1994 Green Paper, was to set the Tribunals a series of service standards to meet, at the same time limiting the financial resources available. The only way of squaring this particular circle was to find ways of short-cutting the processes that had been established to provide employment rights protections. Can this be accomplished without compromising on basic concepts of 'natural justice'? Many consider that it cannot. Some will find support in this situation for the proposal that completely new methods should be found to take cases outside the purview of the industrial tribunals. To this we shall return in the succeeding pages.

1.8. The cost of the Tribunals to the Parties.

The question of cost is a complex one, involving not just the parties; and we have already introduced the issue in 1.5.2. In arguing for labour tribunals that would be 'inexpensive' the Donovan Commission probably had the interests of the parties more at the centre of its thinking than those of central government. Yet a strong emphasis of the 1994 Green Paper was upon the overall cost of the industrial tribunals and the conciliation services of ACAS.

We were told, for example, that the total expenditure, in the year 1993/94, on the operation of industrial tribunals amounted to almost £25 million. In administrative terms, however, this represents something of a fiscal triumph. In the year 1986/87 the caseload was about half the level of 1993/94, yet the expenditure in 1986/87 was 75 per cent of that in 1993/94. In 1979/80 the average cost of a day's hearing was quoted by Dickens as £266 (Dickens *et al.*, 1985:183). By the year 1988/89, however, the cost per completed case (not the same thing as a day's hearing, of course) was given as £1572. This figure has since fallen to £966. The cost per completed case (which the government sees as a key measure of efficiency) has fallen in most recent years.

From the point of view of participants, the costs of industrial tribunals are not insignificant. A Department of Employment survey of cases arising in 1990 and 1991, published in the ***Employment Gazette*** of January 1994, showed that the *median* cost to the employer (respondent) of unfair dismissal cases, including all outcomes, was £1845. The median cost of industrial tribunal claims brought but withdrawn before a hearing (all jurisdictions) was £499, while the median cost of those claims which were upheld by the tribunal was £2874. These costs include the costs of representation (if any), the time spent in preparation, **and of any**

awards made (Tremlett & Banerji, 1994: 26). By contrast, the median cost to applicants in unfair dismissal cases measured in the same survey was found to be £57 (*ibid.*: 27).

These figures should be placed in context beside those derived by the Warwick team in their extensive survey of 1976/1977 tribunal cases (on which the book 'Dismissed' was based). Though not strictly comparable, not least since **it does not include any award made**, the *average* total cost incurred by the 433 respondents surveyed was only £130. The equivalent figure for applicants in 1977 was £40, on a sample size of 429 (Dickens *et al.*, 1985: Table 7.1).

By any standards, an expenditure of £57 in 1994 could not be regarded as excessive, since it represents approximately a week's unemployment benefit or Statutory Sickness Pay. It could thus be argued that, if nothing else, the industrial tribunals have maintained the objective of being inexpensive from the applicant's point of view. Respondents are less likely to be impressed by the statistics, and a figure of £2874 as the median cost of a defeat in the industrial tribunal would be seen as a major blow - particularly to small employers, who figure disproportionately among tribunal respondents (DoE, 1994(a): 22).

1.9. The 'best opportunity of amicable settlement'.

We have reviewed the current state of industrial tribunals in relation to the first four criteria usually associated with the Donovan Commission's 'prescription' for labour tribunals; and we now turn to the fifth, i.e. that tribunals should 'give [the parties] the best possible opportunity of arriving at an amicable settlement of their differences'. This is bound up with the issues of reasonableness and fairness, as well as the foregoing matters of accessibility and the likelihood of re-employment, already discussed.

What, it might be thought, **is** an 'amicable settlement' in terms of unfair dismissal? If a crisis in the employment relationship has reached the stage when internal procedures cannot repair it, can there be any kind of amicable settlement other than a parting of the ways and a financial reckoning? The answer surely centres upon the cause of the breakdown in the employment relationship, and whether that cause places either party at fault.

If, for example, the termination of employment arises for one of the reasons that Collins calls 'economic' and for which Pitt prefers the term 'no fault', then there will no question of re-employment and an 'amicable settlement' can only involve financial compensation to the dismissed employee. Such dismissals, say for reasons of redundancy, can become 'fault dismissals' if the employer has breached procedural rules or conventions; but this can serve

only to increase the compensation, since the job is no longer there to be restored to the employee.

The question is, do the industrial tribunals, as presently constituted, provide the **best** mechanism whereby such distinctions can be made, and fairness achieved? They certainly provide one mechanism for establishing the cause of a dismissal, and for attributing any fault involved. But they are not ideally equipped for providing a settlement which serves the best interests of both parties. In their examination of the reasons for the low level of re-employment of successful applicants, Dickens *et al.* point out that the tribunals tend to look at the question from the employer's perspective, despite the fact that the statute enjoins them not do so. "in practice they appear to be willing to order re-employment only in cases where the employer seems willing to countenance it or where there are special circumstances relating to the applicant ... which serve to underline the inadequacy of compensation as a remedy' (Dickens *et al.*, 1981: 169). We have already referred (page 34) to the tendency of the employment contract to legitimate the power of the employer, and to the subtle influence this has upon the tribunals in applying the 'test of reasonableness'.

It may well be in the interests of a successful applicant to be re-employed, if only temporarily, rather than be 'tarred with the brush' of being an awkward individual, currently unemployed. There would be 'fairness' in requiring the unsuccessful respondent to cope with the embarrassment of re-employment. The statute (now the Employment Rights Act 1996. s.113) provides for tribunals to order, not merely recommend, re-employment against an employer, and some discomfort to him may necessarily result' (Dickens *et al.*, 1981:168).

An amicable settlement of differences, in the plain meaning of the words, suggests that parties come to agreement, no longer differ, and restore friendly discourse. This can only occur if the contract of employment continues or resumes, on the same or similar terms, or if the parties mutually agree to part on specific terms. In short, an amicable solution to a dismissal dispute will be a 'reasonable' one, applying not a legalistic formula but a pragmatic and balanced analysis of the issues. In the next chapter we shall examine the arguments that arbitration can and does provide a means of achieving such outcomes, at far less cost and with much less formality than the industrial tribunals. And in the following chapters, we shall also examine the claim that the JIB procedure has provided a similar mechanism to achieve mutuality of interest between employers and employees involved in disputes over dismissal.

1.10. Summary.

This chapter has attempted to describe the current situation in the industrial tribunals at the point in time when successive governments have been seriously considering major revisions in the law and practice of dispute resolution. It has examined whether the industrial tribunals have achieved the aims set out for them in the proposals of the Donovan Commission, and assessed critical reviews of the tribunals' record from a variety of sources. It concludes that tribunals have fulfilled to varying degrees their objectives of providing an accessible, informal and inexpensive mechanism for the redress of unfair dismissal from the point of view of applicants, though in respect of respondents the tribunals could not be described as inexpensive. However, both parties are now subject to substantially longer delays in settlement of cases than was the situation in the early days of the tribunals, largely because of the increase in caseload.

In relation to the key question of whether industrial tribunals provide the **best** means of achieving an amicable settlement of an unfair dismissal dispute, the answer must be a provisional 'no'.

CHAPTER TWO:
Conciliation as a Form of Alternative Dispute Resolution

2.1 Introduction:

In this chapter we begin our examination of the existing alternatives to the industrial tribunals in the external resolution of employment disputes, in particular those concerning unfair dismissal. Under current British legislation these alternatives comprise the processes of conciliation, mediation and arbitration undertaken by or through the Advisory, Conciliation and Arbitration Service, together with significant non-ACAS variations. Consideration of these methods of 'alternative dispute resolution' is timely, insofar as there is an urgency in the search for ways of reducing the industrial tribunal workload, as expressed in the Green Paper (DoE, 1994: para. 1.6). The substantial amount of individual conciliation now undertaken by ACAS has led to an extension of scope for methods of settlement that do not involve ACAS at all, such as compromise agreements. A discussion of these approaches is relevant because the dismissal procedure which is the focus of the present research, that of the Joint Industry Board for the Electrical Contracting Industry, contains an element which is analogous to ACAS individual conciliation (i.e. the role of the National Officer), and actually utilises ACAS arbitration as a final stage.

This chapter therefore describes what conciliation, in its various forms, amounts to; how it comes to be used in unfair dismissal cases; who carries out the conciliation; and how successful it is, from the point of view of the disputing parties and as a means of reducing tribunal workload. The effectiveness of the conciliation method will be assessed in terms of the ACAS description of individual conciliation as being: 'voluntary, impartial, confidential, free of charge, and independent of the industrial tribunals' (ACAS, 1995: 1).

It is necessary, first of all, to distinguish the three processes which form the cornerstone of the principal alternative dispute resolution methods, as follows:

Conciliation in individual, as opposed to collective disputes involves the parties agreeing to use an independent third party, (in the UK employment scene, the ACAS conciliation officer), as a conduit or facilitator, with a view to establishing common ground on the points at issue and promoting a settlement by the parties themselves without the need for a tribunal hearing.

Arbitration (the subject of the next chapter) takes place when disputing parties, who have reached a deadlock, agree to refer a defined dispute to an experienced arbitrator, who will

hear submissions, examine evidence and question the parties before making a determination of the issue which the parties have agreed in advance to accept.

Mediation is a less-frequently used procedure in the employment field, in which the process is similar to arbitration, but where an independent mediator makes proposals and/or non-binding recommendations to help resolve the matter in dispute. It is important to understand that a mediator does not make a binding decision, ruling or determination on the issues; the actual settlement of the dispute remains a matter for the parties. Mediation may thus be seen as a 'half-way house' between conciliation and arbitration.

2.2 Historical and Legal background

The legal right to pursue a claim of unfair dismissal through an industrial tribunal did not, as has been seen, appear from nowhere in 1971. Alongside the contractual right of an employee, to complain of 'wrongful dismissal' in the ordinary courts when deprived of employment in breach of the contract's terms, there had also been established, through collective bargaining, a number of non-legal protections against arbitrary behaviour on the part of employers. These 'voluntary' protections were patchy, however, since substantial numbers of employed people remained outside unionised or 'organised' industries. And the reality of the protection was variable, since trade unions were not equally capable of pursuing their members' rights. Where their bargaining power was weak, they could not always achieve redress for the unfairly dismissed employee.

In the industries and business sectors with the most firmly established collective bargaining arrangements, there were (and in many instances there remain) procedural agreements which operated in the enterprise and beyond, to resolve disputes which might arise - including those concerning discipline and dismissal. Joint Industrial Councils were structured upon the lines recommended by the Whitley Committee towards the end of the First World War (Whitley, 1917, 1918); and less formal National Joint Industrial Committees usually established processes whereby disputes could be aired and resolved without recourse to industrial action (i.e. the application of 'power-play' sanctions by either the employer, the trade union or the employees).

Such disputes procedures were frequently the subject of academic study, for example in the mid-1960's in the Donovan Commission's Research Paper No. 2 (Marsh and McCarthy, 1966). A frequent feature of the longest-established agreements and those in the largest industries was the provision of some form of ***conciliation*** by parties external to the dispute. At the same time, Marsh and McCarthy acknowledged that the terms 'mediation' and

'conciliation' were "difficult to separate from one another and are [...] used differently in different contexts" (*ibid*: Part 1, para. 27). In the Engineering Industry, for example, the 1922 'Procedure for the Avoidance of Disputes' provided that a dispute which could not be resolved locally (including disputes over the dismissal of an individual) would be referred first to a 'works conference' which took place on the employer's premises, yet involving two 'new minds' - an employers' association official and a full-time trade union officer. If they, too, could not resolve the question, a further appeal was made to a wider forum still, in the setting of a 'local conference'.

For historical reasons, this stage in the engineering industry procedure involved the parties putting the dispute before a small panel of ***other engineering employers*** in the locality or region. Such a procedure was manifestly not neutral; but it survived nonetheless until the 1980's. It could only be said to involve a process of conciliation at the 'works conference' stage, where the parties themselves were still fully engaged in the negotiation of a solution to the dispute, and could respond immediately to the conciliating endeavours of the trade union and employers' association officials brought in from outside. At the 'local conference' stage, the procedure became essentially an adjudication. At no stage was an independent third party involved. Even the final stage of the engineering procedure, the so-called 'York' conference, was still exclusively a creature of the parties to the agreement. Council members of the Engineering Employers Federation, and national officials of the trade unions which comprised the Confederation of Shipbuilding and Engineering Unions (CSEU), would meet in York to seek to resolve the most intractable of disputes. In practice, they almost invariably referred issues back to the local conference stage.

Although the voluntary industry procedures developed over the last 100 years have seldom provided for a strictly neutral outsider to become involved, there was nonetheless a strong 'conciliating' element in many of those established. As to statutorily-based conciliation, the Conciliation Act 1896 was itself a product of major industrial disputes and of the deliberations of the Royal Commission on Labour, which reported in 1894 (Mumford, 1996: 292). It established a 'voluntary' machinery by means of which the government could appoint a conciliator, or a panel of three conciliators (or indeed an arbitrator if the parties agreed) to help resolve collective disputes which threatened significant economic disruption. All previous legislative provision for compulsory binding arbitration, some of it dating from the eighteenth century, was repealed at this time. For example, the Cotton Arbitration Act 1800 and the Arbitration Act 1824 had allowed for 'referees to arbitrate in disputes and make legally binding pay awards'. In the Nottingham hosiery industry and elsewhere, from about the 1860's there were formed 'Boards of Conciliation' representative of both sides of industry and empowered to determine wages and settle disputes. What took their place after the

Conciliation Act 1896 was a machinery operated by the Board of Trade through a Labour Department. The purpose of the legislation was, *inter alia*, to achieve 'amicable settlements', a phrase echoed in pages of the Donovan Commission report. According to the Industrial Relations Handbook, published by ACAS in 1980, the conciliation machinery set up in the 1890's was generally used only in major disputes, while 'the arbitration facilities tended to be used in smaller disputes which had not involved a stoppage of work' (ACAS, 1980: 25).

From 1916 the powers of the Board of Trade in these matters became the responsibility of the Ministry of Labour and its successors. During the Second World War the voluntary arbitration and conciliation service was augmented by the provision of an advisory service to both employers and trade unions, and the conciliation function became an established part of the response of governments to major disputes. In the 1950's and 1960's the Ministry of Labour found it necessary from time to time to appoint a conciliator (frequently Sir Jack Scamp) in the motor manufacturing industry, to help resolve a number of crippling disputes.

From 1960 the Ministry's services became known as the Industrial Relations Service; in 1969 it was renamed the Manpower and Productivity Service, and three years later, the Conciliation and Advisory Service (CAS). The independence of this highly important service was ultimately achieved in 1974, since it became extremely difficult for government conciliators to retain credibility during the period of the 1972-74 incomes policy. The independent service was renamed again, this time adding 'arbitration' to its title; and the ACAS we know today was given a statutory basis in the Employment Protection Act 1975, now contained in s. 247 of the Trade Union and Labour Relations (Consolidation) Act 1993. From 1975 the government effectively gave up its powers to impose a conciliator upon the parties to an industrial dispute, since:

> its functions, and those of its officers and servants, shall be performed on behalf of the Crown, but not so as to make it subject to directions of any kind from any Minister of the Crown as to the manner in which it is to exercise its functions under any enactment. (TULR(C)A 1993, s 247(3))

2.3. Conciliation: definitions and distinctions

The usage of the term 'conciliation' has altered subtly since the Conciliation Act 1896. As indicated above, its early use was largely in relation to collective disputes. Moreover, the term did not necessarily hold the implication of an independent third-party involvement in the process of reconciling the two sides in a dispute; it often referred to a procedure or process which parties used in crisis situations. **Collective conciliation** today is in effect a form of joint problem-solving, and indeed has been 'promoted' as such by ACAS in its publications

and videos. It has a family likeness to the kind of conciliation practised by Jack Scamp, even though he and his contemporaries operated under the earlier legislation whereby the intervention was imposed by government. The similarities lie in the techniques employed, and the fact that modern collective conciliation is still focused largely upon disputes which have a high public profile.

The advent of the right to claim unfair dismissal placed a special emphasis upon what ACAS came to call **'individual conciliation'**; that is the process which ACAS is statutorily bound to undertake following most, though not all, industrial tribunal applications. This form of conciliation is the principal focus of this chapter, but it is necessary to examine the taxonomy of conciliation in more detail first.

There may be said to be four significant dimensions to conciliation in the arena of industrial relations, which may be briefly stated as:

1. whether it is based upon statute, or upon a collective agreement (and thus voluntary though 'regulated')
2. whether it is employed for the resolution of collective or individual disputes
3. whether it is brought into play voluntarily by the disputing parties or by some means of outside compulsion, and
4. according to who is the 'agent' of conciliation.

It will be apparent that these dimensions are inter-linked. For example, a conciliation mechanism based upon collective agreement will tend to be used primarily to resolve disputes with a strong collective aspect, and to involve only the parties themselves or someone acceptable to them. On the other hand, a form of conciliation involving an 'imposed' conciliator will have a quite different feel. Similar considerations apply to the process of arbitration, of course, and these will be examined in the next chapter. However, it should be noted that the legitimacy and credibility of a third-party conciliator will be crucially affected by the means through which he or she comes to be appointed.

2.4. Individual conciliation

ACAS now clearly distinguish **individual** conciliation from the role undertaken by a conciliator in **collective** disputes. Different officers are usually involved, the techniques are different, and the outcomes rather distinct in their legal implications. The Service has defined individual conciliation most recently in its 1995 leaflet, 'Individual Employment Rights'. This lists the types of issue in which ACAS has a legal duty to offer conciliation, and explains how the process begins. The service is succinctly summarised as being: 'voluntary, impartial,

confidential, free of charge, and independent from the industrial tribunals' (ACAS, 1995: 1). This description will provide the focus for much of the following analysis, though some of the adjectives are easier to justify than others.

The individual conciliation service is unquestionably **free of charge** to the disputing parties, despite the Conservative government's altering the basis of ACAS funding, and allowing it to levy fees for some of its services. It is not, of course, without cost - as will be discussed later. The service is **independent** from the industrial tribunals, both in the physical and organisational sense. There will be brief discussion later of the experiment conducted in 1995 and 1996 whereby conciliation officers were located in regional office of industrial tribunals with the aim of facilitating last-minute settlements. Suffice it to say that this experiment has been discontinued. Individual conciliation is entirely **voluntary**, in that if either party declines to participate then the process ends. Indeed, there has been no suggestion in recent years that individual conciliation should be a necessary preliminary to an industrial tribunal hearing, even though this is the case in some other countries (Barnard *et al.*, 1995: 36) and despite the pressure to make access to tribunals conditional upon the use of domestic dispute procedures (for example, EEF, 1995: para. 4.21).

The **confidentiality** and **impartiality** of the individual conciliation service are assured partly by the legal restrictions upon the role of the conciliation officer and partly by the reputation which has been established over the last twenty-two years. The ACAS publication, ***Individual Conciliation Explained***, which is given to the parties on request, describes the process from the conciliation officer's point of view: 'I convey information from one party to the other' ....'I cannot advise either party what action to take' .....'It is not my job to express an opinion on the merits of a case or the likely outcome of a tribunal hearing' (ACAS, 1992: 4). Whether these aims are always achieved will be the subject of further comment later in the chapter.

In their early years of operation, dealing exclusively with training levy and redundancy payment disputes, the industrial tribunals had no formal link with the conciliation staff of the Ministry of Labour. The introduction in February 1972 of the right not to be unfairly dismissed placed a completely new responsibility upon these staff, that which is now set out in Sections 133 and 134 of the Employment Protection (Consolidation) Act 1978. In essence these responsibilities have remained unchanged since 1972, though with the inauguration of ACAS in 1975 they devolved upon the staff of that body. Most conciliation officers were simply seconded to CAS (and then ACAS) from the Department of Employment, and were normally drawn from the ranks of established civil servants - albeit those with substantial experience of industrial relations. While there have been brief experiments with the recruitment of conciliation officers from outside, it remains the practice, according to a Senior

Conciliation Officer, to recruit them exclusively from the ranks of established civil servants; and usually those with not less than twenty-five years service (Interview, Colin Welch, 20 October 1995).

2.5. Objectives of the Conciliation Officer

The primary duty of the Conciliation Officer in individual disputes is set out in Section 18 (2) of the Industrial Tribunals Act 1996 (ITA 1996) as follows:

> Where an application has been presented to an industrial tribunal, and a copy of it has been sent to a conciliation officer, it shall be the duty of the conciliation officer
>
> (a) if he is requested to do so by the person by whom and the person against whom the complaint is presented, or
>
> (b) if, in the absence of any such request, the conciliation officer considers that he could act under this subsection with a reasonable prospect of success,
>
> to endeavour to promote a settlement of the complaint without its being determined by an industrial tribunal.

It is clear from the final phrase above that one objective of conciliation is to act as a **filter** to prevent an excessive workload falling upon the industrial tribunals. That is not to say that it functions as an impediment to the pursuance of a legal right, but rather that it endeavours to distinguish those disputes which are complex and intractable from those which may be resolved by the application of goodwill, improved communications, and perhaps common sense. ACAS takes great pride in pointing out, in its annual reports, the high percentage of tribunal cases which are settled or withdrawn before a hearing - and argues that this is generally after the involvement of a conciliation officer.

The table below shows that in the last three reported years the number of unfair dismissal cases initiated has levelled out at around 45,000 and the proportion that have been settled or withdrawn has been about two-thirds. The five-year average of unfair dismissal cases received was 44,819 (ACAS, 1996: 112). It should be noted that, in the same period, there have been rises in the number of industrial tribunal applications in other areas; for example, the new 'breach of contract' jurisdiction.

Table 2.1: **Unfair Dismissal Cases received and dealt with: IT1 and non-IT1**

	1996		1995		1994	
Cases received	46566		40815		45824	
Cases settled	19376	(42%)	18504	(45%)	19111	(42%)
Cases withdrawn	13064	(28%)	11993	(29%)	11368	(25%)
Cases proceeding to a tribunal hearing	13207	(28%)	12352	(30%)	13174	(29%)
TOTAL of completed cases	45647		42849		43653	

Source: ACAS Annual Reports, 1995: Table 8, and 1996: Table 7

In Table 2.1 above, a distinction is made between those cases which are settled as a consequence of ACAS conciliation, and those which are **withdrawn** by the applicant before the case proceeds to a hearing. In the latter situation, a CO might or might not have been actively involved. Often, their explanation of the procedure, the nature of the other party's case, or the possible outcomes, will have discouraged the applicant from pursuing their case; but other counsels may have played their part. Full credit can only be claimed by ACAS conciliators for the 'settled cases'. The Senior Conciliation Officer of the South and West Region (South sector) of ACAS, Mr. Colin Welch, reported that his team was achieving the following settlement rate in the second half of 1995:

Table 2.2: **Settlement Rate in ACAS South & South-West Region in 1995**

Cases Settled (recorded on COT3)	43%
Withdrawals by applicant (both with and without ACAS involvement)	31%
Cases proceeding to IT.	26%

Source: ACAS regional records.

(At the time of the interview, this was a little better than the national average of 29% of cases proceeding to tribunal, a fact from which the regional staff derived some satisfaction).

2.6. Re-instatement and re-engagement

The avoidance of a formal hearing is not the only objective of conciliation; another specific purpose is set out in Section 18 (4). Where a tribunal applicant has been dismissed: '(a) the conciliation officer shall in particular seek to promote the reinstatement or re-engagement of the complainant by the employer [.....] on terms appearing to the conciliation officer to be equitable' (ITA 1996). This particular aim of conciliation has been the subject of considerable debate, already referred to in Chapter 1 (see, for example, Dickens *et al.*, 1981). The 'lost remedy' of re-employment is hardly more likely to arise from conciliation than from a decision of the Tribunal - despite (presumably) being considered earlier and before the traumas of a formal hearing. Dickens suggests that ACAS COs readily accept without question the stated preference of the applicant on the IT1, and move to explore the 'easier option of settlement for money'. Fewer than one per cent of applicants who are successful at the tribunal hearing then obtain an order for re-employment; more recent statistics of the numbers of applicants achieving re-employment at the conciliation stage are not available. The Warwick survey found that by 1980/81 the proportion of conciliated settlements resulting in re-employment was about the same as the proportion of tribunal awards of re-employment (Dickens *et al.*, 1985: 158).

2.7. Achieving a financial settlement

Conciliation officers thus more often turn their attention to the question of financial compensation, in response to Section 18 (4)(b): 'where the complainant does not wish to be reinstated or re-engaged, [.....] he shall seek to promote agreement between them as to a sum by way of compensation to be paid by the employer to the complainant'. How is this accomplished? The conciliation officer is duty bound, on receiving the case papers from the Regional Office of Industrial Tribunals, to make contact with the parties - applicant and respondent - or their appointed representatives. Current ACAS national policy is that both parties must be advised of ACAS's interest in the case within 14 days of the receipt of papers; 'in reality we write to the parties the day we receive the case' (Interview, Colin Welch. 20 October 1995). An example of this standard letter is given at Appendix One. A CO will then make personal contact within the following five working days. Dickens *et al.* found that most COs approached the applicant first, though some ACAS regions would contact the respondent first if the IT3 was not yet available. It was also found that ACAS would often make contact direct with the parties even when they were represented, though only when permission had been sought from the representative (Dickens *et al.*, 1985: 150).

About 5% of respondent employers make contact with ACAS in order to seek help in the completion of form IT3. However, the CO cannot provide this assistance, and is usually wary of embarking upon conciliation proper until in possession of both the IT1 and the IT3. The first party to be contacted will generally be the one who has provided the least, or insufficient, information. The contact will normally be by means of a telephone call, although face to face meetings are arranged when the CO believes it would be valuable; for example where the applicant is unrepresented (Interview, Colin Welch. 20 October 1995).

Dickens *et al.* found that a high proportion of applicants (over 90%), and almost 70% of respondent employers, actually met the CO. The author, when working in 1984/85 for an employers' association, discussed individual IT cases with COs exclusively by telephone, though informal meetings took place from time to time on general issues. Current practice would seem to involve far fewer direct meetings. Records in one regional office show that a meeting takes place between the CO and one or more of the parties in only 8% of cases; 5% involving unrepresented applicants , and 3% unrepresented respondents (Interview, Colin Welch. 20 October 1995). It has been suggested that one factor causing this drop in the proportion of cases where COs visit clients is a concern for their personal safety. Internal ACAS guidelines stress that there is no compulsion upon officers to visit the parties.

The actual process by which the parties are encouraged to move towards the option of a financial settlement is individual to the particular officer. As indicated above, the CO has first to establish whether there is a possibility of re-employment. When that has been ruled out, his or her duty is then to see what form of settlement, if any, would be acceptable to the parties. Most applicants value the opinion of the officer on the strengths and weaknesses of their case. Dickens *et al.* found that 27% of unrepresented applicants saw this as a key expectation of the CO - the largest category, closely followed by advice on procedure and how the tribunal works (1985: 154). Before such advice has been given, most applicants will not have a realistic idea what to expect by way of financial compensation. As the Warwick survey points out, many applicants are concerned not so much with 'compensation' as with more specific financial losses, such as pension rights, withheld holiday pay, bonus, back pay, and with the need for a good reference (*ibid*: 158).

As far as the respondent is concerned, there is often less need for the CO to explain basic procedures. The first approach may often involve the CO saying something along the lines: "The applicant says this and that; what do you say?" In the author's experience, a telephone exchange of this kind was often followed by the question from the CO: "Are you prepared to make any sort of offer?" - to which the frequent reply was: "What do you think he/she might settle for?" In this relatively informal way, the CO will try to discover exactly what the gap is

between the expectations of the parties; how determined the parties are to have their 'day in court', and how flexible they are.

It is not the responsibility of the CO to comment upon the fairness or equity of any financial settlement offered or accepted. Whereas an industrial tribunal will be bound to take such factors into account if it makes an award, there is no such obligation during conciliation. Undoubtedly, this places ACAS COs in a difficult position at times, when an applicant asks outright whether a proposal from the respondent employer is **fair or equitable**. Strictly speaking, the CO should only be concerned as to whether an offer is **acceptable** to the parties. However, there is a good deal of evidence available to COs as to the general level of awards and settlements, in the form of statistics published in the ***Employment Gazette*** (now '***Labour Trends***') and internal ACAS sources. This material can also give a respondent employer a realistic idea of the costs of various options open to them. For example, research by Tremlett and Banerji shows the cost comparison of different case outcomes:

Table 2.3: **Cost to the Organisation of Industrial Tribunal Case Outcomes (1993)**

	£
Case settled before an IT hearing	**1484**
Case withdrawn by applicant before a hearing	**499**
Case upheld by an industrial tribunal	**2874**
Case dismissed by an industrial tribunal	**1934**

Source: Tremlett and Banerji, 1994: 26, Table 10

These figures suggest that the financial risk to an employer of pursuing a case to a hearing rather than settling out-of-court can range from an extra £450, if the case is won, to an additional £1390 is the case is lost. Regardless of the merits of the case, a minimum cost to the employer of £500 can be anticipated.

2.8. Confidentiality and Impartiality

The conciliation process is, despite its reliance upon communication skills, essentially confidential. The ACAS CO will not normally be called as a witness in a subsequent industrial tribunal hearing; and if he or she is, no information divulged by the parties in confidence may be given in evidence unless the provider of the information gives his or her consent (ITA 1996, s 18 (7)). The evidence is that the parties to tribunal applications are generally satisfied as to the independence of the CO. Dickens reports that 66% of applicants regarded the CO as

neutral (though the opinion correlated noticeably with the outcome of the case!) (Dickens *et al*, 1985: 165). The Institute of Personnel Management, surveying its members in 1986, found that 75% were satisfied with the role played by ACAS COs (IPM, 1986: 46), though this survey did not analyse the conciliation function in great depth.

Once an agreed settlement has been achieved, it is the duty of the CO to commit the terms to paper, in order that the Industrial Tribunal can formally confirm them. Such written settlements are set out on a standard form, COT 3, which is attached to the formal decision of the tribunal, signed by a Chairman. The applicant thus gives up any right to pursue the claim further.

2.9. The role of the conciliation officer where a tribunal case has not been initiated

An agreement made between an employer and employee **without** the involvement of a conciliation officer is rendered null and void by virtue of Section 203 of the Employment Rights Act 1996. This provision, which for many years formed part of the 1978 Act, has led to ACAS being frequently asked to become involved in cases which have not yet been raised as tribunal claims. These are referred to as the 'Non-IT1' cases in ACAS statistics, and recorded as a separate category until the 1996 Annual Report. The legislation which defines the duties of a CO allows them to become involved in cases which have not yet been the subject of an application to the industrial tribunal **but which could be** (ITA 1996, s 18(3)). The actual policy and practice of ACAS in this regard has varied over time and from region to region. Conciliation officers have been suspicious, at times, that they have been called in by an employer to 'give the ***imprimatur***' to a deal already settled between employer and employee. In some cases there has been little real likelihood that the potential applicant would initiate a tribunal application - perhaps because they did not understand their rights. Guidelines prepared by ACAS itself requires the CO to be satisfied that there has been a dismissal, that there is a real likelihood of a tribunal application being made, and that there has been a genuine agreement made between the parties.

The most significant case to have tested this role of the CO is *Moore v Duport Furniture Products Ltd. and ACAS* ([1980] IRLR 158; CA). Among other points this case established that a valid COT3 settlement did not require the CO to be involved in, or even present at, the agreement of terms between the parties **provided** he or she had the opportunity to explain the implications of the settlement to both parties. Thus, in all 'COT3' cases of this kind, ACAS has insisted that its CO must explain fully to an employee that they may have rights under legislation which they would be giving up if they reached a COT3 settlement.

In the Annual Report of ACAS for 1990, the Service explained clearly how they would regard situations where the CO is called in prior to a claim being made to the tribunal. In essence the CO must only act within his or her statutory authority; that is where something has **already occurred** which could lead to a tribunal claim. 'Conciliation officers cannot purport to exercise a statutory duty where employment has ended voluntarily or by mutual consent, or where there is clearly a redundancy under customary arrangements or agreed procedures fairly applied' (ACAS, 1991: 27). Since the clarification of this policy there has been a dramatic reduction in the proportion of 'non-IT1' cases' dealt with by ACAS, a fact which has also eased the resourcing problems of the conciliation service.

Table 2.4: **Unfair Dismissal Cases Received by ACAS; Both IT1 and Non-IT1 Cases**

	(a) Total Cases & dealt with:	Cases arising from IT1s:	(b) Non-IT1 Cases:	(b) as a percentage of (a)
1990	37,564	23,917	13,647	36.3
1991	39,234	36,036	3,198	8.2
1992	44,034	41,902	2,132	4.8
1993	46,854	44,560	2,294	4.9
1994	45,824	43,659	2,165	4.7
1995	40,815	39,481	1,334	3.3
1996	46,566	(no longer separately recorded)		

Source: ACAS Annual Reports; Tables 8 & 9

There is a distinct downward trend in the number of non-IT1 cases handled by ACAS since 1990. There could be a variety of reasons for this, quite apart from the policy change referred to above:

- that applicants have become better informed of their rights through other channels, and have consequently been more ready to initiate claims formally on an IT1.
- that disputing parties have been concluding agreements which, though not legally enforceable, employees have been reluctant or afraid to challenge because of extraneous factors (such as the economic situation).
- that parties have been increasingly using the new 'compromise agreement' procedure.

On the other hand, the combined figure given for 1996 shows an upward trend in the total of cases; though it is too early to infer a trend. The caseload of the ACAS South and West Region, South Sector, in the second half of 1995, included only 5% of cases recorded as 'non-IT1'. This type of case was still, however, described as 'an important part of our business' (Interview, Colin Welch. 20 October 1995).

2.10. The training of ACAS conciliation officers

The following information was provided by the Senior Conciliation Officer at the ACAS office in Fleet, Hampshire, interviewed on 20 October 1995.

Notwithstanding their extensive civil service experience before appointment, all COs follow a comprehensive initial and refresher training programme. Few of the newly appointed officers are graduates, fewer still have legal training. All therefore spend their first two months engaged in an induction programme, following a specially prepared distance learning package under the guidance of a mentor. The mentor is likely to have a responsibility for the development of the new officer for up to two years. After the initial induction a small number of straightforward cases will be allocated, which will be undertaken under the mentor's oversight. A residential course designed to consolidate the 'distance learning' will normally take place during the first six months of an officer's service. This will include considerable role-play work, helping the CO to deal with the more difficult scenarios. Officers will not be expected to take responsibility for the more complex cases, such as those involving Equal Pay, or the Transfer of Undertakings (Protection of Employment) Regulations until they have been in post for about two years.

2.11. Compromise agreements

Section 39 of the Trade Union Reform and Employment Rights Act 1993 amended the 1978 Act to provide for another form of 'conciliation', or out-of-court settlement, by introducing the concept of the 'compromise agreement' (the legal basis of such agreements now rests in s. 203 (3) of ERA 1996). A compromise agreement may be drawn up between parties in dispute provided the advice of an **independent legal adviser** has been made available to the employee in the case. It is too early to comment on the effectiveness of this provision, as there have yet to be cases tested in the courts. However, it might be supposed that the most recent fall in the involvement of ACAS in COT3-type settlements (in the 1995 figures above) could be partially attributable to the advent of compromise agreements.

Initially, few compromise agreements were reported. One reason for this was that the legal profession expressed concern about whether professional indemnity fully covered the risk of lawyers providing defective legal advice in this new area (DoE, 1994: para 4.32). The then government indicated that it would also consider widening the scope of the law to permit other bodies, such as trade unions, to give the necessary advice to employees which is a key condition of the compromise agreement procedure (*ibid.* para. 4.34). These concerns, even with the change of government, are likely to be addressed in forthcoming legislation and will probably follow the lines suggested in the 1996 White Paper (DTI, 1996: sect. 9 of draft bill).

An extended role for trade unions and other legal advisers, within the legislation, would not amount to a new form of conciliation. It is difficult to see how the rights of a prospective tribunal applicant could be safeguarded simply by requiring that they put their case before an independent party having a duty only to conciliate (i.e. convey the parties' cases to each other), or indeed by requiring that they seek formal advice from a trade union. Applicants frequently have such advice available to them within an organisation's 'domestic procedure' and yet fail to use it. The strength of the ACAS conciliation staff lies clearly in their independence, which is not only popularly accepted but professionally attested. No such independence could be guaranteed in others without some kind of registration of conciliators.

2.12. European comparisons

Conciliation is available in a number of European Union member states; in particular Spain, Portugal, Germany and Italy have some form of conciliation as a mandatory element in the procedure for dealing with complaints of unfair dismissal. According to Barnard, Clark and Lewis, 'the statistical evidence suggests that conciliation is an extremely effective means of dealing with dismissal claims, and that it reduces substantially the number of disputes which are referred to a court or tribunal' (Barnard *et al.*, 1995: 36). For example, the 'settlement rate' in German individual employment disputes bears a striking resemblance to the ACAS rates quoted earlier:

Table 2.5: **Individual Employment Disputes Settled Prior to a Full Hearing**

	Germany *		United Kingdom **	
	1991	1992	1991	1992
Agreed settlement	43%	44%	36%	35%
'Other forms of settlement' (Germany) 'Withdrawal' (UK)	37%	37%	32%	32%
Proceed to hearing	(20%)	(19%)	32%	34%

*Sources: *Germany - Barnard et al, 1995: 14. **United Kingdom - ACAS annual reports*

It is important to note, however, that conciliation in Britain and Germany do not mean the same thing. The German version is conducted by the legally qualified chair of a labour court sitting without lay assessors, and contrasts with the more formal proceedings which lead to a judgement of the court. An agreed settlement or a withdrawal ('other form of settlement') will probably both be strongly influenced by the conciliator (Barnard *et al.* 1995: 14). The British system , involving an experienced though not legally qualified conciliator, achieves much the same level of successful outcome. There is at present no indication of any plans by the Social Affairs Directorate to bring unfair dismissal in general within the ambit of EU regulation. Neither has the European Commission made any proposals which affect the mechanisms by which employment disputes are resolved within member states.

2.13. The Future of Individual Conciliation

ACAS is financed by government and has thus been as much under financial pressure as any other element of public service. The number of staff has fluctuated in recent years around the 600 mark, and there is constant re-evaluation of priorities in a situation where the tribunal caseload continues to rise. The 1994 Green Paper reported that individual conciliation accounts for an ever-increasing proportion of the ACAS budget.

Table 2.6: **Percentage of ACAS Expenditure Devoted to Individual Conciliation**

1988	1989	1990	1991	1992	1993
50%	48%	51%	57%	64%	66%

Source: DoE, 1994: 14

In view of the fact that overall caseloads are expected to rise by between 15 and 30% in the next five years (DoE, 1994: para 3.9) there may need to be improvements in cost control and methods of working if budgets are to remain under control. The 1994 Green Paper also noted that the 'cost' to the Exchequer of a cleared individual conciliation case is about 28% of the cost of a case that proceeds to a full hearing (*ibid*: para 3.20). It may thus be an attractive option to government to put new resources and ideas into the conciliation service. A number of suggestions were listed in the Green Paper, including:

- targeting conciliation on the types of cases where the success rate has been shown to be highest.
- offering conciliation at the stage of a case when it is most likely to achieve success.
- following up particular types of cases and not others.

(adapted from DoE, 1994: para 5.12)

Concerning the first of these points, individual conciliation does, indeed, appear to be more successful in achieving a settlement in unfair dismissal cases than in most other IT jurisdictions. Figures for 1994, given below, are broadly typical in this respect.

Table 2.7: **Clearance Rates**

	Unfair dismissal	Equal Pay Act	Sex Discrimination	Race Relations	Wages Act
	%	%	%	%	%
Conciliated Settlements	42	23	33	30	28
Withdrawn	27	55	44	34	37
To Industrial Tribunal	31	22	23	36	35

Source: ACAS Annual Report 1994: Table 10

This may be due to the fact that straightforward unfair dismissal cases are less likely to polarise the participants; and that conciliation officers have accumulated more experience in dealing with such cases. The pattern has been consistent for several years; only in 1992 and 1993 have rates of conciliated settlements for sex discrimination cases exceeded the rate for unfair dismissal cases.

Table 2.8: **Unfair Dismissal: Clearance Rates**

	1991	1992	1993	1994	1995	1996**
	%	%	%	%	%	%
Conciliated settlements	40	39*	38*	42	41	42
Withdrawn	29	29	28	27	29	29
To Industrial Tribunal	32	32	33	31	30	29

* In 1992 and 1993 higher rates of conciliated settlement were achieved in Sex Discrimination cases.

** IT1 and non-IT1 cases are now consolidated.

Source: ACAS Annual Reports: Table 10 (1996, Table 8)

With regard to the second point, i.e. offering conciliation at the point in time when it is of most value and most likely to succeed, ACAS decided to experiment with 'last minute conciliation'. Pilot trials were started in 1995 in a number of Regional Offices of Industrial Tribunals, wherein a CO was made available to the parties on the day of attendance for their hearing. The trials were ended in late 1996 when the 'take-up' proved extremely small (Lewis *et al.*, 1997).

Identifying which particular kinds of cases are best suited to conciliation calls for more detailed study. The factors contributing to success are not well understood at present. Following publication of the Green Paper, ACAS was due to begin a 'programme of evaluative research to identify the determinants of successful individual conciliation, [etc.]' ((DoE, 1994); para 5.13). Initial results were to have been available in Spring 1995. However, the Director of Research for ACAS, Bill Hawes, reported in mid-1995 that this research programme was yet to begin in earnest (Interview, Bill Hawes, 15 August 1995). An 18 month programme was envisaged, with results to be published some time in 1997. The research will include:

1. a survey among existing COs, relating to their current caseload at a specific date.
2. a 'customer satisfaction' survey among applicants and respondents who have used the individual conciliation service.
3. a qualitative enquiry, involving selected interviews with part of the sample above.
4. and, a large-scale interview survey on public perceptions of individual conciliation, probably conducted by an independent survey organisation.

Other parties have voiced opinions on the future of conciliation. The 1987 Justice Report on Industrial Tribunals considered the possibility of ACAS COs taking a more 'investigative' role in the early stages of a tribunal case. On the advice of ACAS at the time they rejected a combined investigative and conciliating role as unworkable and likely to undermine ACAS's reputation for impartiality (Justice 1987: 20). According to Bill Hawes, the attitude of ACAS has not changed at all in the intervening period, and the Council remain opposed to an investigative role for the CO (Interview, Bill Hawes. 15 August 1995).

According to the 1994 Green Paper there is a prospect of significant efficiency gains arising from the introduction of RITAS, a national computer network which is designed to link all Regional Offices of the Industrial Tribunals and all ACAS offices. Some senior officials of ACAS hope that a more rapid interchange of information between ROIT's and ACAS could allow prompt initiation of individual conciliation, and have argued that this will increase the likelihood of successful settlement (Interview, Colin Welch. 15 October 1995).

The role of the CO could also be influenced by other developments in the practice of unfair dismissal law. Consideration is being given, for example, to an 'arbitral alternative' to the conventional tribunal hearing. The CO might, in future, be placed under an obligation to offer such an alternative to an applicant, and to explain to both parties how arbitration would work in practice. He or she would need to be given additional powers under legislation, to promote settlements that would prevent an applicant taking their case further (DoE, 1994: para 5.30). This will be discussed in more detail in the following chapter.

2.14. Individual Conciliation; a success in unfair dismissal cases?

This chapter has sought to describe and evaluate the record of the conciliation service, especially in regard to the legally prescribed objective of avoiding the need for a full tribunal hearing of cases. Conciliation needs to be seen in context as a non-judicial, independent third party dispute resolution process which leaves the problem essentially in the hands of the parties. It is a process of facilitation and clarification which, in some settings, can be usefully accomplished by those close to the parties. But in the British industrial relations system there has developed a mechanism for independent conciliation in particular kinds of employment dispute. This mechanism stands between the exclusively 'domestic' dispute resolution stages and the quasi-judicial stage of the industrial tribunal.

The evidence is that conciliation works well in many kinds of employment dispute, and that the independence of ACAS and its conciliation officers is a major reason for this success. As we shall see, the procedures of the Joint Industry Board for the electrical contracting industry

(JIB) provide for an analogous process of conciliation, but in this case it is offered by a National Officer. In contrast to a CO provided by ACAS, the JIB national officer is 'of the industry'; his or her specialist knowledge of the industrial context is seen as a necessary factor in their conciliating function. In the case of the JIB, the independence of conciliation is achieved by the fact that the Board is jointly controlled and financed by the employers' association and the trade union.

Before examining this 'conciliation analogy' more closely, however, it is necessary to turn to the other major types of third-party dispute resolution available to the generality of cases. These are the mediation and arbitration services provided by ACAS in certain circumstances and for certain types of cases. Their usage is not a legal pre-requisite to a tribunal hearing, though they are offered under the same legal framework which governs all of ACAS's work. And their 'take-up' is at present very much less than the extent of individual conciliation. Their relevance to the present thesis is that there are active proposals that arbitration should be more widely encouraged as a mechanism for the resolution of individual unfair dismissal disputes.

CHAPTER THREE:
Mediation and Arbitration in the Resolution of Individual Employment Disputes

3.1. Introduction

We now turn our attention to another well-established form of alternative dispute resolution, known as arbitration, which is also used extensively in fields other than employee relations. In the previous two chapters we have examined the establishment and operation of industrial tribunals, and shown how the introduction of the right to complain of unfair dismissal brought with it a legal duty upon ACAS COs to seek a settlement of disputes without recourse to a formal hearing - what Dickens has called 'the invisible stage' of the industrial tribunal system (Dickens *et al.*, 1985: 140). These two approaches, the adjudication of the tribunal and the reconciling activity of the CO, are both regulated by law; the first being the eventual legal backstop and thus in a sense compulsory, and the second being a voluntary procedure. Arbitration, which is also now a voluntary procedure in the United Kingdom, is as yet little-used in the resolution of unfair dismissal cases. Where it is used, it can be either facilitated by ACAS or undertaken privately by the disputing parties.

In the context of the current debate on alternative approaches to handling individual employment rights disputes, one of the main aims of the present research is to evaluate in detail the experience of the alternative dispute resolution mechanism used in the electrical contracting industry. This particular procedure incorporates, as a final stage, referral of unfair dismissal disputes to an ACAS-appointed arbitrator. It is thus important for us to consider how the technique of arbitration has come to be applied to such disputes in general, and how successful it has been in resolving them to the satisfaction of the parties. An important source for any discussion of ACAS arbitration is the survey and analysis conducted by Alice Brown (1991).

We shall describe the historical roots of arbitration; how arbitration is initiated in employment disputes; who conducts the process and what methods they apply; how acceptable their determinations are to the parties; and what the method costs in comparison with the industrial tribunals. We shall also consider the specific proposal made by Lewis and Clark (and broadly accepted by the former Conservative government and the current Labour administration) for an arbitral alternative to an industrial tribunal hearing to be offered by the ACAS conciliation officer in all cases of unfair dismissal. Some of the reservations that have

been expressed about it will also be examined. The use of ACAS arbitration in the JIB Unfair Dismissal procedure will be considered more fully in a later chapter.

3.2. What is arbitration?

Arbitration involves a decision, a determination, or a judgement*, between two disputing parties by an independent person known as an arbitrator or by a panel of arbitrators (usually three). In Scotland and the United States, the arbitrator is known as an 'arbiter'. Since 1975, this individual, or panel of individuals, has been chosen by ACAS after consultation with the parties. The arbitrated decision is binding in honour upon them, though not legally binding.

It is a method of alternative dispute resolution with an extensive history, much of it connected with contract or commercial law. Arbitration is commonly employed to settle financial disputes relating to building and civil engineering construction. The tourism industry, too, makes use of arbitration. The Chartered Institute of Arbitrators operates a number of complaints procedures including one for the Association of British Travel Agents, and references to this are commonly found in the 'small print' of holiday brochures. Commercial arbitration functions against a legal framework contained in the Arbitration Acts of 1889, and more recently, 1950, 1979 and 1996. These enactments regulate the conduct of arbitration proceedings in contract law, and - significantly - provide remedies to enforce the decisions of arbitrators.

A simple form of arbitration was practised in the settlement of pay issues as long ago as the fourteenth century. The Statute of Labourers 1388 allowed justices of the peace to establish the 'going rate of pay' for a locality. However, the practice was overtaken by more specific arrangements following the advent of the industrial revolution and the early growth of trade unions (see Mumford, 1996: part 2, for a comprehensive review of the history of arbitration applied to the realm of employment). The statutes relating to employment disputes have been careful to draw a distinction between 'commercial' arbitration and the practices which prevail in the employment field. In drafting the Conciliation Act 1896, the legislators were at pains to ensure that '[the rules of commercial arbitration] shall not apply to the settlement of any dispute or difference to which this Act applies' (Conciliation Act 1896 s.3). This is a highly significant provision, since it has allowed arbitration a wide use within the essentially 'voluntary' system of industrial relations in the UK. The Employment Protection Act 1975, which established ACAS and gave it responsibility, *inter alia*, for the use of arbitration in

* See caution in a later section, regarding the use of the term 'judgement'

employment disputes, also precluded the commercial rules of arbitration from the field in which ACAS works.

There are several reasons for not subjecting employment arbitration to the same constraints as commercial arbitration. In an unpublished paper delivered to the Chartered Institute of Arbitrators, South-East branch by Geoffrey T. King in 1994, the following reasons were given:

- The parties to employment disputes have seldom, historically, desired a judicial approach to problem-solving; but rather, a pragmatic approach.
- Employment disputes are frequently about matters which 'might be' rather than those which 'are at present'; and legal enforcement presents an insuperable problem when it relates to conjectural items.
- Third party intervention in employee relations is still an exceptional step to take, and it inevitably alters the balance of harmony which the parties may have established.

It remains the case, however, that when and if an arbitration is carried out in an individual employment dispute ***other than*** under the auspices of ACAS, it can fall within the scope of the Arbitration Acts. Thus, for example, an award of re-instatement of a contract of employment following such an arbitration could be enforceable in the courts (as a breach of contract). In fact, of course, one of the cardinal principles of voluntary labour arbitration is that awards are 'binding upon the parties in honour only'. It has not always been so. During both the First and Second World Wars there was provision for compulsory reference of a labour dispute to arbitration; first, under the Munitions of War Act 1915 and, during the later conflict, under the Conditions of Employment and National Arbitration Orders 1940-44. In the latter case the powers lasted until October 1947, and about one thousand awards were made in all (Owen-Smith *et al.* 1989: 13). The attitude of trade unions to such legislation has been mixed; during the First World War there was a growth in membership of unions, and they found 'it advantageous to make a quick reference to arbitration .....as awards..... were binding on both sides and enforceable at law' (*ibid.*: 11). Owen-Smith and his colleagues trace a degree of the 'acceptability' of resort to third parties to these war-time experiences.

Compulsory arbitration has never quite left the scene. After 1947, provisions for compulsory binding arbitration were retained in various forms (from 1951 to 1958, for example, in the form of the Industrial Disputes Tribunal) until the Terms and Conditions of Employment Act 1959, which made possible a reference to arbitration of the issue of whether an employer was observing 'established terms and conditions'. When the Central Arbitration Committee came into existence in 1975 replacing the Industrial Arbitration Board, it, too, had a role in

deciding comparability issues in pay and conditions of employment. This jurisdiction was removed in 1980, and since then, the only form of compulsory binding arbitration in British law is the power of the CAC to make an award as a last resort in a dispute over the disclosure to a recognised trade union of information required for collective bargaining purposes.

A distinction has been made, by Rideout (1982: 51), between 'equitable' and 'regulated' arbitration. The first refers to dispute resolution where the parties' 'terms of reference' provide the only yardstick within which the arbitrator can function, perhaps within the context of a collective agreement; the second denotes a situation where the arbitration takes place within a framework of legal regulation according to criteria not determined by the parties, and may perhaps be legally enforceable (Dickens *et al.*, 1985: 284). The following discussion focuses largely upon 'equitable' arbitration, conducted under the auspices of ACAS. In a later chapter our attention will turn to the limited use of 'regulated' arbitration by the Joint Industry Board for the electrical contracting industry in unfair dismissal cases; 'regulated' because, though conducted under the terms of a collective agreement, it is also subject to the terms of the statutory regulations which grant exemption. Since the central actor in the use of arbitration in labour dispute resolution today is the Advisory Conciliation and Arbitration Service, it is necessary to begin by examining the background to its role and function.

3.3. The Role of ACAS

The right of ACAS to use arbitration to resolve a 'trade dispute' was originally granted in the Employment Protection Act 1975, and is currently enshrined in the Trade Union and Labour Relations (Consolidation) Act 1992 s.212. as follows:

> where a trade dispute exists or is apprehended [ACAS] may, at the request of one or more parties to the dispute and with the consent of all the parties to the dispute, refer all or any of the matters to which the dispute relates for settlement to the arbitration of (a) one or more persons appointed by [ACAS] for the purpose (not being an officer of [ACAS]; or (b) the Central Arbitration Committee.

A trade dispute is defined in TULR(C)A 1992 s. 218 (b) and (d), and includes disputes connected with ' the engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers' and 'matters of discipline'.

It is important to note that ACAS is duty bound to look upon arbitration as a last resort, as should the parties. All appropriate procedures for dispute resolution, including ACAS conciliation, must be tried first (TULR(C)A, 1992. s. 212 (2)). ACAS must not only be satisfied that the parties wish to move to arbitration, but that they have made a serious effort

to utilise all other alternatives. An ACAS guidance pamphlet published in 1987 states that 'the value of arbitration would be reduced if it served to undermine or diminish the responsibilities of the parties for reaching their own negotiated settlements' (ACAS, 1987: 19).

This emphasis upon the importance of existing procedures (which are likely to exist in their most developed form in workplaces where trade unions are recognised) may explain why the place of arbitration in the resolution of **individual** employment rights disputes has been consistently underplayed by ACAS. Explanatory leaflets have, over the years, clearly distinguished their 'collective' role from their 'individual' role, and have tended to label arbitration and mediation as mechanisms exclusively for use in collective disputes, i.e. 'settling disputes between employers and trade unions' (ACAS, 1987: 19). This reluctance to acknowledge a role for arbitration in individual disputes continues with the current publication ***Individual Employment Disputes***, in which there is no mention of arbitration whatsoever (ACAS 1995a).

This is not because ACAS is not permitted to use arbitration in these cases, for there are, each year, a number of arbitration cases, facilitated by ACAS, on matters recorded as concerning individual 'dismissal and discipline'. A trade union can, of course, validly contest and settle a member's individual dispute with their employer under the terms of a collective agreement. Such agreements are usually incorporated into the individual's contract of employment specifically or by implication. Furthermore, a proportion of these disputes may have the potential to become collective disputes (the statistics do not show the extent) but they all concern matters which could otherwise be the subject of industrial tribunal proceedings. Table 3.1 shows how many such cases have arisen in recent years.

Table 3.1. **Dismissal and Discipline Cases Referred to ACAS Arbitration and Mediation**

YEAR	Total number of Cases referred to ACAS arbitration & mediation	Number of mediation cases (of previous column)	Number of these cases which concern Dismissal & Discipline
1990	200	17	52
1991	157	16	55
1992	162	7	56
1993	163	7	49
1994	156	8	34
1995	136	5	47
1996	117	4	30

Source: ACAS Annual Reports; Tables 6 and 7

It is important to note, however, that many of the cases relating to dismissal and discipline which have traditionally been referred to ACAS arbitration arose in the electricity supply industry, until its privatisation (ACAS, 1991: 38). Here, there was a national disciplinary procedure agreement which stipulated ACAS arbitration as the final stage. A decision of an ACAS arbitrator in these cases did not prevent the aggrieved employee from pursuing a case to the industrial tribunal, for there was no 'Section 65' exemption in force, but in practice no tribunal cases followed. There has never been a fully-fledged legal challenge to an arbitration award (Interview, Simon Gouldstone. 23 February 1996). Since electricity privatisation in 1992/93 most electricity supply companies have re-negotiated their disciplinary procedures, and limited or removed the scope for cases to be taken to arbitration. This accounts for much of the drop in the 1994 figures (ACAS, 1994: 48). In 1995 there was something of a resurgence in the use of arbitration in discipline and dismissal cases, involving eight industries outside electricity supply (ACAS, 1995: 48).

ACAS also provides an independent secretariat service to a number of standing arbitration bodies, such as the Police Arbitration Tribunal, the Railway Staff National Tribunal and, since 1992, the Civil Service Arbitration Tribunal (ACAS 1992). These responsibilities contribute a small number of cases in most years, to the statistics in Table 3.1 above.

One indicator of the potential extent of usage of arbitration is found in the Workplace Industrial Relations Survey 1990 (Millward *et al.* 1992), which reports that there was a substantial decline during the 1980's in the proportion of discipline and dismissal procedures which referred to the role of independent third parties in their final domestic stage. The decline was particularly notable in relation to ACAS involvement.

Table 3.2 **Provisions for Third Party Intervention 1980, 1984 and 1990 (Discipline and Dismissals Procedures)**

	Percentage of surveyed organisations providing for third party intervention		
Person or organisation specified within the procedure	**1980**	**1984**	**1990**
ACAS	29	18	15
Higher level management	39	60	64

Source: Millward et al. 1992: Extract from Table 6.5, 195

Though the survey covered procedures which refer to both ACAS conciliation and arbitration, it is clear from the above that the trend for organisations to use ACAS as a final stage in their discipline and dismissal procedures was markedly downward in the late 1980's. Millward *et al* comment that, with the exception of the banking sector, which still makes frequent use of ACAS assistance, 'the fall was spread across the full range of industries and all categories of size, age, workforce composition and ownership of establishment' (1992: 196). We shall return to a discussion of the possible reasons for this decline later in the chapter, but it is first necessary to describe in more detail the process by which ACAS conducts its arbitration function.

3.4. The ACAS arbitration service

The facility of arbitration is provided by the Operational Policy Directorate of ACAS at their Head Office. The Director of Operational Policy is responsible for two Principal Officers, one of whom has charge of Operations. His team covers collective conciliation and advisory mediation, arbitration and standing bodies, the 'independent experts (available for equal value cases), and the Central Arbitration Committee. Simon Gouldstone is the Senior Executive Officer in charge of arbitration, standing bodies and the CAC. It is considered important to separate the administration of collective conciliation from that of arbitration at this level of the organisation, since the COs have an obligation of confidentiality to the parties which could be compromised if their role became confused with the determinative function of the arbitration service. The writer is indebted to Mr. Gouldstone, interviewed on 23 February 1996, for much of the information upon which the following two sections are based. He is not, of course, responsible for any of the opinions expressed therein.

The option to refer a case to an arbitrator or arbitration panel lies with the Senior Executive Officer once he is satisfied that conciliation is not a likely means of resolving the dispute (or has been tried and failed) AND that the disputing parties have genuinely attempted to use whatever procedural steps were at their disposal for settling the dispute (ACAS, 1987: 20/21). This would include any collective procedure agreement existing between the employer and any trade unions concerned. It is not necessary that such a procedure agreement makes specific provision for reference to arbitration - though, as the WIRS reports indicate, a number of collective agreements still do.

The next pre-condition upon which ACAS must be satisfied is that all the parties to the dispute actually wish the reference to be made. The key to this type of labour arbitration (in Britain at the present time) is that it is voluntary. The disputants need to agree not only that

the reference be made, and the exact terms of reference, but they must satisfy ACAS that they are willing to abide by the arbitrator's decision. ACAS COs will normally have been involved in seeking to promote a settlement of the dispute, and will assist the parties in defining the terms of reference. Conciliation Officers occasionally consult ACAS Head Office on the question of whether mediation or arbitration is the best option to recommend, but not as to the way in which terms of reference should be expressed. These are usually kept as brief as possible, consistent with the need to clarify, for the arbitrator, exactly what point or points are at issue. The standard form used by ACAS is given at Appendix Two. A typical statement of 'Terms of Reference' might read: 'To consider an appeal by [.....] against the decision made under the [.....] disciplinary procedure; to determine whether the decision was fair and reasonable and should be confirmed, or alternatively whether the penalty should be varied or revoked'.

Following the agreement of the Terms of Reference, ACAS will issue to the parties a leaflet: ***Arbitration and Mediation: Notes for Guidance*** (ACAS 1995(b)) which sets out advice on the preparation of written statements about the issues by the parties involved, and guidance on the exchange of documents with the other party, the use of witnesses, site visits, and other matters relating to the hearing.

3.5. The Arbitrators

ACAS is responsible for identifying a suitable individual, or less frequently a suitable panel, to conduct the arbitration. Arbitrators are selected from a list held by ACAS, which comprises experienced academics, lawyers, and retired employee relations practitioners and COs. The list was inherited from the Department of Employment in 1975, when ACAS was set up, and then included some 200 individuals. By 1996 there were only 55 members of the panel, and the last 'recruitment' exercise took place in 1990. Some of the current list have over 20 years experience on the panel. Arbitrators are appointed following personal recommendation, by a process involving, since 1990 at least, an informal interview and discussion over a period of two days. On rare occasions consideration will be given to an individual who applies direct to join the panel. The numbers on the panel were considered sufficient to meet current needs in early 1996, though it is recognised that changes in the law to extend the use of arbitration in unfair dismissal cases may lead to a new recruitment drive. In the light of the report of the Nolan Committee (on integrity and accountability in public service) it appears likely that any future recruitment would need to be conducted more formally and openly than has been the case in the past.

Newly appointed arbitrators spend up to a year 'shadowing' experienced panel members, acting as observers at hearings (with the consent of the parties) and writing shadow decisions for consideration by ACAS. A handbook was prepared in January 1988 for limited circulation to new and existing arbitrators: ***A Guide for Single Arbitrators***. Its purpose is summed up in an introductory quotation from Sir Roy Wilson QC, a former President of the Industrial Court and the Industrial Arbitration Board: 'The most important of all qualities necessary for a good arbitrator is the personal capacity to inspire in the parties who come before him full confidence that he will hear and decide the reference with understanding and care and complete impartiality' (ACAS 1988).

About a dozen of the 55 arbitrators possess academic legal qualifications, and even fewer are what the profession calls 'legally-qualified'. The members of the list receive periodic training and briefings from ACAS; and in complex cases may be assisted by technical assessors. There are only half a dozen female arbitrators on the panel, and only one arbitrator from an ethnic minority. ACAS recognises that this creates a situation of imbalance that may need to be addressed when arbitrators are recruited in future.

The arbitrator is normally selected for each case by the ACAS arbitration section. However, in a minority (about 1 in 10) of cases the parties are offered a limited choice on the basis of three curriculum vitae. An arbitrator's CV is occasionally updated in consultation with the individual concerned; but the process contrasts strongly with the approach in the United States, where, according to Gouldstone, arbitrators are much less mysterious figures who almost 'tout' for business, with their CVs detailing the cases they have decided and the outcomes. The considerations which ACAS bears in mind when deciding which arbitrators to appoint are their skills in controlling the proceedings, their sensitivity to the needs of the parties, their degree of formality in conducting a hearing and, not least, their availability.

A detailed description of the procedure adopted by ACAS in facilitating an arbitration hearing is contained in the pamphlet: ***The ACAS role in Conciliation, Arbitration and Meditation*** (ACAS, 1987: 20 - 25). Though this publication is now out of print, it remains the fullest treatment of the subject (albeit in relation specifically to 'collective' arbitrations) so far issued by ACAS to the general public.

In 1995 ACAS published a mission statement and commitment to quality in which it undertakes to 'provide parties with a nominated arbitrator/mediator and details of any hearing arrangements within five working days' (ACAS 1995c). It usually takes between two and three weeks to actually set up an arbitration hearing. Unfortunately, there is little independent evidence as to how successful ACAS is in achieving this objective. Gouldstone recalls an

instance of a reference being made on a Monday and the hearing taking place on the following Wednesday! Jon Clark, an ACAS arbitrator, notes that most hearings appear to take place between three and six weeks after the ACAS office first requests his involvement (Interview, Jon Clark. 9 February 1996). In Alice Brown's substantial survey of ACAS arbitration cases in 1988, satisfaction with the overall administration of the arbitration process was expressed by 86% of participants (Brown, 1992).

3.6. Arbitration Hearings

In contrast to the industrial tribunals, arbitration hearings are not subject to formal regulation; it is for individual arbitrators to decide upon procedural matters, within a broad framework suggested in the aforementioned guide (ACAS 1988). Hearings can take place at any convenient location, such as a local hotel, or in regional offices or the Head Office of ACAS; though more than half take place on the employer's premises.

The following discussion of the conduct of a typical hearing is based upon an interview conducted on 9 February 1996 with Jon Clark, who has been an ACAS arbitrator since 1990.

Written statements from the parties are received by the arbitrator about a week before the hearing, although the formal 'minute of appointment' and the terms of reference will have been despatched at least three weeks earlier. Management statements are often the longer, containing substantial detail and appendices; those prepared by the trade union side or the employee vary between a hand-written page and 70 typed sheets. The arbitrator will usually analyse the submissions and prepare a series of questions to be asked of the parties, taking into account ACAS guidelines on procedure. If the case involves dismissal it is usual for the arbitrator to have with him at the hearing a copy of the ACAS handbook: ***Discipline at Work*** (ACAS 1987), which contains a reprint of the ***ACAS Code of Practice on Disciplinary Practice and Procedures in Employment*** (ACAS, 1977).

The arbitrator will open the hearing by explaining the procedure to be followed. A key point that will be stressed is that the process is informal yet structured. The parties are required to address their arguments through the chair (the positioning of the principal advocates on either side of the arbitrator will facilitate this); parties must not interrupt, or begin to refute the opposing party's case before it has been fully stated. The character of the arbitrator's examination of the issues is interrogatory, rather than adversarial, and though witnesses will be questioned, they are not placed on oath, nor are they cross-examined. Legally qualified representatives are rare, since the issues are seldom legal in character and the outcome is not legally enforceable. The arbitrator will allow the parties to continue as long as new matters

are being placed before him; it is customary to offer a 'final round' to those present, to put their case fully. Occasionally it is considered prudent to offer an adjournment after which the parties will be allowed time to sum up their case briefly. Most arbitration hearings take about three hours, and it is normal practice for the arbitrator to reserve their decision.

Arbitrators are paid (1996) a daily fee of £186 for the hearing itself, and an hourly rate of £13.29 (186/14) for preparation and report-writing. According to Simon Gouldstone, the average direct in 1995 of an arbitration hearing was approx. £350, though this does not include venue costs and ACAS overheads (Interview, Simon Gouldstone, 23 February 1996). This sum is, however, only slightly more than the cost of an individual conciliation case settled or withdrawn, of £256 (ACAS 1995(e): 74).

3.7. Arbitration decisions

A draft decision may take one to two days to compile, and must then be sent to ACAS arbitration section for dissemination. ACAS is committed to issuing the decision in writing within three weeks (ACAS, 1995(b)). In theory the service can exercise a monitoring function on the decisions, since they are issued in the name of ACAS; but it is extremely rare for anything more than drafting advice to be given to an arbitrator before the decision is promulgated to the parties. Occasionally an arbitrator is advised of an apparent inconsistency between the draft decision and the original terms of reference, or - even more rarely - the conciliator's report (Interview, Simon Gouldstone, 23 February 1996).

There have been no reported cases of an arbitrator's decision being rejected or reneged upon by one of the parties. The formal position of ACAS is that no difficulties arise in the implementation of awards, though it is understood that minor problems have occasionally arisen from overseas parent companies. In theory, there is a possibility of recourse to 'judicial review' if an aggrieved party believes an administrative error by ACAS has taken place, or that the arbitrator has acted perversely; but here again, the possibility has so far remained theoretical (Lewis & Clark 1993: 29)

Constrained by concepts of fairness, an arbitrator may be tempted to steer a middle course in resolving multi-issue disputes. Rideout notes that: 'One of the principal complaints against arbitrators has long been that they tend to split the difference between claim and offer, or otherwise produce some compromise or fudge' (1989: 320). Where a single issue is in contention it may be difficult, and perhaps impossible, for the arbitrator to achieve the 'win-win' solution that has eluded the parties beforehand. But here we see one of the advantages the arbitrator has over the industrial tribunal, at least in the eyes of industrial relations

practitioners. Due weight can be given by the arbitrator to the realities of the workplace; they are not bound to follow precedent, or even legal correctness. Lawyers may be presumed to feel less happy about this approach, though the following comment was made by someone who is both a trained barrister and a noted arbitrator: 'There is no requirement that an arbitrator should decide a dispute judicially' (King, 1994: 3).

In the opening sentence of this chapter it was suggested, on the basis of a dictionary definition, that arbitration might involve a 'judgement'. This now requires closer examination in the context of a discussion of what arbitrators actually DO. While in some countries arbitration is practised in the labour relations field through formal and semi-judicial procedures (for example in Australia), the British model is essentially one of pragmatic problem-solving within an established framework of industrial relations principles. Rideout addresses the question of the parallels and distinction between industrial tribunals and arbitration in his paper: 'Unfair dismissal - Tribunal or Arbitration' (Rideout, 1986). He makes clear that an arbitrator's function is to 'settle the dispute'; in contrast, the adjudicator [in the industrial tribunal] 'primarily applies rules, principles, guide lines, call them what you will, to arrive at a conclusion.' (*ibid.*: 90). There is no doubt in the minds of Rideout and others that the intention behind the post-Donovan legislation was to allow for **alternative** channels of dispute resolution; for example in Sections 65 of EP(C)A 1978 (now s. 110 Employment Rights Act 1996). The 'industrial relations standard' (*ibid.*: 88) is therefore at the centre of the debate over the validity of non-IT methods of dispute resolution.

Concannon, in a study of the application of arbitration to dismissal cases, comments that: 'arbitrators are not constrained by any external criteria of relevance..... [Arbitration] is a method of adjudication without legal constraints, able to see the reality of the power relations and collective bargaining dynamics' (Concannon, 1980: 21). His research focused upon those arbitrations in the mid 1970's which ACAS conducted using single arbitrators to decide unfair dismissal issues. He argued that such cases were generally put to arbitration by unions, who placed importance upon the collective implications of the issue to hand. The ACAS Code of Practice and Disciplinary Handbook now make it difficult to assert that arbitration is 'without legal constraints'.

> It is not to be supposed that every dismissal situation is appropriate for arbitration. The major reason for this lies in the collectivist character of arbitration. If a dismissal is seen by the union as raising a collective interest, there will be other ways of pursuing that interest than by arbitration. (Concannon, 1980: 22)

It might be thought that Concannon wants his argument both ways. In the cases he examined arbitration was resorted to in **unionised** employment situations, to resolve dismissal disputes that threatened harmonious industrial relations; yet in such circumstances there are other, perhaps more powerful, tools that a union would have available to it. No account is taken, in this research at least, of the reality which has emerged in the last fifteen years, of declining union membership, and extended individual employment rights. Yet the question remains, is arbitration essentially for resolving the collective rather than the individual grievance?

Dickens comments that the freedom which arbitrators enjoy from the constraints of case law 'does not mean that they may not be faced with a job of interpretation and application of rules' (Dickens *et al.*, 1985: 282) They may, indeed, be operating within established collective agreements and procedures and restrained by the 'art of the possible'. Here, again, lies one clue to the somewhat limited use to which arbitration has thus far been put in dismissal disputes; it may be resorted to principally where the case has implications for **groups** of employees. It should not be forgotten, however, that an arbitrated decision does not (at the time of writing) stop an aggrieved **individual** proceeding to a tribunal hearing; thus, to them, an arbitration may seem a waste of time. In 1985 Dickens found that about one in three unfair dismissal claims were made by members of trade unions. She suggests that a case might be made for such disputes to be referred to an arbitral alternative to the industrial tribunal; though problems might arise if the same facility was available for the other two thirds of cases, where there might not be a collective bargaining context against which the arbitrator could devise a solution. She writes:

> We need to consider therefore whether, as British legislators have assumed, arbitration is suitable only for disputes where trade unions are involved, where inequality in bargaining power is less stark than as between an individual employee and employer. (Dickens *et al.*, 1985: 283).

Before discussing this issue, however, we should consider the extent to which arbitration is already a part of collective agreements.

3.8. Arbitration in collective agreements

In some sectors of business and industry there are provisions already in place - as a result of collective bargaining - which require the contracting parties to refer disputes to arbitration automatically if the other available procedures fail to achieve settlement. This is sometimes known as 'equitable arbitration'; where it forms the final formal stage of a disputes procedure. Whereas, in normal situations, ACAS needs to check that all disputing parties are willing for a

dispute to be referred to arbitration, in these agreements the parties are taken to have ***already agreed in advance*** that arbitration will follow a failure to agree. There is a sense in which this process could be regarded as mandatory on the parties; and in some examples the special form known as pendulum arbitration is specified.

The 1990 Workplace Industrial Relations Survey recorded the extent of such arrangements, mainly in the context of pay bargaining. However, the research shows that of all business establishments surveyed who acknowledged a place for 'third-party intervention' in employment disputes, over a third specified recourse to an arbitrating body as a last resort. In most cases, the arbitration was the 'final and binding' stage of dispute resolution. Though 'final and binding', the arbitration stage still retains a voluntary element, since either party can walk away from the process. A relatively small proportion of organisations in the sample had provision for 'final-offer' or 'pendulum' arbitration, where the arbitrator is constrained to determine entirely for one party's case or the other.

Table 3.3. **Extent of the Use of an Arbitration Stage in Disputes Procedures (All disputes; not just unfair dismissal)**

Percentages of organisations surveyed.

	Private: Manufact'ing	Private: Services	Public Sector	ALL
Arbitrating body specified	38	43	27	38
Arbitrator's decision final & binding	28	43	19	34
Final-Offer arbitration	9	6	6	7

Source: Millward et al. 1992. Table 6.10 adapted. p.210

It must be repeated that these arbitration provisions, enshrined in procedure agreements, exist primarily to resolve ***collective*** disputes. These disputes concern issues such as pay and grading, changes in working practices, health and safety, working conditions, and so on (Millward *et al.*, 1992: Table 6.9 p 205). There is no evidence available showing how many of the ACAS arbitrations that deal with dismissal and discipline issues arise in organisations where there is a procedural requirement to seek arbitration.

Only one clear-cut case exists of a collective disputes procedure, concerned solely with unfair dismissal cases, which provides for arbitration at the final stage; and that is the procedure

which is at the heart of the present research - the JIB's unfair dismissal procedure. ACAS arbitration was built into this procedure, at the time exemption from Section 65 of the EP(C)Act 1978 was first sought in 1979, so as to comply with the requirements of the Department of Employment. The procedure, its formulation and its subsequent operation, will be discussed fully in Part Two of the thesis; for the present it is sufficient to note that ACAS arbitration has been called upon, on average, only once per year since the inauguration of the procedure.

3.9. An evaluation of ACAS arbitration

The most extensive assessment of ACAS arbitration in recent years has been the research undertaken by Alice Brown in 1988/89, published as a doctoral thesis of the University of Edinburgh in 1991 (Brown, 1991), and summarised in the Industrial Law Journal (Brown, 1992). Since it will be our intention to draw comparisons, where possible, between the present research and that of Brown, it is desirable at this point to outline the broad scope of her findings.

Brown's research was an attempt to fill a void noted by Concannon (1986), that there was a lack of information as to how the participants in ACAS arbitration valued the process. Her method included the analysis of all arbitration awards made between 1942 and 1985, and a survey by postal questionnaire of 223 individuals and employers who had been party to arbitration proceedings facilitated by ACAS during 1988, including 62 participants in proceedings brought under the Electricity Supply Industry's (ESI) disciplinary procedure. The questionnaire called for the parties to 'reflect on their latest experience of arbitration before being questioned on their general views of arbitrators and the arbitration process' (Brown, 1992: 225). Because of the unique character of the ESI industry's procedure, the questionnaire issued to participants in that part of the research differed in some respects from that used for the main survey. For example, it was not necessary to enquire into the formulation of the terms of reference, as these were provided in the agreement defining the ESI procedure.

In respect of the stages preceding an arbitration hearing, Brown found that only about 65% of all parties made mention of a conciliation meeting under ACAS auspices; this in spite of the fact (as aforementioned) that ACAS does not initiate arbitration unless they are satisfied conciliation has already been attempted. Brown interpreted the shortfall by suggesting that parties may not have regarded the contact with a conciliator as a formal conciliation meeting, or may have already undertaken conciliation at an earlier stage of procedure. In Brown's study 62.5% of respondents believed the arbitrator had been given the freedom to decide as

he or she thought fit, while 27% of them believed the arbitrator was enjoined to decide either for one party or the other (in effect, 'pendulum' arbitration, as for example in re-grading or unfair dismissal claims). Brown comments (1992: 226) upon the somewhat disparate views of the arbitrator's terms of reference, as perceived by employer and trade union respondents; which suggests that the conciliation process was not always as helpful as it might have been.

In the Electricity Supply Industry the cases which Brown studied all related to discipline and dismissal; but of the cases outside that industry, only 15% related to such issues. The remainder of the non-ESI cases dealt with pay and conditions, or grading issues.

Brown's survey focused heavily upon the arbitration hearing itself, and the contribution made by the arbitrator to the dispute resolution process. Commenting that 'little is known about the selection of arbitrators [for particular cases] and their attitudes to the process involved' (Brown, 1992: 227) she seems to confirm the general impression of the mystique surrounding the arbitrators. The survey gives substance to the broadly accepted view of how ACAS arbitrators are chosen for particular cases; excluding ESI cases, 16% of the parties believed they had chosen the arbitrator, 41.7% said that ACAS made an appointment after consultation, and 38.2% considered that ACAS had made the choice. This is broadly confirmed by the ACAS staff during the author's interviews, noted above. The findings of Brown's survey regarding the characteristics of the ACAS arbitrator in action are analysed in Table 3.4.

In essence, the parties described themselves generally satisfied with the process and the outcome of the arbitration. There was a high measure of agreement on the usefulness of the arbitrator's decision, even between the parties to the same issue. Yet there are interesting divergences of view as to the willingness or reluctance of each party to put a dispute to arbitration in the first place. Brown found that trade unions held, more extremely than did employers, the view that 'management representatives are generally reluctant to put a dispute to arbitration'. The view that union representatives were reluctant to go to arbitration was held much less strongly; indeed, a majority of both union and management respondents felt unions more likely than not to go to arbitration where it was available (Brown, 1992: 230).

Table 3.4. **Participants' Assessment of the Characteristics of the Arbitrator in ACAS Arbitration Proceedings**

Did the arbitrator:	**Employers**	**TUs**	**Total**	**percentage**
act impartially?				%
Agree	87	89	176	88.9
Partially agree	7	5	12	6.1
Disagree	1	3	4	2.0
No response	1	3	6	3.1
handle matters confidentially?				%
Agree	84	95	179	90.4
Partially agree	10	4	14	7.1
Disagree		1	1	0.5
No response	2	2	4	2.0
have your trust?				%
Agree	85	71	156	78.8
Partially agree	9	20	29	14.6
Disagree	1	4	5	2.5
No response	1	7	8	4.9
have sufficient experience / knowledge of industrial relations?				%
Agree	69	81	150	75.8
Partially agree	21	15	36	18.2
Disagree	1		1	0.5
No response	5	6	11	5.6
sufficiently understand the issues involved?				%
Agree	74	78	152	76.8
Partially agree	18	15	33	16.7
Disagree	3	3	6	3.0
No response	1	6	7	3.5
act according to your expectations?				%
Agree	67	85	152	76.8
Partially agree	50	9	29	14.6
Disagree	7	5	12	6.1
No response	2	3	5	2.5

Source: Brown, 1992: Table 1, p.228.

Brown concluded that, despite some differences in perception, the parties who use arbitration believe that it had a valued and continuing role in the British industrial relations scene. The then Conservative government was seen to be 'not entirely hostile to arbitration *per se*, but to unilateral access by one party to a dispute' (*ibid.*: 233). She argued that 'as long as conditions of employment are determined by collective bargaining, there ought to be some system of

arbitration available to parties who fail to agree' (*ibid.*: 233). Yet again, it seems, a study of arbitration lays emphasis upon the 'collectivist' dimension. Even in the one area of arbitration exclusively devoted to discipline and dismissal cases, the Electricity Supply Industry, the value of the process has been seen primarily in terms of the established collective bargaining arrangements. It is too early to assess how the more recent privatisations, and the consequent changes to collective bargaining practice in the industry, have affected this perception of arbitration. At the moment, all that can be said is that a number of supply companies appear to have thrown out the arbitration 'baby' with the 'union recognition agreement' bathwater!

3.10. A word about Mediation

Before turning to the proposals to introduce an 'arbitral alternative' into the resolution of unfair dismissal disputes, a few words should be said about the related technique of mediation. It falls, rather appropriately, mid-way between conciliation and arbitration in the lexicon of dispute resolution, and is invoked by ACAS in circumstances where the door cannot, for one reason or another, be opened to arbitration. The fundamental problem is normally that one or other of the parties will not accept the principle of **binding arbitration**, or (more rarely) cannot agree to the nominations for arbitrator. In some cases, even, the two parties are not close enough together to agree terms of reference for an arbitrator, though of course they would still need to agree a clear definition of the problem, and express a desire to resolve it, in order for a mediator to start work! Since arbitration clearly relies upon rather more common ground in order to get under way, it is clearly not feasible in such circumstances.

However, the boundary between mediation and arbitration is sometimes indistinct; the cases are heard by members of the panel of arbitrators (not by ACAS staff), and the procedure is administered by the same ACAS officials. Some arbitrators prefer not to take such cases, however, for reasons difficult to speculate upon. The process, according to ACAS, differs largely in the degree of formality, and in the fact that 'the mediator may, for example, suggest that it might be useful for the parties to discuss their position with him or her separately to examine the prospects of achieving a settlement' (ACAS, 1995(b)). The mediator is in effect an expert, an outsider, a fresh mind, brought to bear on an intractable problem. Their task is to gain an understanding of the issues and make proposals to the parties, some of which they may not previously have considered.

The recommendations of a mediator are 'similar in form to an arbitrator's award but the crucial difference is that the parties do not undertake in advance to accept them' (ACAS, 1987). The process by which these recommendations are arrived at may often have a strong

resemblance to conciliation, though it is not being practised by an ACAS official. The mediator will ask questions, examine documents, visit locations, meet the parties separately and together, as (s)he thinks appropriate, and offer ideas informally as well as formally. There will, if mediation is successful, be a 'coming together' of the parties; and it will remain their responsibility to hammer out the details of a settlement.

Unfair dismissal disputes rarely, if ever, fall to be resolved by mediation. Those cases that are not settled through conciliation or by means of a compromise agreement are likely to be cases which turn on matters of legal interpretation, or cases with a significant 'collective dimension'. If the former is the case, the parties may well seek a judicial type of decision in the industrial tribunal, and if the latter is the case, then arbitration may provide the answer. In these situations, mediation has all the faults and advantages of conciliation and arbitration but nothing additional to offer.

3.11. An Arbitral Alternative

The suggestion that industrial tribunals should be replaced, or at least supplemented, by a more 'investigative' mechanism has been made on a number of occasions since 1980. The Warwick team, under Linda Dickens, devote a whole chapter of their influential analysis to the subject of an 'arbitral alternative' (Dickens *et al.*, 1985: 272 - 300), and reference has already been made to Rideout's work on similar lines (Rideout, 1986). The debate was given further impetus by the publication in 1993 of an argument in favour (*inter alia*) of the ACAS conciliation officer being allowed to offer arbitration as an alternative method of dispute resolution to those alleging unfair dismissal within the industrial tribunal system. The authors of the monograph (Lewis & Clark, 1993) claimed that the legal changes that would be necessary to give effect to this proposal were minimal, and they sought to put to rest the concerns that had been expressed by such as Rideout in the matter of awards, enforcement and appeals. A brief summary of the Lewis and Clark proposal, contained in chapter 4 of their monograph, follows.

- A person claiming unfair dismissal would be able, if they wished, to request ACAS arbitration as an alternative to an industrial tribunal hearing on their claim.

- The employer concerned (the respondent) would need to give their consent to the request.

- The agreement to take the dispute to arbitration would itself be taken to constitute either a valid 'settlement' under the auspices of a CO within the meaning of Section 134 of

EP(C)A 1978 , or a compromise agreement provided for under the Act (and hence in either case a valid bar to the further presentation of the claim to a tribunal, as provided by Section 140 of the same Act).

- A standard form of 'terms of reference' would be applied automatically, to be varied only by the joint agreement of the parties (and, by implication, with the advice of the conciliator).

- In general, unfair dismissal arbitrations under this procedure would be conducted by single arbitrators. However, if ACAS or the parties thought it appropriate, the usual criteria for appointing boards of arbitration could apply.

- There would be no appeal from an arbitrator's decision; indeed, if a party wished to preserve the option of appeal, arbitration would not be used. Judicial review would, as in current labour arbitrations, be available on the grounds of illegality, irrationality or procedural impropriety.

- Awards of an arbitrator in unfair dismissal cases would not be published, except with the consent of the parties.

- The decisions of arbitrators would be based upon the terms of reference and not upon legislative provisions, for example, in the matters of remedies.

- Enforcement of an award of re-instatement or re-employment would normally be through the power of moral obligation (a principle agreed by the parties before arbitration takes place); though in the final resort failure to comply would result in a breach of contract enforceable at law.

- A further remedy, in difficult cases, would lie in the fact that an arbitration award under this proposal would be sent to the tribunal for it to promulgate as its own award, thereby giving it legal force.

The proposal by Lewis and Clark was put forward in a number of different forums in 1993, and was evidently noted within the Department of Employment; for it was specifically referred to in the Green Paper 'Options for Reform' (DoE, 1994: para 5.23 *et seq.*). However, the version of the proposal that was set out in the Green Paper differed in several respects from the original ideas of Lewis and Clark.

In particular, the DoE envisaged that an appeal should lie, from the decision of an arbitrator, to the Employment Appeal Tribunal. This appeal could be on two grounds: that the arbitrator's decision was perverse in relation to the facts of the case, or it was perverse in respect of the relevant statutory provisions. This introduction of a right of appeal against the decision of an arbitrator on the facts of a case or the legal arguments was a fundamental departure from the Lewis and Clark concept; indeed from the whole basis of voluntary labour arbitration. What was being proposed was a hybrid system, with arbitration first, then, if you weren't satisfied with the outcome, a recourse to a court of law.

The Green Paper interpretation of the arbitral alternative also confused the issue of the terms of reference which an arbitrator would be required to address. Lewis and Clark had argued that, since their scheme was to apply equally to unrepresented applicants, it 'could be highly problematic to "negotiate" terms of reference in each case' (Lewis & Clark, 1993: 24). The Department of Employment, on the other hand, suggested that 'the conciliation officer would help [the parties] to draw up terms of reference stating the nature of the claim and what the arbitrator was asked to decide'. (DoE, 1994: para. 5.26). In the autumn of 1995 however, in a consultation paper circulated by the Department of Trade and Industry, Employment Rights section (successors in these matters to the Department of Employment), the original idea of Lewis and Clark has been restored and, if anything, clarified, by the proposal that standard terms of reference would be used by ACAS, as follows:

> To consider an application by ..... contesting his/her dismissal by .....; to determine whether the penalty was fair and reasonable and should be confirmed; or alternatively whether it should be varied or revoked; and whether the applicant should receive an award of compensation.
> The arbitrator shall have regard to general industrial relations standards of fairness, consistency and reasonableness as laid down in the ACAS advisory handbook on Discipline at Work, and the ACAS Code of Practice on Disciplinary Practice and Procedures in Employment.
> The parties agree that they will accept and abide by the arbitrator's award, which will be final and binding. (DTI 1995: para 12)

The consultation paper backed away, too, from the notion of an appeal to the EAT; the Lewis and Clark view, that arbitration should be understood by the parties as final and that the only recourse should be to judicial review, was fully endorsed in the DTI paper. The possibility, also canvassed in the Green Paper, of providing for parties to fund the cost of arbitration, was also omitted from the consultation paper.

The consultation paper was circulated in a restricted manner, to employers' associations, trade unions, legal practices specialising in employment law, and other interested parties. On 20th November 1995 the then President of the Board of Trade, Ian Lang, announced the government's intention to implement the proposal for independent binding arbitration as a voluntary alternative to an industrial tribunal hearing. The announcement left open the issue of whether this provision would be available only in unfair dismissal cases; and also gave no indication of the timetable of the necessary legislative and regulation changes.

3.12. Reaction to the arbitral alternative

Response to the DTI consultation paper may be assumed to have been broadly favourable to the Lewis and Clark proposal; indeed more favourable to it than to the bowdlerised version contained in the Green Paper! Nevertheless, there are critics concerned about the impact on the tribunal overload, or who believe that there could be unforeseen consequences to the general conduct of labour arbitration in Britain.

The Justice report on Industrial Tribunals noted, several years before Lewis and Clark published their detailed proposals, four problems that might arise with the arbitral alternative: that two different standards of fairness might develop, which could cause confusion when applied within the same enterprise; that unrepresented, or poorly represented employees could be unfairly pressed into going to arbitration; that in relation to compensation, arbitration would not necessarily provide as good remedies as the tribunals; and, finally, that ACAS could have substantial problems in recruiting the arbitrators required (Justice, 1987: 41). (It should be borne in mind that Justice is an organisation composed entirely of lawyers, who might see an extension of arbitration as posing a threat to their continuing role in dispute resolution). Since the debate has widened, a further criticism has been added to the above; that the alternative might be taken up by so few that its impact upon the industrial tribunals would be minimal.

The application of both a legal standard of fairness and an 'industrial relations' standard, side by side in the same organisation, does raise a potential problem. Practising supervisors and managers have quite sufficient difficulty, in the writer's experience, in applying one set of behavioural standards; they might find the mixed messages from tribunal caselaw and the organisation's experience with dismissal arbitrations to be altogether too confusing! Lewis and Clark address the issue by reference to the ACAS Code and Handbook, which they believe lay down 'the more generalised industrial relations standards of fairness to the employee and employer, consistency, and reasonableness in all the circumstances' (Lewis and Clark, 1993: 18). They point out that there are already distinctions between the current legal

definition of 'reasonableness' (the 'band of reasonable responses' or 'reasonable employer' test) and the industrial relations definition. This is exemplified in those cases turning on the employer's belief in the dishonesty of an employee, who later turns out to be probably not the culprit.

The 'inequality in bargaining power' dimension, referred to above (Dickens *et al.*, 1985: 283) must be addressed in any discussion of the application of arbitration to unfair dismissal cases. If, as she implies, arbitration has been successfully used by trade unions because they enjoy a broadly equivalent bargaining power to the employer, is it inevitably less attractive to the individual - perhaps quite unrepresented - employee? The growth, and the widely attested 'success', of industrial tribunals is sometimes attributed to their capability of placing employer and employee on a 'level playing field'. Would the same advantages apply to an employee arguing his or her unfair dismissal claim before an arbitrator, probably on their former employer's premises? Would the employee come under strong pressure from the employer, first to go to arbitration and then to accept a solution that met the employer's pragmatic objectives at the expense of fairness to the employee?

The experience of the electrical contracting industry may shed some light upon this issue. Our own investigations will show, in a later chapter, how fairly the individual employees who took their cases to the JIB unfair dismissal procedure felt they were treated. There was a suggestion in the Justice report that some such individuals 'have complained that their trade union has failed or refused to put their grievance through the exempted procedure' (Justice, 1987: 43). The research by Brown sought opinions from the 'employers and trade unions' involved in ACAS arbitration cases, and not from the individual employees involved in those cases that revolved around discipline or dismissal. It may be surmised that the high levels of satisfaction indicated by the trade union side (see Table 4.3 above) would not necessarily be shared by those individuals. The question of how effectively ACAS arbitration met **their** needs has not apparently been addressed.

The third potential problem area with an arbitral alternative, identified in the Justice Report, relates to the likely outcomes of arbitration, in particular where compensation is involved (Justice, 1987: para 3.31). There is now a well-established approach adopted by the industrial tribunals to the question of compensation; based upon legal enactments, it is true, but according with most people's conception of fairness and common sense. An arbitrator under the Lewis and Clark proposals would be bound only by the legal maximum limits, but not by the procedural conventions. He or she could thus take much more account, for example, of the 'size and administrative resources' of the employer than the tribunals have allowed themselves under Section 57(3) EP(C)A 1978. An employer experienced in arguing a case

before an arbitrator would probably be more adept at justifying a case for minimal compensation, than an inexperienced employee would be capable of refuting it. The problem could be exacerbated if the employee was not represented.

In view of the above issues, the ACAS CO will play a crucial role in triggering the use of an arbitral alternative to the industrial tribunal. The DTI consultation document acknowledges this by suggesting that the officer will suggest arbitration only in certain types of case:

> ACAS conciliation officers will play a key role in suggesting arbitration in suitable cases - perhaps the most appropriate being those in which a larger employer with in-house legal and personnel expertise is defending a claim against an applicant with access to advice from a trade union official. To safeguard the interests of unrepresented applicants in disputes where ACAS are not involved, arbitration will be accessible only through a compromise agreement. (DTI, 1995: para. 9)

It remains to consider the cost-effectiveness of the arbitral alternative to industrial tribunals; for it could conceivably emerge that the costs involved in developing this route for unfair dismissal claims are not justified by the number of claims that eventually adopt it. It has already been noted that the average direct cost of an ACAS facilitated arbitration in 1995 was £350 (before various overheads are taken into account), substantially below the cost of an industrial tribunal hearing though more than the cost of a conciliated settlement. The average cost of a case involving a tribunal hearing was estimated in the year 1992/93 to be £966 (DoE, 1994: para. 3.20).

The process of 'gearing up' to offer the arbitration path to unfair dismissal claimants would include the following:

- costs associated with achieving the required legislative changes.
- explanatory publications.
- training of existing individual COs.

and, depending upon take-up,

- recruitment or transfer of additional staff to the ACAS arbitration section.
- recruitment and training of additional arbitrators.

These matters would all involve cost, primarily to ACAS, and the on-going costs of the additional service might well be comparable with the present costs of an arbitration hearing. Nevertheless, the effective level of demand needs to be set against them. There is some scepticism as to how much demand there might be for the arbitral alternative. The labour lawyer Peter Wallington, addressing a conference of personnel directors and managers in

December 1995, conducted a 'straw poll' which indicated that only three of the 150 managers present saw themselves as likely to use arbitration in preference to the tribunal. Wallington considers that a 'crucial turn-off' is that the 'industrial relations standard' which arbitrators would apply is seen (by employers) as 'inevitably more favourable to the employee'. He suggested that 'the consent of one party to arbitration is usually one of the strongest reasons for the other party not to consent!' (Interview, Peter Wallington, 27 February 1996). Sources within ACAS itself expected (in 1996) that the usage of the arbitration route would settle down to about 200 to 300 cases per annum (though they acknowledge it is a very difficult matter to predict). This would require at least a doubling of the present list of ACAS arbitrators.

3.13. The place of arbitration

There is no question that the technique of arbitration will continue to be applied to a variety of dispute situations in employee relations; it has an unique and extensive history which for a century has been distinct from the use of arbitration in commercial and contractual affairs. The manner in which ACAS facilitates arbitration has been widely praised, and the service is proven to be effective and acceptable to disputing parties. None of the proposals for extending the application of arbitration to individual unfair dismissal cases will move the technique into uncharted waters; indeed such cases can already be put to arbitration if the parties agree. The way ahead for arbitration does appear to call for clarification of the role of the conciliation officer, and of the legal status of the arbitrator's decision. There is now a consensus in favour of a ' trial run' of the arbitral alternative, and we now await the Labour government's finding parliamentary time, and a suitable legislative vehicle, for putting this alternative into effect.

Postscript:

In July 1997 a Bill was introduced in the House of Lords by Lord Archer of Sandwell, a former government Law Officer, entitled the Employment Rights (Dispute Resolution) Bill. It has government support, and received an unopposed first reading. During its passage through Parliament ACAS is simultaneously working out details of the individual arbitration scheme to which the Bill refers.

In the debate over the Bill, significant points have been made regarding the attitude of disputing parties to the 'arbitral alternative'. For example, some employers may assent to arbitration only reluctantly since they would otherwise face an industrial tribunal hearing; thus the arbitration would not be wholly 'voluntary'. Employers who have no experience of trade

union negotiations, and applicants who are unrepresented by trade unions, may both be less committed to the 'rules of the game' in arbitration (for example, less ready to be bound in honour by the outcome).

PART TWO

The Development and Operation of the JIB Unfair Dismissals Procedure

CHAPTER FOUR:
Establishment and Development of the Joint Industry Board

4.1. Introduction

So far in this thesis we have examined three mechanisms of third-party dispute resolution: industrial tribunals, conciliation, and arbitration.

The unfair dismissal procedure of the Joint Industry Board for the electrical contracting industry, to which we now turn our attention, occupies in one industry the domain filled by both arbitration and the industrial tribunals in the resolution of unfair dismissal disputes. These disputes are individual in character, though in an industry where one trade union predominates it is questionable whether any disputed dismissal can be devoid of collective implications. In the following chapters we will examine the origin and development of this procedure (Chapter Four) and attempt to evaluate its effectiveness from the point of view of the employee participants as well as the others involved (Chapters Five and Six). In this respect the investigation differs from the work of Brown, who questioned only the representatives of the aggrieved parties in arbitration cases. Since our aim is to shed light on the reasons why the JIB example has not been more widely emulated, the parallel with industrial tribunals is more extensively explored and comparisons made with the work of the Warwick team under Linda Dickens. First, however, we must examine how the JIB came about, and how it came to seek exemption for its Unfair Dismissal Procedure.

In order to provide a basis for comparison between the dismissal procedures which apply outside and within the electrical contracting industry it is necessary to trace the factors which led to the establishment in 1968 of the Joint Industry Board (JIB), the only body of its kind in England and Wales, and the only one to have sought and obtained an exemption order under Section 65 of the Employment Protection (Consolidation) Act 1978 (now s. 110 Employment Rights Act 1996). We shall examine the extent to which the JIB was itself a response to an unique situation in an unusual industry; and thus to elucidate the question of whether there are special reasons why its exemption order has remained the only one to be granted. In a subsequent chapter we shall describe the operation of the exempted procedure, and evaluate its record over the decade and a half in which it has applied.

Some of the following description draws upon published material and such unpublished JIB documents as have been made available, together with personal interviews conducted with individuals who were directly involved in the events described. They are named in an acknowledgement at the conclusion of the chapter.

4.2. The Electrical Contracting Industry

Electrical Contracting is an industry which has largely become established in the present century. Broadly speaking, it comprises those companies engaged in the installation, and commissioning of electrical services in association with the construction industry, and in the maintenance and repair of such services in existing domestic, commercial and industrial buildings. It employs about 30,000 electrical craftsmen (and very few women) in some 3000 to 4000 companies. The industry is distinct from the Electricity Supply industry, which is concerned with the generation and distribution of electrical power; though in the past the electricity boards have maintained an installation capability, whose employees were subject to terms and conditions which related to the supply rather than the contracting industry.

The Census of Employment in September 1993 recorded a total of 93,600 persons employed in the electrical contracting sector, though this figure includes non-manual occupations, which are not covered by the JIB agreements, and the employees of a number of small companies not registered with either the JIB or the Electrical Contractors' Association (ECA). In mid-1997 there were approximately 10,500 companies registered with the National Inspection Council for Electrical Installation Contractors (NICEIC) - this figure includes a substantial number of self-employed individuals - and just over 2000 of these were member companies of the ECA. The NICEIC and ECA are independent of each other; the first providing a sort of 'kite mark' of quality assurance to customers of the industry, and the second providing technical, commercial and industrial relations advice to member companies.

4.2.1. The Employers' Association

The electrical contracting sector was the first part of the construction industry to establish a Joint Industrial Council on the Whitley pattern, in June 1925 (Keep, 1988: 14). A significant majority of employers in the industry (about two-thirds) are members of the ECA, and this body has for many years negotiated national collective agreements on the pay and conditions of employment of manual operatives and salaried staff on their behalf. The ECA is an employers' association within the meaning of Section 122 of the TULR(C)A 1992, and is registered with the Certification Officer as such. The members of the ECA are organised in England, Wales and Northern Ireland in eleven regions (there is a separate Scottish ECA), and the association has its headquarters in Bayswater, in central London. Prior to 1970 the ECA consisted of several related organisations, and the employers association 'component' was known as the National Federated Electrical Association (NFEA).

The employers are relatively small business concerns employing, on average, between nine and twelve staff. Keep has noted that 'the more broad-ranging and comprehensive industry agreements were often associated with industries predominantly made up of small employers' (Keep, 1988: 68). The proportion of employees who are engaged in manual work is relatively high; indeed there are a number of companies in which the principal is himself engaged 'on the tools'. The industry is overwhelmingly male; of all the manual employees issued with current grade cards by the JIB (24,500 in December 1995) fewer than **ten** were females. The preponderance of small-scale companies has led to a considerable degree of influence being exercised in the employers' association by individuals who themselves were employed 'on the tools' in times past; and some have been active trade unionists before joining the managerial echelon.

According to the JIB there were, in December 1994, some 24,842 electrical installation operatives registered as active; they were employed in 2,302 member firms, 2,017 of whom were also full members of the ECA (JIB, 1995: 167).

4.2.2. The Union

There is an apparent simplicity in the industrial relations structure of this particular sector which is the envy of many other industries. This is due to the dominance of the employers' association and the fact that for most of the century the employers have had the advantage of conducting collective bargaining exclusively with one trade union, the Electrical Trades Union (ETU). This union has changed its name, by reason of amalgamation, on a number of occasions in the last thirty years, and at the time of writing forms part of the Amalgamated Engineering and Electrical Union (AEEU). Its headquarters is at Hayes Court, West Common, Bromley, Kent, a substantial 19th century building, now much extended. At the time the Joint Industry Board was established, in the mid 1960's, the union was known by the somewhat cumbersome title: 'Electrical, Electronic, Telecommunication and Plumbing Union' (EETPU). The General Secretary at that time was Frank Chapple, later Lord Chapple.

4.3. Industrial Relations in the Sector prior to 1966

Despite the advantage of a single powerful employers' association and a strong trade union, the industry was beset by industrial strife for much of the 1950's. The trend continued into the early 1960's, as indicated in the following table, which shows industrial stoppages occurring in the electrical contracting industry in the period 1961 to 1966.

Table 4.1: **Industrial Disputes and Man-Days Lost in Electrical Contracting 1960 to 1966**

Year	Disputes	Man-days lost	Operatives involved
1961	50	31,836	3,229
1962	55	36,801	4,088
1963	49	9,365	2,351
1964	35	5,477	1,671
1965	54	11,891	2,590
1966	48	9,904	2,488

Source: JIB Annual Analysis of Industrial Disputes 1994

The ETU was dominated by the Communist Party in the period following World War II and until a notable court case in the early 1960's. In June 1961 several members of the then ETU executive, including General Secretary Frank Foulkes and the President, Frank Haxell, were found guilty in the High Court of ballot-rigging on a grand scale. As a result the defeated candidate in the disputed election, Jock Byrne, was declared General Secretary of the union. He subsequently formed a decidedly anti-Communist executive which included Les Cannon and Frank Chapple (who was himself a former communist).

Cannon and Chapple were convinced that the industry's poor industrial relations record was directly connected with the obstructive policies of the defeated communist executive. Thus, the new union executive's took early steps in the electrical contracting industry to seek an agreement to 'buy out' a multiplicity of different site payments around the country. They saw this as a way of achieving a high rate of wage throughout the country. This objective was substantially achieved in 1966 with the conclusion of an agreement in which employers conceded a three year pay agreement (even the first year's increment was a then unprecedented increase of one shilling (5p) per hour) in return for a national rate only enhanced in London and Merseyside regions. The Merseyside rate was itself 'bought out' in January 1975. At the same time an agreement was concluded concerning apprenticeships, whereby technical qualifications were insisted upon, and college day release was guaranteed by employers.

4.4. Origins of the Joint Industry Board

According to Frank Chapple, (Interview, Lord Chapple, 31 January 1996) he was in 1961 seeking election as the Assistant General Secretary of the ETU, and happened to read an article in the Reader's Digest - believed to be Raskin, 1961 - describing the dramatic changes

taking place in the United States trade union movement. In the mid-nineties this article seems remarkably prescient of the changes that have taken place in the United Kingdom during the last fifteen years; but the theme was very radical to a British trade unionist 35 years ago. Not long after reading the article, Chapple was introduced , at a reception in the US Embassy, to Harry van Arsdale, the Business Manager of Local 3 (the New York Chapter of the International Brotherhood of Electrical Workers) who was in Britain as a member of a delegation including the Machinists' Union. The Americans were later invited to visit ETU headquarters at Hayes Court. Chapple himself was a recipient of a Ford Foundation grant soon afterwards, and took the opportunity to visit van Arsdale while he was in the United States.

Chapple found that the New York electrical contracting industry had indeed been very close to gangsterism. Its affairs had hitherto been conducted in a manner which bore comparison with the Mafia; van Arsdale himself carried a handgun for protection and claimed to have used it! The industry had been strike-ridden and violent, and van Arsdale had struggled to bring sanity to bear. The New York Joint Industry Board had developed, from its beginnings in the 1930's (Rico, 1986: 574), as a result of the union and employers sitting down and deciding: 'This has got to stop!'.

Parallel to Frank Chapple's own interest in the New York JIB, another contact was being established on the UK employers' side. Geoffrey King, then Director of the NFEA, recalls (Interview, 8 August 1995) that a member of the Cohen family, accountants to the large electrical contractors James Scott and Company, was in touch with a large contractor in New York. This led to a director of one of the largest New York contractors visiting Britain and addressing the NFEA annual conference in Eastbourne in the early 1960's. The American visitor was charmed by his British hosts, and played an important part in arranging hospitality for a return visit.

Matters converged somewhat slowly, as those on both sides of the industry who had taken an interest in the New York JIB wisely chose not to rush matters. Les Cannon, who was by now President of the ETU and in the early stages of a terminal illness, was cautious about Chapple's reports from New York, feeling that a similar body to the JIB was unrealistic in Britain. He modified his view, however, after he himself concluded a visit to the United States with a visit to the New York electricians. Chapple feels this was the essential 'conversion' (Interview, 31 January 1996). Following the next annual conference of the NFEA, which was also addressed by a visitor from the New York employers, a joint union and employers association delegation visited New York State and met employers, trade unionists, and officials of the body known as the Joint Industry Board. The British delegation consisted of

Frank Chapple, Eric Hammond and Ernie Hadley for the ETU, and Vic Stock, Arthur Speed and Geoffrey King for the NFEA.

They found an institution jointly owned and managed by employers and the trade union, that was somewhat analogous to a National Joint Industrial Council but with its own permanent staff, including industrial relations 'trouble-shooters'. The New York JIB operated a labour pool, organised extensive fringe benefits, and safeguarded standards in training and dispute resolution. The British visitors took back a very favourable impression of the American model, and reports were prepared for the executive committees of both the trade union and the employers' association. Geoffrey King wrote the NFEA report, which commended British electrical contractors to consider establishing a body similar to the New York JIB. The proposals were given urgency by the need to review pay rates in the industry, and bore fruit in the 1966/69 National Agreement.

4.5. The original JIB agreement

The 1966/1969 Industrial Agreement, made under the auspices of the existing National Joint Industrial Council, provided a completely new framework for the electrical contracting industry in England and Wales. In addition to a three-year staged rationalisation of pay rates, including substantial increases that drew the critical attention of the National Board for Prices and Incomes (NBPI), the agreement committed union and employers' association to establishing a fresh basis for their relationship. The draft agreement on the constitution of the Joint Industry Board was prepared by a team which included Philip Durance, the NFEA/ECA solicitor, Ben Hooberman, his opposite number for the ETU, and a number of other advisers including Geoffrey King, Professor Sewell-Bray (the ECA's auditor), John Hall (an influential member of the ECA's Labour Relations Committee) and, interestingly, Tom Claro, who was at the time the Chief Conciliation Officer of the Ministry of Labour. Under provisions signed on 15th August 1967 and brought into force on 1st January 1968 a Joint Industry Board was established with offices and staff of its own, charged with responsibilities including the resolution of disputes, the protection of standards, the improvement of industry productivity, and the extension of employee benefits.

The principal objectives of the JIB were defined as follows:

> .. to regulate the relations between employers and employees engaged in the [electrical contracting] industry in such ways as the Joint Industry Board may think fit, for the purpose of stimulating and furthering the improvement and progress of the industry for the mutual advantage of the employers and employees engaged therein,

> and, in particular, for the purpose aforesaid and in the public interest, to regulate and control employment and productive capacity within the industry and the level of skill and proficiency, wages and welfare benefits of persons concerned in the industry. (JIB, 1995; 2)

A number of points call for emphasis at this point. First of all, the public interest is clearly stated within the objectives, and this is an interest which itself has several facets. It was seen as very much in the interests of the general public and of the government of the day that the industrial strife which threatened to delay the large-scale construction of power stations should be controlled. Furthermore, it was felt that the public has an obvious safety interest in the level of skill and competence of those who are engaged in the installation of electrical services. Slightly less obvious may be the interest which the general public has in having a fair deal financially from the electrical contracting industry.

A second theme which emerges from the objectives quoted above is that of 'productivity', which in the 1950's and 1960's was something of a *buzz-word* in industrial relations, even finding its way into the new title of the former Ministry of Labour, the 'Department of Employment and Productivity'. The electricity supply industry was engaged in negotiating a 'status' agreement which consciously embraced flexibility and productivity aspects pioneered in the United States and in the Esso Petroleum agreements at Fawley (Donovan 1968: para 318). The two sides of the electrical contracting industry saw clearly a shared interest in efficiency, flexibility and technical progress. From its earliest days the JIB sought to enhance the productivity of the industry as a whole, as well as the skills of individual employees through training and grading.

The third theme which appears briefly in the statement of objectives concerns 'wages and welfare benefits'; a matter which was naturally of paramount concern to the ETU. Herein lies a significant clue to the facility of establishment of the JIB and to its continuing success. The industry operates - in common with other sectors of construction - a holiday stamp scheme whereby operatives receive holiday credits week by week, and carry that credit to another employer whenever they change job. When an employee's annual leave is due, a new employer is able to release them and pay their holiday pay in full, regardless of length of service, since their credits will be reimbursed to that new employer by the stamp scheme. This scheme, as it has developed in electrical contracting, has been the financial basis upon which the JIB has grown. We shall return to examine its influence in more detail later.

The 1966/1969 agreement was negotiated at a time when the Labour government was operating a policy of pay restraint monitored by the National Board for Prices and Incomes,

and the clauses dealing with wage increases were found to be in breach of the policy. Chapple, in his autobiography, tells of the difficulty encountered by the union and the employers in persuading the government to make an exception of the new JIB agreement (Chapple, 1984: 113). The NBPI eventually contented itself with insisting upon a short delay in the implementation of the pay increases.

However, some aspects of the agreement were apparently well-received by the government, for the Minister of Labour, Ray Gunter, wrote a message of commendation in the first edition of the JIB handbook, published in 1967. Geoffrey King recalled that Gunter had hinted during the negotiations leading to the agreement that, if the JIB model got off the ground, consideration might be given to exempting it from future legislation providing for the statutory resolution of disputes (Interview, 8 August 1995). Lord Chapple could not recall such a hint being apparent, though he concedes that Gunter was very supportive of the new agreement (Interview, 31 January 1996). Jim Houston, who was to become the independent Chairman of the JIB in January 1969, does not recall a particularly supportive stance from the Labour administration; though he was not involved in the discussions which established the JIB (correspondence, 9th October 1995).

4.6. Opposition to the JIB

Others within the industry and the trade union were certainly not so impressed by the achievement of the ECA and the ETU. Opposition to the birth of the JIB took many forms and arose from several directions. Senior figures in the ETU, including Les Cannon, were sceptical about the provisions in the agreement for the grading of all electrical operatives - a form of simple job evaluation by classification. It had originally been envisaged that the 40,000 or so electricians and labourers would be graded by their own employers, but many in the union who were otherwise supportive of the new agreement were unhappy about this aspect. In the end the classification task was carried out, in conditions of some secrecy, by a small team under Geoffrey King (by now Director-designate of the JIB), and overseen by the newly established JIB Grading Committee consisting of Eric Hammond and John Hall. King recalls that when it became known that the grading work was under way at the union's headquarters in Bromley (using the ETU computer facilities) some left-wingers in the union picketed the premises (Interview, 8 August 1995).

The clear opposition of the left-wing in the ETU to the 1966/69 agreement had in fact become obvious as soon as it was publicly announced. In Eric Hammond's autobiography he graphically describes the occasion, immediately after the news broke in the press, when 300 demonstrators marched on Hayes Court. In the violence that ensued when the demonstrators

were addressed in the canteen, Frank Chapple was injured to such a extent that he was off work for three months (Hammond, 1992: 36-37).

Left-wingers in the ETU were at this time reluctant to admit to membership of the Communist Party due to a membership rule revision after the ballot-rigging case which prohibited Communists from sitting on the union's Executive Council; and they continued to oppose the infant JIB for some years. Well into the 1970's, meetings of the National Board were regularly picketed. On one occasion at least, the members of the Board required police protection to arrive at and leave the Cafe Royal in Piccadilly (Interview, Geoffrey King, 8 August 1995)! The essence of this opposition lay in the character of the dispute resolution process, which had virtually outlawed strike action. Before discussing these procedures in detail, however, there were other sources of opposition to the JIB which should be noted.

The employers were, as a body, rather cautious about the new agreement. Some had found it difficult to adjust to the 'standard wage rate' philosophy evolving in the industry in recent years, and still valued an ability to pay forms of site bonus to their operatives. (Informal bonuses, such as 'job and knock' - whereby an operative can 'knock off' after completing a job for an agreed price - have never quite disappeared from the industry, despite various efforts at JIB control).These employers saw the JIB structure as a further constraint upon their business flexibility. Nevertheless, many were themselves former electricians - and union members - and were eventually won round.

The Trades Union Congress was not, in general, as accommodating. Cannon and Chapple received little encouragement from the members of the General Council at the time. According to Chapple, two of them, Harry Irwin and Ken Gill, were saying one thing (about the iniquity of what later came to be known as 'no-strike' agreements, for example) and doing another (Interview, 29 January 1996).

4.7. Setting up the JIB

Despite the early difficulties, however, the Joint Industry Board quickly became established in its own offices in Sidcup under the directorship of Geoffrey King. John Walker was appointed as Director of Industrial Relations. The National Board itself, consisting of 16 nominees from each of the two 'constituent parties', was initially chaired by Tom Daniel, a retired former Chairman of the North West Electricity Board. His role, under the Rules, was to safeguard the public interest and, as we shall see, provide a final adjudication (or arbitration) in the event of serious disputes remaining unresolved. Unfortunately Tom Daniel died of a heart

attack after less than a year in office * . Tom Daniel was succeeded by Jim Houston, a former Production Director of the Fairfields Shipyard experiment. Les Cannon made the initial suggestion, and a formal invitation was sent to Houston jointly by Vic Stock of the ECA, and Frank Chapple. He remains the Chairman of the JIB to the present day.

In Scotland there exists a separate employers' association, which has frequently adopted policies independent of the ECA in England and Wales even though it negotiates with the same trade union. When the JIB was under discussion in the mid-1960's, the Scottish ECA had applied to join the International Electrical Contractors (in effect, the European ECA) and became somewhat estranged from the association in London because it felt the ECA was dragging its feet over that application's approval. Partly as a consequence the Scottish Joint Industry Board was formed separately though on similar lines to its counterpart south of the border. Yet at its inauguration in December 1969 Jim Houston was also appointed its Chairman - an act which has held the two JIBs together since.

For the purposes of the present study it is not necessary to examine in detail the National Working Rules of the JIB, the Productivity Department, the Employment Pool, the Grading system nor the workings of the welfare and Holiday Benefits system. We shall return to the issue of the JIB's finances, but it is now necessary to describe the key industrial relations feature of the JIB, which led ultimately to the application for exemption from industrial tribunal procedure, which is the focus of this part of the thesis.

4.8. The Disputes Procedures

The JIB has, from its inauguration in 1968, been organised on a regional basis - just as were the Joint Industrial Councils which preceded them, and in much the same manner as the employers' association. There are thirteen Regional Boards whose membership consists of local employer representatives nominated by ECA branches in the region, and union officials who, in rare cases, may be 'lay' officials' i.e. shop stewards. The Chairmen, Deputy Chairmen and members are all formally 'appointed' by the National Board. Whereas the National Board is chaired by a 'neutral' and, indeed, has a second member representing the public interest, there is no such representation at Regional Board level.

The 'Disputes Procedure' is fairly succinct and given its importance to this thesis may usefully be quoted in full:

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*Eric Hammond recalls that the death came just two days after a meeting of the infant National Board, at which he (Hammond) had challenged a procedural ruling given by Daniel. As a result 'I have become rather wary of challenging elderly gents who chair meetings I attend' (*op.cit.*: 39).

1.1 **Prompt Action**:

The resolving of disputes shall follow the principle of prompt action being taken at each stage and all possible steps must be taken to resolve problems at the earliest stage of the following procedure.

1.2 **Procedure.**

(a) Individual operatives shall report to their immediate supervisor any problems relating to these Rules. [The National Working Rules]

(b) Failing satisfaction, the Job/Shop Representative [shop steward] may approach the supervisor concerned and then, if necessary, the Employer's Representative on site on behalf of the individual operatives.

(c) In the event of a problem not being resolved, either party may refer to their respective organisations for assistance but if the problem cannot be resolved it shall be immediately referred to the local Regional Joint industry Board in the form of a full written report of the problem addressed to the Secretary of the Board [a JIB National Officer].

(d) The Secretary will use his best endeavours to reach a conciliated settlement but failing such settlement he will report to the Chairman of the Regional Joint Industry Board who, after consultation with the Deputy Chairman, may order an investigation to be carried out within ten days, by the Regional Board (or a committee of that Board) which shall ascertain the facts and settle the problem within the terms of these Rules.

(e) Notice of appeal against a decision of a Regional Board or a committee of that Board must be lodged in writing with the Secretary of the Joint Industry Board within twenty-eight days from the receipt of the written confirmation of the decision of a Regional Board or a committee of that Board, and shall be decided by reference to a meeting of the National Board or a committee of the National Board.

(f) Where a decision of a local RJIB disputes committee, which involves the payment of monies is the subject of an appeal the appropriate amounts may be required to be paid to the Joint industry Board and will be held in a JIB suspense account until such time as the appeal is finally settled. (JIB, 1995; 49)

Thus, under this original national agreement all disputes that could not be resolved speedily 'in-house' were referred to the JIB National Officer responsible for that region of the country. The national officer's role was to promote a resolution of the issue in a manner analogous to that of an ACAS conciliation officer. Failing such a settlement, the dispute was referred to a meeting of the Regional Joint Industry Board, a joint panel of employers and union officials which met regularly to discuss matters of mutual concern. However, in practice the RJIB

always appoints a 'dispute committee' of two of its members, to hear the issue and make a decision on its behalf. Appeal can be made from the RJIB decision to the National Board.

The National Board, which consists essentially of the members of the Labour Relations Committee of the Electrical Contractors' Association and the relevant Executive Council members of the union meeting under an independent Chairman, then has the final say. In practice, once again, the National Board has appointed a sub-committee, known as the National Appeals Committee, to act on its behalf. At the time of writing this committee has a member from each of the parties, meeting under the chairmanship of the second 'public interest' member of the National Board, Ivor Williams.

It is important to note that the disputes procedure referred to above was designed to deal with issues that were both individual and collective in character. Geoffrey Kay, in an unpublished degree dissertation, points out that it was possible, from the outset, to pursue a case of unfair dismissal under the above dispute procedure. He comments that (a) any employee participant has a right to pursue a grievance through the procedure, and (b) 'if a person feels he has been dismissed unfairly with no redress it is likely those working with him will acquire a sense of injustice which could spill over into some form of industrial action and would inevitably require resolution before a dispute committee' (Kay, 1993: 6).

The mechanism of dispute resolution, though in practice *ad hoc*, was from the origins of the JIB built upon institutions that had a permanent character. The Regional JIBs, for instance, met regularly three or four times a year. Where previously an issue might be 'kicked into touch' by tacit agreement of the local officials or for reasons of policy, there was now a known procedure and known individuals who had a responsibility to adjudicate. It was a procedure which functioned by the continuing good relations of the parties, at both regional and national level; and those good relations extended well beyond the matter of dispute resolution into areas of mutual, financial interest.

4.9. The Combined Benefits Scheme

According to Geoffrey King, the key to the successful establishment of the Joint Industry Board lay in the pre-existence of a joint employer-union operation known as the 'Specialist Trades Holiday Scheme Limited' (Interview, 8 August 1995). In the early 1960's this organisation shared the Bedford Row offices of the NFEA/ECA. It administered the scheme referred to earlier whereby employers purchased a weekly stamp whose face value represented, roughly, a 52nd part of the annual holiday pay due to the employee. The stamps were fixed to each employee's card week by week. When the holiday actually took place, the

employee was paid the total value of the stamps on his card, and the employer sought refund of the same amount from Specialist Trades Holiday Scheme Ltd. Such schemes are particularly useful in industries where employees frequently changed employers; the stamped cards are taken with them to their new employer. They operate in several other sectors of the construction industry.

The financial advantage of such a scheme to the employers' association requires little imagination, for it amounts to an industry savings plan whose investment potential is considerable. At the time of the formation of the JIB the scheme was already under the joint trusteeship of the ECA and the ETU, and it was an obvious step to link the scheme's future with the embryo joint body. Indeed, it represented a means of paying for the running costs of the JIB. Furthermore, as the JIB's services to individual employers and employees developed, it became possible to combine other forms of benefit with the basic holiday scheme. For example, sickness benefits, redundancy payments, death and disablement insurances were added, stage by stage, and the Combined Benefits Scheme became a leader in the field.

By late 1974 it was being suggested that the accumulating investments of the JIB Combined Benefits Scheme could also make a direct financial contribution to the running costs of the ECA and the EETPU themselves. In other words, that employers' association subscriptions and union membership dues might be 'subsidised' by the investment earnings. It proved difficult for ECA member companies to accept the concept that cash which they had paid to the JIB for the benefits stamps would find its way, by whatever circuitous route, into the union's own funds! In December 1973 the JIB Management Committee agreed points of principle on a suitable financial mechanism, and on 15th January 1975 an agreement was reached between the parties whereby an Agency would be set up by the ECA to administer the scheme and by which 'the distribution of the funds so collected would be under the authority of ECA/EETPU trustees [as before]' (Letter from M.A. Stothers, Chairman of the ECA Labour Relations Committee, to E.A.B. Hammond: 16 August 1976).

The Electrical Contracting Industry Benefits Agency (ECIBA) was accordingly established in its own offices in Orpington. The EETPU, despite receiving from that time a substantial financial contribution comparable with the membership dues of its electrical contracting members, continued to harbour suspicions that the funds now being collected by an arm of the ECA were not always applied immediately to the joint benefit of the JIB parties. Eric Hammond, as an EETPU trustee appointed by the JIB's Management Committee, sought on several occasions to be given fuller information about the use of the schemes funds - suspecting their short-term application to the ECA's interests (Interview, Eric Hammond, 19 April 1996).

Geoffrey King always regretted the removal of the Combined Benefits Scheme from the JIB's direct control. He believed that the scheme should not have thus become the 'instrument of the ECA and the Union'. (Interview, 8 August 1995). Nevertheless, he acknowledged that the experience of generally fruitful working relations within the administration of the scheme contributed to the harmonious nature of employer-union relations within the JIB.

4.10. Legal enforceability of the Rules of the JIB

The Joint Industry Board was established, it should be remembered, at much the same time as the Donovan Commission was deliberating and reporting. One of the matters debated by the commission was the question of whether collective agreements should be legally enforceable (Donovan, 1968: ch. VIII). In the United States it was, and remains, commonplace for collective bargaining to result in a legally enforceable contract between the employers and trade unions involved. In the United Kingdom, on the other hand, there has been an almost mythical belief in the effectiveness of 'voluntary' collective bargaining. It was as though the concept of legal enforceability might, of itself, muddy the waters of industrial relations. The Labour Government's plans to implement Donovan, contained in the White Paper, ***In Place of Strife***, did not envisage legal enforceability. But when the Heath administration enacted the Industrial Relations Act 1971 there was provision for collective bargains to be legally enforceable unless the parties specifically excluded the possibility by a so-called 'TINALEA' clause ('this is not a legally enforceable agreement'). In fact, during the brief period when this provision was in force, employers and unions generally opted out by specifying that their agreements were not intended to be legally enforceable!

The JIB Rules (in a sense the founding constitution of the Joint Industry Board) were agreed between the parties at a time (1965) when the law specifically excluded collective bargains from legal enforceability. Nevertheless, the wording of the Rules, and the behaviour of the parties at the time and since, might lead an unbiased observer to conclude that it was and is the intention of the parties to be morally, if not legally, bound by the Rules. For example, Rule 13 states: 'Every member of the Joint Industry Board shall be and remains bound by and shall at all times observe and comply with the provisions of these Rules, and of the bye-laws' (JIB, 1995: 15). The term 'members' includes all employee and employer participants, and thus the two principal parties also. There are penalties provided in the Rules to punish those who break the rules, including the levying of fines. The solemnity of the terminology itself confirms the serious intention of the two parties.

The question of legal enforceability appears only to have been tested once; when a 1978 wages 'determination' of the National Board was deemed by the government of the day to be in breach of the current incomes policy. According to Eric Hammond, this led to the only 'official' strike to have occurred in the electrical contracting industry since the formation of the JIB. The union called a strike in defence of the properly constituted (and in their view legally enforceable) JIB determination upon which the government was forcing the employers to renege. The employers had sought injunctions against the strike in order to protect their interests, but Lord Denning refused. 'The Attorney General had to come to court and apologise for interfering with a legally binding agreement' (Hammond, 1988: 3). The exact legal status of the JIB Rules does not appear to have been examined on any other occasion; and it may be surmised that the degree of financial involvement of the parties is now such that either would baulk at the idea of pressing a dispute into the courts.

Having examined the establishment and early development of the JIB, we must now consider the origins of the legal provision which was to provide the parties to the JIB with their unique opportunity to seek exemption from tribunals.

4.11. Section 110 exemption from industrial tribunals

The passage of the Industrial Relations Act 1971 brought with it a brief and succinctly worded section (31) intended to give effect to one of the proposals of the Donovan Commission (Donovan, 1968: paras 559 - 562), namely that, where appropriate industry provisions existed to deal with such matters as unfair dismissal, it should be possible for such provisions to remain in effect as an **alternative** to statutory arrangements. The debate in parliament about this section was virtually non-existent, such was the non-controversial nature of the exemption provision. A tri-partite body known as the National Joint Advisory Council on Dismissal Procedures reported in 1967 to the effect that the voluntary development of internal domestic procedures was preferable to legislation on unjust dismissals, and that if statutory machinery was introduced it should only provide a 'fall-back' position (Bourn, 1979: 91).

Perhaps no-one really thought it would, or could, ever be used; for the likelihood of employers and unions voluntarily agreeing a comprehensive package of arrangements to protect individual employees adequately against unfair dismissal must have seemed remote in the extreme. Such an application had to be made jointly by employers and unions, and had to provide for substantially equivalent remedies to be available to successful applicants. Bourn noted that, though the jurisdiction of an exempted agreement could be wide, there was 'no requirement for such cases to be decided according to statutory principles. It is common

practice for each case brought under either an industry-wide or an internal dismissals appeals procedure to be decided according to its merits' (*ibid.*: 91). Indeed, he concluded that one of the reasons why there were (at the time he wrote) no exemption orders in existence covering unfair dismissal, could arise from 'the contrast between the indicative and fluid way in which collective agreements are couched as opposed to the more rigid statutory requirements, thus making it difficult to show on paper that the relevant collective agreement offers a better standard of protection to the worker than the statute' (*ibid.*: 99).

The exemption provision lay unused on the statute book for several years, and was then relocated in Section 65 of the Employment Protection (Consolidation) Act 1978, unchanged from its original wording. It was as the so-called **'Section 65 exemption'** that the JIB came to utilise the provision in negotiations with the Department of Employment in 1978 and 1979. The exemption provision attracted no further public interest until the publication of the Green Paper on the reform of the industrial tribunals in 1994, though the JIB gave informal briefings from time to time to representatives of other industry negotiating bodies; for example, the Engineering Construction National Joint Council. The exemption clause now resides in Section 110 of the Employment Rights Act 1996, and since it is so germane to the following analysis, the key elements are reproduced below:

> (1) An application may be made jointly to the Secretary of State by all the parties to a dismissal procedures agreement to make an order designating that agreement for the purposes of this section.
> (2) On any such application the Secretary of State may make such an order if he is satisfied -
>
> (a) that every trade union which is party to the dismissal procedures agreement is an independent trade union;
> (b) that the agreement provides for procedures to be followed in cases where an employee claims he has been, or is in the course of being, unfairly dismissed;
> (c) that those procedures are available without discrimination to all employees falling within any description to which the agreement applies;
> (d) that the remedies provided by the agreement in respect of unfair dismissal are on the whole as beneficial as (but not necessarily identical with) those provided in respect of unfair dismissal by this Part [of this Act];
> (e) that the procedures provided by the agreement include a right to arbitration or adjudication by an independent referee, or by a tribunal or other independent body, in cases where (by reason of an equality of votes or for any other reason) a decision cannot other wise be reached; and

(f) that the provisions of the agreement are such that it can be determined with reasonable certainty whether a particular employee is one to whom the agreement applies or not.

(3) Where a dismissal procedures agreement is designated by an order under this section which is for the time being in force, the provisions of that agreement relating to dismissal shall have effect in substitution for any rights under section 54; and accordingly that section shall not apply to the dismissal of an employee from any employment if it is employment to which, and he is an employee to whom, those provisions of the agreement apply.

The JIB did not immediately consider applying for exemption under Section 31 of the Industrial Relations Act 1971. It has been suggested by one researcher (Kay, 1993: 6) that the matter did not receive full attention until two particular cases occurred which were heard both under the JIB Disputes Procedure ***and*** in the Industrial Tribunal. Since in both cases the tribunal agreed with the decision of the industry disputes committee, we may surmise that the industry's leaders asked themselves whether such duplication of procedure could be avoided. Whatever the immediate cause, the JIB began negotiations with Department of Employment officials in the late 1970's, with a view to obtaining an exemption order.

4.12. The Problems and the Negotiations

Discussions with the then Department of Employment and Productivity began in 1978, in the context of a Labour government wrestling with inflation and growing industrial discord. The fact that the electrical contracting industry had achieved ten years of comparative industrial harmony was an undeniable fact; the record of industrial stoppages compared well with the situation prior to 1966 (see Table 4.2 below).

The JIB negotiators, who included John Walker, the Director, and Ron Coulbert, for the ECA, argued that the existing disputes procedure already met most of the criteria required by Section 65 of EP(C)A 1978. In the first place, it was considered feasible, in the light of the JIB's record, to achieve the necessary agreement to amend the final stage of the industry's existing procedure to provide for independent arbitration under ACAS auspices. A number of issues relating to the appeal to an arbitrator arose during the negotiations and in the early years of the exempted procedure, in particular, the JIB took the view that the arbitrator should not re-hear a case in its entirety, since the ACAS arbitrator is in effect substituting for a court of appeal. The JIB Management Committee initially went further; arguing that it should have an opportunity to 'vet' cases which were to go to the ACAS arbitrator (Interview, Ron Allender, 13 October 1995). However, it was not possible to reconcile this view with the

meaning of the legislation; sub-section (e) of the exemption clause required a clear right to 'arbitration or adjudication by an independent referee, or by a tribunal or other independent body'.

Table 4.2: **Industrial Disputes and Man-Days Lost in Electrical Contracting 1968 to 1975** *(Compare Table 4.1)*

Year	Disputes	Man-days lost	Operatives involved
1968	31	5,350	1,452
1969	21	4,832	1,235
1970	29	9,732	1,681
1971	23	16,646	1,093
1972	31	19,953	3,937
1973	37	21,138	5,614
1974	49	10,946	1,637
1975	84	12,370	4,250

Source: JIB Annual Analysis of Industrial Disputes 1994

The question of remedies and awards also required careful consideration. The disputes procedure could only impose penalties provided for under Rule 22 of the Joint Industry Board i.e. fines of £1000 upon an employer or £100 upon an employee, expulsion from the JIB or lesser withdrawal of privileges of membership. The government negotiators saw it as essential that a scale of awards and remedies broadly comparable with those available to the industrial tribunals was put in place; and the JIB duly imported many provisions of the legislation intact into its new unfair dismissal procedure. It should be noted that the Department of Employment's view on this matter has not been consistent. In 1986/87, for example, when a revised exemption agreement was being discussed, they suggested that provisions on interim relief would not be required; however, in more recent negotiations it was argued, once again, that the JIB remedies must closely parallel the statutory ones. (Interview, Ron Allender, 13 October 1995).

An agreement acceptable to the Department was entered into by the constituent parties of the JIB on 31st May 1979, and accordingly on 14th September 1979 the new - Conservative - Joint Parliamentary Under Secretary of State for Employment, Patrick Mayhew, signed the only order (apart from revisions) that has ever been made under the exemption provision (Appendix Three). The Order came into effect on 1st October 1979, and since that date the

general JIB Disputes Procedure has, in effect, consisted of two parallel procedures. The original procedure still applies to all issues arising under collective agreements (i.e. the JIB National Working Rules), while the exempted Dismissals Procedure Agreements operates in most matters that would otherwise be within the jurisdiction of industrial tribunals. In practice, as will be seen in the following chapters, most of the individual disputes are concerned with dismissal or redundancy. The exempted procedure specifically excludes discrimination cases, and cases relating to the assertion of trade union rights. As noted below, it has become necessary to amend the original Order, and the current exemption takes the form of Statutory Instrument 1991 No. 1105, signed by a junior Employment Minister, Eric Forth, on 29th April 1991. The text of the current Unfair Dismissal procedure is contained in JIB document W.12354 dated 13th November 1989 and mirrors almost word for word the relevant sections of the EP(C)A 1978. However, the essence of the procedure is summarised in Appendix 'A' of that document, which is given in full at Appendix Four below, by permission of the Joint Industry Board.

4.13. The exempted Disputes Procedure

The key features of the JIB unfair dismissal procedure were drawn up in terms very similar to the legal protections against unfair dismissal originally contained in the Industrial Relations Act 1971, and for many years thereafter in Section 57 *et seq.* of the Employment Protection (Consolidation) Act 1978. The JIB procedure used identical wording to the all-important sub-sections 57 (1), (2) and (3) of the EP(C)A, which set out the considerations which an industrial tribunal must take into account when deciding if a dismissal is fair or unfair. These key definitions placed the burden of proof as to the reason for dismissal upon the employer, and require the tribunal to consider the reasonableness and sufficiency of the reason in the circumstances of each case. The JIB procedure has retained the original wording even though the 'burden of proof' has long been more balanced in the statutory definition.

However, the JIB procedure also differed from the statutory system of employment protection in a number of other important respects, including the practical process of conciliation by national officers, adjudication by regional boards, the nature of awards, enforcement rules, and appeals. Most significantly, when a decision of the National Board fails to resolve an unfair dismissal claim, the matter was referred to an arbitrator appointed by ACAS. This type of arbitration, a hybrid of Rideout's 'regulated' and 'equitable' forms, is unique in current British industrial relations practice. It is a voluntary agreed arbitration, the final and binding stage of a dispute resolution procedure; yet it is also enshrined in the law of the land by means of the exemption order.

4.13.1. Eligibility

The procedure, when originally exempted, applied to 'JIB employee participants'. In practice, all operatives registered with the JIB and employed by ECA member companies were ***deemed*** to be union members, since (as explained above) JIB investments had effectively paid their subscriptions since the setting up of the ECIBA in 1975. The changes in trade union law enacted during the 1980's, however, included a gradual elimination of the 'closed shop' from the British industrial relations scene. This made it necessary for the JIB to allow individual operatives to opt out of EETPU membership. As a result, the Unfair Dismissal procedure had to be amended to make it applicable only to JIB employee participants who are members of what is now the AEEU (EETPU section). Furthermore, they must be employees of a company which is itself in membership of the Electrical Contractors' Association. All JIB registered apprentices who meet the above criteria are also covered by the provisions of the exempted procedure.

The agreement is therefore clearly limited in scope to those employees who are the subject of collective agreements between the JIB parties. As a corollary of this 'membership restriction', it follows that no party to an unfair dismissal hearing under the procedure may be represented by another trade union or employers' association. In a general analysis of the exemption provision, written before the JIB procedure came into effect, Colin Bourn considered whether a non-unionist would be placed at a disadvantage by inclusion in or exclusion from an industry agreement. He understood the Donovan Commission to have been 'relatively sanguine about the disadvantage that might be suffered by a non-unionist in such a situation' (Bourn, 1979: 95). He pointed out that were an application for exemption to be made then 'only those few [procedure agreements] which offer the alternative of .. independent arbitration fully meet the point about discrimination [against non-unionists]' (*ibid.*).

One very significant difference between the JIB procedure and the statutory provisions is that the unfair dismissal protection applies after 26 weeks of service, not the 104 weeks that normally applies to industrial tribunal jurisdiction. This arises because the eligibility provision was not altered when the statutory rules were changed in the mid-1980's. The present statutory limit has recently been called into question on grounds of its alleged effect of sexual discrimination, in that short-term employees who never stay long enough in employment to acquire statutory protection are predominantly women (see R v Secretary of State for Employment *ex parte* Seymour-Smith; Court of Appeal. July 1995). In the electrical contracting industry, however, virtually none of the eligible employees are female, yet a considerable proportion have relatively short service, and might well fall outside a 104 week eligibility criterion.

4.13.2. The Procedure in Detail

The following examination draws principally upon the JIB publication: "Guide to the Disputes Procedures" (JIB, 1993), supplemented by discussions with the current JIB Secretary and JIB National Officers.

When an eligible employee wishes to raise a complaint of unfair dismissal, he (or she) should complete an Originating Application form, analogous to an IT1, sign it and send it to the JIB head office. In practice, this is usually undertaken by the union official concerned with the case, once it is clear that internal machinery has failed to achieve agreement with the employer. The application must be received by the JIB within three months of the date the dismissal took place. According to the JIB Guide, 'it may be necessary for the JIB to require a statement from that [union] official, ... confirming that he has carried out all the required preliminary steps [i.e. raised the issue through 'domestic machinery']' (JIB, 1993: 2).

On receipt of an application the appropriate National Officer (who is also, of course, Secretary of the Regional Joint Industry Board) sends a copy to the employer together with a Reply Form which the employer must return within seven days. This compares with the 14 days currently allowed to tribunal respondents; a period which is expected to be increased to 21 days (DTI, 1996: 3). Once the application and reply are both to hand, the documents are forwarded to the Regional Board Chair and deputy chair, with a request for instructions with regard to setting up a Disputes Committee hearing. The JIB guide encourages the practice of the RJIB Chairman and Deputy Chairman being given access, before a hearing, to 'the most relevant paperwork, to ensure that if required, they would be in a position to express a view on the merits of the case and whether the application was of a frivolous nature' (JIB, 1993: 3). In any event, all documentation should be prepared, and exchanged with the other party, at least ten days before a hearing.

The National Officer exercises a role in relation to the exempted unfair dismissal procedure which is markedly different from the role of the ACAS conciliation officer, fully described in Chapter Two. In the first place, it is true, the JIB National Officer has a duty to attempt conciliation between the parties at any stage in the period leading up to the hearing. Once the hearing begins, however, the role more closely matches that of the tribunal clerk, or even a magistrates' clerk, since the officer acts as Secretary to the Disputes Committee, and also as its advisor on the procedures and the application of JIB National Working Rules.

The Disputes Committee, as previously noted, consists of a trade union and an employer member of the Regional Board, one acting as Chairman and the other as Deputy Chairman. In theory, any RJIB member might sit on such a committee, but note is taken of members' availability and their experience in unfair dismissal cases when the selection is made. In some Regions the same two RJIB members take all unfair dismissal hearings, alternating in the chair. Hearings are conducted in a manner which closely parallels the industrial tribunals, though evidence is not taken under oath, nor is there any specific requirement as to the layout of the room in which the hearing takes place. However, after introductions the complainant is invited to state their case, present evidence and call witnesses. The respondent employer is then given an opportunity to put questions to the complainant's witnesses. The Disputes Committee may also pose questions to the complainant and his or her witnesses. The respondent is then asked to present their case in an analogous manner.

It is interesting to note that the JIB Guide refers to the possibility that breaches of JIB National Working Rules might be disclosed in evidence (that is, quite apart from 'unfair' employment practices). In order to encourage the full facts to emerge, the guidance suggests that a Disputes Committee should treat any admission of breaches of JIB Rules 'as almost privileged information that is submitted without prejudice' (*ibid.*: 5). Such breaches, whether or not they are found relevant to the unfair dismissal claim, should be dealt with under separate JIB disciplinary machinery. The Disputes Committee, having heard the cases presented by the parties, must then draw to their attention the remedies that are available "with particular reference to reinstatement and re-engagement" (*ibid.*: 6). Final statements from the parties are then called for, the Secretary will ask the Chairman to explain the rights of appeal, and the parties will then withdraw while the Committee deliberates. It is apparently normal for a decision to be reached on the day of the hearing in all but the most complex cases.

Awards and remedies available to the RJIB Disputes Committee are similar to those used by industrial tribunals. The wording of the exempted procedure is almost identical with that of the appropriate sections of the legislation (now contained in Part X, chapter II of the Employment Rights Act 1996). The monetary awards made by the RJIB are enforceable through the County Court as a civil debt; and a refusal to comply with a decision of the Disputes Committee is dealt with by the JIB's Disciplinary Committee under Rule 22: 'Discipline of Participants' (JIB, 1995: 16).

4.13.3. Appeals

The exempted procedure provides two stages of further appeal, beyond the Regional Disputes Committee hearing. The first recourse is to the JIB National Appeals Committee, by means of a notice of appeal lodged within 28 days of receipt of written confirmation of the disputes committee decision. Three grounds of appeal are deemed acceptable:

a. that the Disputes Committee was in error in its application or interpretation of the National Working Rules.

b. that the Disputes Committee made a decision which no disputes committee having due regard to the National Working Rules and the Dismissal Procedures Agreement could reasonably reach on the evidence before it.

c. that the Disputes Committee made an error in the application of the Dismissal Procedures Agreement. (JIB, 1993: 11)

It may be noted that these grounds of appeal are essentially those upon which appeal lies from an industrial tribunal to the Employment Appeal Tribunal. The JIB National Appeals Committee, as earlier noted, consists of three National Board members; an employer nominee, a union nominee, and the independent member. At the time of writing (September 1997) these were:

I. Williams (chair)
D.W. Bevan (AEEU)
G.H. Kay
(The JIB Chief Executive, J.M. Pollard, is the alternate chairman)

The function of the National Appeals Committee is to examine the grounds of appeal, not to re-examine the case. Their procedure is as informal as possible, though their hearings are normally held in the boardroom at JIB head office in Sidcup. Their decision is generally reserved, and conveyed to the parties in writing after the hearing together with a standard form explaining the right of appeal to an ACAS arbitrator. An aggrieved party has 28 days in which to make such an appeal.

4.13.4. ACAS Arbitration

The decision of the JIB National Appeals Committee is, in effect, a decision of the National Board itself. Under the exempted unfair dismissal procedure the National Board decision will be implemented 'subject to the right of appeal to a legally qualified arbitrator to be appointed by the Advisory, Conciliation and Arbitration Service .....' (*ibid.*: 15). If such an appeal is made, the JIB Secretary forwards the request to the Arbitration Section of ACAS Head

Office, whose duty is to appoint an independent arbitrator. The ACAS official who first became involved with the JIB unfair dismissal procedure was Les Parsissons; his role is now undertaken by Simon Gouldstone. ACAS are free to nominate any of their panel of arbitrators who is 'legally qualified'. Although several different arbitrators have dealt with the 14 cases arising since the procedure came into effect in 1979, recent cases have been referred to John Davies, Barrister at Law.

Once the case is referred to ACAS it is no longer the responsibility of the JIB, though complainants do continue to direct their attention to the JIB head office if they believe the matter is not receiving prompt attention (Interview, Ron Allender, 11 October 1996). In the early 1990's there does appear to have been some disquiet expressed informally to ACAS over the time taken to arrange arbitration hearings. The precise role of the arbitrator has also given rise to debate. The JIB has always contended that it is not the arbitrator's place to re-hear the entire case; rather to adjudicate upon the grounds of appeal only. A right of appeal exists, according to the agreement, if 'either party ... is dissatisfied with (i) the determination or direction of the National Board in respect of the Dismissal Procedures Agreement, or (ii) the admission or rejection of any evidence' (JIB, 1989: A2). This limited role is further clarified in the following subsections. The statement of grounds of appeal must ' seek to show that in reaching its decision the Regional Board or the National Board or both made some error in interpretation or application of the Dismissals Procedure Agreement to the matter with which the appeal is concerned' (*ibid.*). Matters which could have been raised at an earlier stage, but which were not, cannot be used as a basis for appeal to the ACAS arbitrator.

On the other hand, the general terms of reference allowed to the arbitrator within the agreement are stated as follows:

> (h) On the hearing of an appeal the arbitrator may:
>
> (i) order a re-hearing of the complaint, or
>
> (ii) make a decision in respect of any party, or
>
> (iii) make an order on such terms as he thinks proper to ensure that the determination is on the merits of the real question in dispute between the parties. (*ibid.*)

This would appear to allow the arbitrator scope for more than a simple 'reference back' to an earlier stage of procedure. The arbitrator is assisted at the hearing by two industry assessors (who are normally National Board members), a fact which tends to confirm that the arbitrator's role is not simply a legalistic one. The cases which have proceeded to arbitration do not appear to exhibit common characteristics; and there is therefore scope for further research into the exact nature of the arbitrator's role.

Not only has the JIB sought to avoid claimants using the arbitration stage to achieve a complete re-hearing of their case when they objected to the decision of the RJIB or the National Board, it has also contended that no complainant should be able to 'by-pass' earlier stages of the procedure and insist upon immediate arbitration. This point appears to have figured in negotiations with the Department of Trade and Industry in 1995 and 1996 about the revision of the exempted procedure. As a consequence, the then Conservative government's draft ***Employment Rights (Dispute Resolution) Bill*** included a section to clarify the legal provision under which the exemptions were granted. Section 12 of the proposed Bill provided *inter alia* that an exempted procedure should provide:

> for arbitration in every case or
>
> (i) for arbitration where (by reason of equality of votes or for any other reason) a decision under the agreement cannot otherwise be reached, and
>
> (ii) a right to submit to arbitration any question of law arising out of such a decision (DTI, 1996).

This proposed amendment would make clear that, in the case of the JIB procedure (where arbitration in every case is **not** on offer), the ACAS arbitrator would only have a role when either the National Board could not reach a clear decision, or a question of law had arisen from a decision.

4.14. A summary

This chapter has sought to explain the historical context against which the electrical contracting industry found itself able to apply for an exemption from the industrial tribunal mechanism for the resolution of unfair dismissal claims. The circumstance of a highly representative and financially sound employers' association negotiating with a single trade union known for its opposition to militancy, allowed the establishment of a unique institution called a Joint Industry Board. This body, after some twelve years of demonstrable success in dispute resolution, was in a position to take advantage of a virtually unknown clause in the employment protection legislation allowing procedural exemption. The key features which distinguish the JIB procedure are:

1. It applies only to employees who are members of the AEEU, working for companies who are members of the ECA under the JIB National Working Rules.
2. There is no service requirement before an employee becomes eligible to complain under the procedure.
3. The JIB national officer fulfils a dual function as a conciliator (if conciliation is called for by the parties) and as secretary of the disputes committee hearing.

4. The disputes committee consists of two voting members, not three as in the industrial tribunal; and neither are legally qualified. They represent the two sides of the Regional JIB in which the dispute has arisen.
5. Hearings are conducted more informally than in the industrial tribunal.
6. Appeals from decisions of the RJIB disputes committee are heard by the JIB National Appeals Committee.
7. Appeals from the National Appeals Committee are placed in the hands of ACAS, who appoint a legally qualified arbitrator sitting with two assessors from the industry.
8. Awards are enforceable under the JIB Rules and as civil debts in the county court.

Does the exempted procedure work? This question has not been formally addressed nor systematically measured since the inception of the JIB Unfair Dismissal procedure in 1979. The author has been granted access to the employer and employee participants in some 450 cases of unfair dismissal which have been dealt with under the JIB procedure from 1991 to 1994 inclusive. A postal survey questionnaire aimed to discover the level of satisfaction with the process and the outcomes of the exempted procedure, and the basis of the study is fully described in Chapter Five. The results form the basis of the Chapter Six.

CHAPTER FIVE:
A Study of the Effectiveness of the JIB Unfair Dismissals Procedure

5.1. Introduction

The JIB Unfair Dismissals procedure has been in operation for 17 years (in 1997) and has not, to date, been the subject of an independent review of its operation and its effectiveness. The term 'effectiveness' is used here in several senses. First, the operation of any formal industrial relations procedure may be assessed in terms of its success in resolving the issues it was set up to address; this may be a purely statistical measure based upon a comparison of the situation which prevailed before the procedure came into effect and the situation thereafter, or it may be a more qualitative - or even subjective - determination based upon the opinions of those who have used the procedure. Second, the 'effectiveness' of a procedure may be assessed against a set of criteria deemed to have a wide applicability or public recognition; in the present case the criteria might appropriately be those defined by the Donovan Commission as being desirable in any procedure dealing with individual employment rights disputes (see Chapter One). Third, a procedure may be directly compared in its effectiveness with analogous or parallel procedures which exist to respond to the same types of problem.

The following chapter describes the planning and execution of an attempt to assess the effectiveness of the exempted JIB unfair dismissal procedure by means of a questionnaire survey of the disputing parties who have used the procedure during a five year period, 1991 to 1994 inclusive, supplemented where possible selected interviews conducted with those who have taken part in the operation of the procedure at various levels. The analysis of the information obtained focuses upon:

a) an assessment of the extent to which the procedure meets its stated aims,
b) the comparison of the exempted procedure with the industrial tribunals, and
c) an evaluation of the procedure in terms of meeting the broad 'Donovan' criteria of a disputes procedure.

5.2. Planning the survey

5.2.1. Access

The Joint Industry Board is a voluntary organisation established by two consenting partners, and not constrained by statutory formulations. Consequently it takes some care to preserve its privacy and confidentiality. Quite apart from the desire of the employer representatives and the union officers to do business away from the glare of publicity, there are other reasons why the Board maintains its privacy. It is the guardian of personal information about large numbers of electrical contracting operatives, including grading, training, and certain employment records, which have been held on computer and documentary files for up to thirty years. The minutes of the National Board's meetings are in the public domain, though in practice somewhat difficult to access; but the correspondence files of the JIB have not been made available to the present research.

When the Chairman of the JIB, Mr. J.D. Houston, was first approached he was unwilling to provide any information not available to the general public. However, a subsequent personal approach to the JIB Secretary, Mr. R. S. Allender, resulted in the provision of copies of the JIB reports from which the survey population was identified. General information relating to the exempted unfair dismissal procedure was in due course willingly provided, including the text of the procedure itself, and guidance notes thereon, the names of the parties to each case initiated in the survey period, and the addresses of all employer participants of the JIB.

The cases arising under the procedure cover England, Wales and Northern Ireland. It was not considered practical to conduct a extensive programme of formal interviews with the parties to each case, for reasons of time and cost. This had been the method adopted by the Warwick investigators under Dickens, in the early 1980's. However, a copy of the structured questionnaire used in the Warwick research was generously made available, and the survey instrument used in the present research draws upon it to some extent. Furthermore, respondents were invited to provide their address and/or telephone number if they were prepared to be contacted direct for follow-up. Approximately half provided this information with their completed survey questionnaire, and this is made clear - where relevant - in the following chapter.

5.2.2. The Survey Population

The Joint Industry Board publishes, in the spring of each year and in time for its annual conference, an 'Analysis of Industrial Disputes in the Electrical Contracting Industry and

Investigations carried out by Regional Boards'. These documents contain tables summarising the operation of both the exempted Unfair Dismissal Procedure and the JIB Disputes Procedure (which deals with all disputes falling outside the scope of the unfair dismissal procedure). The information is derived from JIB records and 'with the assistance of the one hundred largest employer-members of the JIB' (JIB, 1992). Up to and including the report for the year 1991, the case by case listing of the disputes does not clearly distinguish the 'exempted' cases. However, the general format of this listing allows such cases to be identified in most instances. After the summary tables, each annual report lists individual cases, showing:

- the names of the employee(s) and employer involved,
- the nature of the dispute or allegation,
- the RJIB area in which the dispute arose,
- the dates of any hearings and appeals,
- the outcome of the case and
- the names of the members of the RJIB Disputes Committee (where one took place).

From 1992 onwards, the annual reports also indicate clearly which cases were regarded as falling within the scope of the exempted unfair dismissal procedure.

The employee population to which the questionnaire was despatched included all those employee participants named as applicants in cases identified as being within the exempted procedure, and initiated in the calendar years 1991 to 1994 inclusive. This period was selected because:

(a) JIB statistics prior to 1991 were not clearly categorised into 'exemption' and 'non-exemption' cases

(b) It was felt that respondent recollection of events would be less reliable more than four years before the time the survey was conducted

(c) The number of the population to be surveyed was considered to be manageable, in terms of results analysis.

In eight instances the JIB no longer had an address recorded for the individual concerned. Nineteen individuals named as applicants in 1991 cases were not sent questionnaires, as they were involved in issues involving redundancy. It was understood that such cases were not, at the time, referred to the exempted procedure.

The employer population included all those companies, named as respondents in the above cases, who were still recorded as JIB employer participants in the 1996 JIB Register of Employer Participants. The questionnaire was despatched to the company head office, or to

the branch falling within the RJIB region in which the case arose. As noted below, a small number of companies have gone out of business since their involvement in a case; in some instances concurrently with the case. In summary, the population contained essentially all those who had been party to a dispute initiated under the JIB unfair dismissal procedure from 1991 to 1994 inclusive.

5.2.3. The Design of the Employee Questionnaire, and the response rate

Almost three hundred employees made applications under the exempted unfair dismissal procedure in the period 1991 to 1994, according to the annual reports prepared by the JIB each year. A proportion (17.5 per cent) of these cases were multiple applications. The 'exemption' cases initiated in this period (193) represent almost exactly a third of the total number of disputes notified to the JIB; the remainder being cases which do not fall within the scope of the exempted procedure; for example, because the complainant was not a member of the EETPU.

While the names of the applicants are recorded in the annual reports, their addresses are confidential to the JIB. However, the Board kindly agreed to post the author's survey questionnaire to the applicants using their own database, including a stamped addressed envelope provided by the author, for returning the completed questionnaire direct to him. In this way the identity of applicants who had responded to the survey would be known only to the author (through a coding system), and the addresses would remain confidential to the JIB.

The 1991 cases were initially used as a **pilot survey**, with the intention of modifying the survey instrument if necessary. In the event, the 1991 employee applicants received their questionnaires with an explanatory letter from the author (Appendix Five) and not a covering letter from the JIB Secretary. This led two recipients to write to the JIB objecting to the apparent divulgence of their home address to an outsider. Nevertheless, the percentage return of the pilot 1991 survey was higher than the later surveys for 1992 to 1994. A possible reason for this is that the questionnaire itself was, at this stage, printed on two sheets of A4 paper (four sides) and was therefore less daunting than the three sheet version used for the 1992 to 1994 cases.

The pilot questionnaire is shown at Appendix Six. It was designed to lead respondents through the JIB procedure in the chronological order of its stage, and contained questions concerning the origins of the dispute and the 'domestic' or internal company stages prior to the reference to the JIB; the applicant's prior level of awareness of the JIB procedure; the role of the National Officer before and during the operation of the procedure; the preparation and

conduct of the RJIB Dispute hearing, and the level of satisfaction of the applicant with the outcome of the case. Questions were included regarding appeals to the JIB National Appeals Committee and the ACAS arbitrator.

The survey instrument was designed to be as 'user-friendly' as possible; that is, the questions were so constructed as to make it possible for a respondent to complete it in less than about 15 minutes, without having to consult more than their own memory. Most questions required a single tick in a box to indicate a chosen option. Half the questions called for a 'YES/NO' response; although, with hindsight, there were a number of instances in which further options: 'Not applicable' and/or 'Don't know' would have been helpful to a full analysis. Questions relating to the conduct of the Disputes Committee hearing (the behaviour of the Chair and panel members, and the nature of their decision) offered respondents a range of options. As far as possible these options were the same as those used in the survey of ACAS arbitration conducted by Brown (1992) or in the Warwick research into industrial tribunals (Dickens *et al*, 1985). Several questions provided a limited space for respondents to add explanatory comment, and there was a final question allowing for any general comment on the operation of the JIB exempted procedure. Recipients of the questionnaire were invited to specify whether they were willing to be contacted again.

As has been noted, the questionnaire was deliberately designed to lead respondents through the procedure in chronological order, according to the manner in which it is **supposed** to operate. Insufficient account was taken of the possibility that respondent employees would misunderstand or misinterpret stages in the procedure. For example, it became apparent from some responses that multiple claims did not always involve the personal attendance of all the claimants at the RJIB hearing. In such cases a respondent might be unaware that representations had been made on their behalf **before** an RJIB hearing took place.

A total of 80 questionnaires were despatched to 1991 complainants, in November 1995, and a total of 19 questionnaires were returned between 2nd December 1995 and 22nd February 1996. Three further questionnaires were returned because the addressee was deceased or moved away; three other recipients telephoned without returning the questionnaire.

No major omissions or errors became apparent as a result of sending the questionnaire to the 1991 applicants; and only very minor amendments were made to the layout before the main survey took place. These changes resulted in the questionnaire being printed on three sheets instead of two. The main survey was posted in a JIB-franked envelope with a covering letter signed by the JIB Secretary; and again, the mailing contained a stamped addressed envelope

for direct return of the survey form to the author. The revised form of the questionnaire used for the employee participants is given at Appendix Seven.

The questionnaires were despatched by the JIB in three batches -1992, 1993 and 1994 cases - during the period 21st May 1996 to 15th June 1996. Of the 202 sent out, a total of 31 useable responses were received, between 2nd June and 10th August 1996. Combining the figures for 1991 to 1994 inclusive, 282 questionnaires produced 50 responses; a rate of 17.7 per cent. We comment below on the level of response, and suggest reasons why it was not higher.

5.2.4. The Employer Questionnaire

Essentially the same questions were included in the questionnaire sent to employers in November 1996 as had been used in the employee survey. The principal change involved the omission of questions relating to trade union representation, which were regarded as being inapplicable. A number of companies had been involved in more than one case under the procedure during the period under review, and in such cases only one survey questionnaire was despatched. The recipients were requested, where the context of the question called for a specific response, to restrict their remarks to the most recent case. The format of the Employer questionnaire is given at Appendix Eight.

Seventy one employers, still traceable as JIB Employer participants in November 1996, were sent the survey questionnaire. Some companies had gone into liquidation since the case arose; indeed, in six cases the JIB records the demise of the employer as occurring during the case. A total of 21 questionnaires were returned by employers (29.6 per cent).

5.3. Response levels

The response to the postal survey was somewhat disappointing, certainly as far as the employees for the years 1992 to 1994 were concerned. The highest percentage responses were to the two components of the survey despatched direct by the author (26.5%); the questionnaires despatched from the JIB itself brought a considerably lower return (15.3%).

The contents of the questionnaires and covering letters were almost identical in the separate despatches; and the clearest distinction between 'batches' lay in the source that would be apparent to the recipient. Those questionnaires despatched by the author were contained in envelopes franked by an academic institution; those despatched by the JIB would clearly indicate a JIB postal franking. An additional covering letter was included in the JIB mailings,

written by the JIB Secretary and giving a clear assurance that the individual's response would not be divulged to the JIB itself (Appendix Nine).

It is possible that this assurance was not taken at face value; indeed it is possible (though difficult to demonstrate) that some recipients were ill-disposed to the JIB after their unfair dismissal case and would not believe the Secretary's assurance. There is some support for this hypothesis in the fact that two individuals telephoned the author to express strong dissatisfaction with the manner in which their case was handled by the JIB, and two other individuals (both 1991 employees) wrote and vigorously objected to the survey being carried out all!

The results of the survey are presented in detail in the following chapter, and tables recording the results of the survey, question by question, are contained in Appendix Ten.

5.4. Issues arising after analysis of the survey results

A number of issues emerged after the responses were analysed, and the following section details aspects of the postal survey which now appear unsatisfactory and which could be the subject of further research.

The respondents did not always have the opportunity to indicate ***why*** they were giving a nil response; in other words, most questions did not provide for separate responses for the categories: 'Not applicable', 'Don't know', 'Can't recall', 'Don't wish to respond', etc. Those respondents who benefited from a conciliated settlement, for example, did not need to answer the later questions in the survey. However, some of them did - even though the questions were probably inapplicable. On analysis, it was not always possible to tell whether their responses referred to the conciliated settlement.

The employer and employee surveys were identical in the pilot phase (1991 cases) but differed to a significant extent in the surveys for subsequent years. This is noted at the appropriate point in the results appendix, but it occasionally gives rise to situations where the differing responses of one group of employers have to be combined in order to be comparable with the responses of other employers or the main body of employee respondents.

5.5. Other evidence

The information derived from the postal survey needs to be set alongside JIB statistical evidence and oral evidence of individuals who have taken part in the exempted procedure.

This is because no postal survey give the full coverage of the Board's official statistics, nor can it provide sufficient opportunity for respondents to describe the exceptional or unusual, or to explain their motivation in their own terms. Individuals often misunderstand survey questionnaires, or fail to respond because the range of options provided does not include their particular circumstances. Lacking time, or space on the survey return, to explain their special concerns, they either make a nil return or choose the 'closest option'. An interviewer is able to sense such hesitancy, and can probe to discover such underlying issues.

The original research design envisaged interviews with a representative number of each of the following categories; but restraints of time allowed only six of the eight categories to be interviewed, some by telephone: Applicants/Complainants (2), Employers / Managers, including Personnel officers (1), Local union officials (nil), JIB National Officers (1), The JIB Secretary (1), Members and Chairs of Regional JIBs (nil), Members of the National Appeals Committee (1), and ACAS-nominated arbitrators (1). There would undoubtedly be advantage in a fuller programme of interviews, for the reasons outlined above; the JIB may wish to consider such a proposal if further research is carried out at a future date.

Further general comments on the outcomes of the research are made in Chapter Seven.

CHAPTER SIX:
The Findings of the Postal Survey

6.1. Introduction

This chapter summarises and analyses the key findings from the postal survey of employer and employee participants. Since both groups were 'respondents' (so far as the questionnaire was concerned) yet the employers were also 'respondents' in respect of the cases raised, it has been decided to use the terms '**applicant**' and '**respondent**' exclusively in the sense they are used in industrial tribunal proceedings. Since the questions to employers and employees were not identical, it is made clear in the following analysis whether a conclusion is based upon one set of returns or the other, or both.

References to tables denoted by letters (e.g. 'Table E') are references to the appropriate table in Appendix Ten. Such tables are derived from the postal survey returns themselves; while tables in the present chapter may have other origins, such as the annual reports of the JIB.

The analysis is structured first of all in chronological order i.e. following the JIB procedure in the sequence that events normally follow. However, we shall depart from a pure chronological discussion where appropriate. The chapter concludes with an evaluation of the extent to which the JIB procedure meets the 'Donovan criteria' for an unfair dismissal procedure.

6.2. Preliminary stages of the procedure

6.2.1. Domestic, or 'in-company' hearings

The first issue addressed in the survey concerned the steps that take place before an unfair dismissal case is drawn to the attention of the JIB. In principle, all cases referred to the exempted unfair dismissal procedure should have first been the subject of proceedings held at 'domestic' level. The November 1989 edition of the Dismissals Procedure Agreement (JIB, 1989) states, in Appendix A:

> It is expected that where an Employee Participant considers he has been unfairly dismissed he will have sought the advice of his EETPU Area Official before the last

> stage of his firm's appeals procedure has been reached in accordance with the provisions of the Joint Industry Board's Code of Good Practice - Discipline. *

This requirement parallels the proposal that has been made in some quarters (for example, in DoE, 1994: para. 4.23) that industrial tribunal applicants should be required to exhaust any internal company appeal procedure available to them before making their application. There is already a legal requirement upon every employer to include, in the written statement of employment particulars, details of the disciplinary procedure applicable to an employee (Employment Rights Act 1996, Section 3). The ACAS ***Code of Practice on Disciplinary Procedures*** (ACAS, 1977) requires, *inter alia,* that a disciplinary procedure should be in writing and available to those to whom it applies. Nonetheless, anecdotal evidence from the author's own students suggests that many employers are dilatory in explaining to employees what rights they have in disciplinary procedures.

In the JIB cases surveyed, more than half the applicants reported that no internal procedure had taken place at all (Table B). This is not to say that no form of domestic hearing took place, for some applicants might not have been personally involved in domestic proceedings if the case concerned several applicants. Furthermore, since the results vary widely from year to year it would be unwise to conclude that there is a systematic disregard of the correct procedures, or even a consistent problem of mis-perception. A more likely explanation is that applicant recollection is poor. Nevertheless, the requirement set out in the extract above was evidently not familiar to a proportion of JIB employee participants.

The employers who responded to the survey were, as might be expected, much clearer as to whether an internal procedure had been followed. Only in four instances did the respondent report that no hearing took place; and the reason always given was that the applicant had gone direct to the JIB without raising the issue domestically.

Applicants were given the opportunity to comment upon the reason why their complaint was not dealt with internally (if this was, indeed, their perception). The responses ranged from the embittered: *"The employer's attitude was that if you didn't like their policies you can go elsewhere"* to the blandly factual: *"It was not company procedure"*. A number of applicants had themselves by-passed an internal hearing by approaching their union official directly after the dismissal. Apparently this action led the cases straight to the JIB; in one case because: *"the employer did not recognise the union and its practices"*. This is remarkable, in view of

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* The 'Code of Good Practice - Discipline' is contained the JIB handbook published each year, and performs a function in the JIB disputes procedures analogous to that of the ACAS Codes in industrial tribunal proceedings.

the fact that every JIB employer must be aware of the union's intimate involvement with the running of the JIB.

The role of the union official in a case, prior to the reference to the JIB, was the subject of further questions in the survey. More than half the responses from applicants acknowledged that an official of the EETPU (now part of the AEEU) played a part in an internal hearing about the dismissal. This result is inconsistent with the fact that fewer than half the applicants recalled an internal hearing at all! An explanation must again be sought in poor recollection, or a confusion over the role actually played by the union official whom the employee consulted. In itself this may indicate a need for the union to explain more clearly to its members the functions it seeks to fulfil at the various stages of these disputes.

Applicants were also asked about their satisfaction with their representative's work on their behalf before the hearing. Over 80 per cent of responses answered this 'Yes/No' question, and of these 68 per cent stated that they were satisfied with the representative (i.e. the trade union official or solicitor) at this stage (Table X). We shall return to this issue later in the chapter.

6.2.2. Individual or multiple cases?

The JIB disputes procedure, which has existed from the formation of the Board in the mid-1960's, is a typical product of collective bargaining and can trace its descent from the procedures of the National Joint Council which preceded the JIB. Until the exemption order of 1979, this procedure was available to employees alleging unfair dismissal, though from 1971 it had been possible for such individuals also to apply to the industrial tribunal. Where more than one employee was alleging unfair dismissal it was likely and possible that a case would be pursued both in the tribunal and through the JIB disputes procedure. After 1979 the exempted procedure, replacing for electrical contracting operatives their access to the tribunals, became the forum for resolving both individual and multiple dismissal cases.

Multiple dismissals are, in the nature of things, more likely to arise in circumstances of redundancy than of incapacity or misconduct. Collective indiscipline is, almost by definition, industrial action, and applicants dismissed for such a reason have no recourse to the JIB's unfair dismissal procedure unless it can be shown that others engaged in the industrial action have not been dismissed (the exempted procedure exactly parallels the law by which industrial tribunals deal with such situations). The JIB annual reports for 1991 to 1994 record the following breakdown of cases arising under the exempted procedure:

Table 6.1. **Proportion of Cases Under the Exempted Procedure that were Multiple Applications**

Year	Unfair dismissal cases	of which, multiple applications	Unfair selection for redundancy cases	of which, multiple applications
1991	59	8	14	4
1992	44	5	23	8
1993	29	2	5	4
1994	12	2	18	6
Totals	144	17 (12% of 144)	60	22 (37% of 60)

Compiled by the author from JIB Annual Reports of Industrial Disputes, 1991 - 1994

The proportion of cases that involved more than one applicant was between 17.5 and 19 per cent (according to whether multiple cases are treated as one application or as many); yet of the cases covered by returned questionnaires 26 per cent were multiple applications (Table A). This suggests that individuals involved in multiple cases were somewhat more ready to respond to the survey, though it is not possible to draw any conclusions about the collective ramifications of the dismissals. As far as we are aware, there are no records linking incidents of industrial action to any of the multiple dismissal applications.

6.2.3. Notifying the JIB of an unfair dismissal claim:

The exempted procedure formally begins when the JIB receives an 'originating application' bearing the signature of the applicant (or 'complainant' in the JIB's jargon). According to the JIB's 'Guide to the Disputes Procedures' (JIB, 1993: 2) a complainant will be 'advised to consult his AEEU-EETPU Section area official'. This official 'must satisfy himself that the matter cannot be resolved at local level'. The JIB reserves the right to call for a statement from the union official confirming that all the required preliminary steps have been taken.

Participants in the postal survey - both employees and employers - were asked who had formally notified the JIB of the existence of the dispute. The replies from applicants (employees) indicate that just over half the cases were notified to the JIB by the union, and most of the remainder notified by the employee direct (Table D). Four of the respondent employers said that the dispute was brought to the JIB by the applicant before there had been a domestic hearing. The JIB does not keep a record of how cases are notified, but it is

understood that letters and telephone calls are sufficient to start the process; the completion of a special form is not insisted upon.

In some respects, therefore, the JIB's exempted procedure would appear to be **easier to access** than the industrial tribunal procedure. There is always a right of access to the union official, and the JIB does not insist upon formal documentation before beginning the process. Yet the procedure does not seem to get under way immediately; the survey indicates that it can frequently be more than a week before the applicant is contacted by the JIB. Though 20% of the responses from employees recorded that the JIB made contact within one week, and 60% within a month of notification, this still leaves almost a quarter of applicants claim to have waited more than a month to hear from the JIB. The Central Office of Industrial Tribunals, on the other hand, claims that it acknowledges originating applications almost by return of post.

The first contact from the JIB to the participants, both employee and employer, takes one of three forms: a telephone call, a letter or a visit. In fact, the JIB Secretary writes to all applicants to explain the working of the exempted procedure and advising that a National Officer will shortly be in touch with the parties. Just over 70% recalled receiving a letter from the JIB, while about 16% of applicants were contacted by a telephone call (Table F). Presumably, some applicants heard from the National Officer before they had received their acknowledgement letter from the JIB Secretary.

Few of the employee participants in the survey could recall exactly who had first contacted them from the JIB; perhaps reflecting a poor level of understanding of the JIB structure and role. 65 per cent of applicants either did not know who first contacted them, or did not respond to the question (Table G).

6.2.4. Knowledge of the special character of the JIB unfair dismissal procedure.

The Joint Industry Board is an unique institution, and its procedures especially so; yet it would be surprising if every employee participant fully appreciated how distinctive is the method of dealing with allegations of unfair dismissal. Several questions in the postal survey sought to discover how well understood was the exempted procedure. Knowledge of the procedure may exist at two levels: an employee participant may or may not be familiar with the working of the JIB procedures in general, and they may or may not be aware that the exempted procedure precludes them from making an industrial tribunal application.

The evidence of the survey, so far as applicants (employees) is concerned, is that over 80 per cent said they were previously unfamiliar with the Unfair Dismissals procedure (Table H). Just under one third of applicants replied that they DID understand, when their dispute arose, that it fell only within the scope of the JIB and not with the industrial tribunal. Yet over half of those surveyed failed to appreciate the special nature of the JIB procedure (Table J).

When the exemption order was first granted there was considerable publicity within the industry aimed at ensuring a full understanding of the implications for disciplinary practices. Articles were written in the JIB newsletter, and the Chairman explained the new procedure. A guide to the procedures has been available to all employer and employee participants ever since, and is revised and reprinted from time to time. This guide is supposed to be despatched to applicants on receipt of a notification of dispute. Since the procedure has been invoked by only a small minority of JIB employee participants in the period since 1979, a direct involvement with its provisions is comparatively rare. The survey asked whether participants were sent any explanatory literature about the unfair dismissal procedure at the time the procedure was invoked. Just under one third of applicants replied that such literature had been supplied; 10% could not recall, or did not reply (Table K). Herein may lie part of the explanation for the poor level of understanding of the procedure. The booklets prepared by the JIB are (in the opinion of this author) well-written and succinct, yet they appear not to be widely enough available or to make insufficient impact when they are read. A copy of the up-to-date JIB Handbook, which contains a brief summary of the procedure, is sent to all JIB employee participants on publication (JIB 1995).

Taken together, the survey responses show that the level of awareness of the special nature of the JIB unfair dismissal procedure rises from about 20% to about 50% once the situation becomes real and immediate to an applicant. Even so, this is hardly a satisfactory level if the applicants are to take a full and constructive part in the resolution of their dispute.

It may be asked how this level of applicant awareness compares with the position outside the electrical contracting industry. The Warwick investigation into industrial tribunals found it 'impossible to know what proportion of non-applicants are ignorant of their rights'. However, the researchers considered it 'unlikely that workers are unaware that there is some provision for challenging dismissal' (Dickens *et al.*, 1985: 183). Anyone who is ill-informed about a legal right is necessarily placed at a disadvantage in asserting that right. 'Ignorance of the law' is no excuse for the offender, yet it is a real impediment to the offended-against.

The applicants in the present survey were asked how the JIB explained that the dispute had to be dealt with under their procedure and not in the industrial tribunals. This was an attempt to

elucidate the means by which an understanding of the special nature of the JIB procedure was eventually arrived at. However, even here one quarter of applicants made no response or replied: 'Don't know', suggesting that some participants in the procedure never fully appreciate its unique character. However, 20% reported that they had learned about the procedure from the trade union, rather than the JIB. This compares favourably with the results of the Warwick survey, which found that only 12% of IT applicants learned of their rights in the tribunal from a trade union source (Dickens *et al.*, 1985: 32).

6.3. The operation of the procedure

The JIB unfair dismissal procedure comprises four elements, not all of which are necessarily invoked: the process of conciliation by a National Officer, a hearing conducted by a Regional JIB Disputes Committee, a hearing of the National Appeals Committee (a sub-committee of the National Board) and an arbitration under the auspices of ACAS. Information about the conduct of the procedure and the outcomes was derived primarily from the postal survey returns, but also from JIB annual reports.

6.3.1. Conciliation

The procedure calls for a JIB National Officer (who is in practice also the Secretary of the Regional Joint Industry Board) to attempt to conciliate between the parties when a case is initiated. Just over half the applicants who responded to the postal survey claimed to be unaware of any attempt at such conciliation (Table M). The question was phrased in such a way as to make clear the meaning of the term 'conciliation'; so it seems unlikely that this result is due to ignorance of the jargon of dispute resolution. It is, however, possible that many of those involved in multiple claims were not personally involved in conciliation efforts even though they were made. One third of applicants believed the National Officer to have attempted conciliation.

Of the applicants surveyed, only one quarter reported that the JIB National Officer had been 'successful in conciliation' (Table N). None took the opportunity, provided in the questionnaire, of explaining why conciliation had not been successful. This is probably because fewer than ten per cent of applicants understood conciliation to have been attempted. Those who received the slightly revised survey questionnaire (1992 to 1994 cases) were also asked what form any conciliated settlement took. Just over half made no response; a quarter claimed they had received financial compensation. This result needs to be treated with caution, as some replies evidently confused a financial settlement after conciliation with a compensatory award following a hearing.

Just two (4%) of those applicants surveyed reported that they had been re-instated as a result of conciliation. This is comparable with the overall JIB statistics which show that 22 out of 323 (i.e. just under 7%) claims made in the period under review resulted in re-instatement or re-engagement at the conciliation stage (see Table 6.2 below). Only a further six claimants were re-employed ***after*** an RJIB hearing, making a total of 8.6% of applicants eventually achieving some form of re-engagement. It is worth noting that Rico, in his study of the JIB procedure (Rico, 1986: 575), records that the JIB Annual Reports for the period 1980 to 1984 inclusive show that applicants were re-employed in 9.4% of the cases brought.

The overall record of conciliation under the exempted procedure is comparatively easy to gauge, since JIB annual reports record the outcome of most cases, including the nature of conciliated settlements. The proportion of cases settled by conciliation in the period 1991 to 1994 inclusive was 50%, and the average level of monetary settlements in those cases was approximately £920. A detailed analysis of the cases recorded in the annual reports is given below:

Table 6.2. **Outcomes of Exemption Procedure Cases, as Recorded by the JIB**

	Total no. individuals making applications **a**	No of applications settled by conciliation **b** (total c, d, e)	No. re-instated after conciliation **c**	Applications withdrawn on conciliation **d**	Conciliat'ns resulting in a financial settlement **e**	Average amount of conciliated settlements **£**
1991	97	44 (45%)	5	13	26	675
1992	96	54 (56%)	12	18	24	681
1993	73	24 (33%)	-	22	2	1840
1994	57	41 (72%)	5	23	13	1700
Total	323	163 (50%)	22	76	65	

Source: Compiled by the author from JIB Annual Reports of Industrial Disputes 1991 - 1994

The evidence of the annual reports suggests that conciliation by National Officers is less successful than the equivalent process in the industrial tribunal system. ACAS claims credit for most of the IT claims settled or withdrawn before a hearing - 68 per cent of the 1994 cases (ACAS, 1995: 51) - and this despite the ACAS conciliation officers possessing substantially less 'industry knowledge' than the JIB National Officer. The training, experience

and administrative and information support, however, may explain the relative success of ACAS staff in the conciliation process.

The acceptability of conciliation by a JIB National Officer may also be affected by the negative perception of the Board which still exists among some sections of the industry's workforce. On the other hand, there is, in the 1990's, no question as to the impartiality of ACAS in providing the service of conciliation as an integral part of the tribunal system. Further study would be required to show whether the fact that conciliation was not attempted by ACAS was influential in the relative lack of success of conciliation under the JIB exempted procedure.

6.3.2. The Regional JIB Disputes Committee hearing.

The next stage of the exempted procedure, analogous to the industrial tribunal, is the hearing conducted by a sub-committee of the Regional Joint Industry Board, known as a Disputes Committee. There is some evidence in the JIB annual reports that a small number of cases - not settled by conciliation - are nevertheless rejected or dismissed without a full hearing. In an informal procedure not unlike the consideration of issues by a tribunal chairman, some cases have been ruled out of time, discontinued because of the death of the claimant or the liquidation of the respondent company, or simply 'rejected by the Regional Board' or 'the Chairman' without recorded explanation. However, fewer than ten out of over 300 claims between 1991 and 1994 failed to reach a hearing for reasons of this kind.

RJIB hearings took place in about 70 per cent of the cases for which survey replies from applicants were received. The hearing occasionally took place very quickly indeed; 8 per cent of applicants in the survey said their hearing occurred within five weeks of the claim being lodged at the JIB. Over half of those surveyed could not recall how soon the hearing took place or did not respond to the question. About one third reported that the RJIB heard their case more than eight weeks after the claim was made (Table Q). The limited number of cases per annum, and the geographical spread of cases, are both factors favouring rapid process. In the period under review the JIB encountered no difficulty in arranging RJIB hearings with expedition.

Hearings may take place in company offices, on a site, in a hotel or in a JIB office. The great majority of hearings in the survey were conducted in a hotel convenient to the parties (Table R). Applicants regarded the location as 'convenient' by a majority of two to one (Table S), and the selected date as 'convenient' by a slightly larger majority (Table T). Almost all the applicants involved in hearings were given more than two weeks' notice of the date and venue

(Table U). With hindsight, it would have been instructive to enquire more closely how applicants and respondents felt about the chosen venue. It is suggested by the JIB Secretary that hotels are more often used for RJIB hearings because they are perceived by the parties as 'neutral ground'; yet there is no confirming evidence. Applicants might conceivably feel more at ease if the hearing takes place at the site where they have been employed. Employers, too, could feel at a disadvantage when arguing their case in an unfamiliar setting, away from their records and files.

The industrial tribunals are sometimes criticised for their formality as compared with everyday industrial relations negotiations. It is an aspect of the 'legalism' critique that the tribunal functions as a court of law, with something of a forbidding atmosphere. This charge could hardly be levelled at the RJIB hearing, where the participants meet in circumstances which are almost congenial in character, and discuss the issues in language which, according to several experienced participants, everyone understands. It is frequently the case that everyone present is a skilled electrician. An indication of the close nature of the industry is the fact that the South-East RJIB includes both the sons of Frank Chapple; one representing employers and the other representing the union (JIB, 1995: 164)!

6.3.3. Preparation for the Hearing.

The participants in the survey were asked a number of questions concerning the preparation they and their representatives made prior to the hearing. Applicants to the industrial tribunal receive, from the Regional Office, a booklet containing advice about preparation for a hearing (COIT, 1995). This document refers, *inter alia*, to the need to bring relevant documents and material witnesses to the tribunal hearing. It also advises on the different preliminary proceedings which may be invoked in some cases (e.g. pre-hearing reviews). Similar written advice is available to those who register claims under the JIB procedure, in the form of the booklet ***Guide to the Disputes Procedures*** (JIB, 1993). It is understood that this publication was available in an earlier edition, prior to 1993. However, the perception among many of those who took part in the present research was that they had not received this kind of information. Three-quarters of those involved in hearings said that they had not had advice about the need to consider documentary evidence (Table Y). The reasons for this may include the style and format of the JIB booklet, the reluctance of applicants to read it thoroughly, and the possibility that some never received it at all.

A slightly higher percentage of applicants - almost 80 per cent - reported that they had not taken witnesses to the hearing (Table Z). Again, there could be a range of explanations, the most obvious being that their cases did not require witnesses. But applicants and their

potential witnesses might also have been discouraged by other factors, including the cost of travel and lost earnings, or even by fear of victimisation.

Just over half of those applicants who pursued their cases to a hearing considered, in retrospect, that they had ***not*** been well-prepared for the hearing (Table DD). One factor in the level of preparation is the matter of **representation**. According to applicants in the survey about 80 per cent of those whose cases were heard by the RJIB were represented (Table V). In two instances the representative was identified as a solicitor; in every other case it was a trade union official (Table W). As earlier noted, the level of claimants' satisfaction with their representatives was high, not only before but particularly during the hearing (Table X). Participants were asked to answer 'Yes' or 'No' to the question '*Were you satisfied with your representative's work .. before .. and during .. the hearing?*' The satisfaction rate before the hearing, roughly 2:1, rose to a ratio of 3.5:1 in respect of the representative's work during the hearing. The survey participants were also asked whether anyone had explained the procedure before the hearing began. About 70 per cent of those taking part in hearings said they had had the procedure explained; it may be presumed that the representative generally provided this explanation (Table CC).

The physical circumstances of the hearing were the subject of two further questions in the survey (Tables AA and BB). Participants were asked whether they were satisfied with the physical arrangements (three-quarters said 'Yes'), and whether a private room has been provided in which they could consult with their representative (two-thirds said 'Yes'). In view of the fact that tribunal offices invariably provide separate waiting rooms for applicants and respondents, there would seem to be room for some improvement in JIB practice in this respect.

6.3.4. Conduct of the Hearing:

The ***Guide to the Disputes Procedures*** (JIB, 1993) contains an explanation of the manner in which an RJIB Disputes Committee hearing should be conducted. Its phraseology is, however, somewhat convoluted, and it may be doubted whether the average applicant (or claimant) would understand the following introductory sentences:

> The hearing should be conducted in as free and unfettered a manner as possible. To that end, and to establish that all the facts are being disclosed, admissions of breaches of the JIB National Working Rules by one or both of the Parties concerned should be treated by the Disputes Committee as almost privileged information that is submitted without prejudice. Straightforward breaches of Rules should be dealt with separately

> through the Disciplinary Machinery and not the Disputes Machinery, although this is not to say that breaches of the Rules may not have a direct influence on the outcome of any claims made under the Dismissal Procedure Agreement.
>
> (JIB, 1993: 5)

Fortunately, the booklet then proceeds to provide more down-to-earth guidance on the sequence of events in an RJIB hearing; i.e. introductions, explanation of procedure by Chairman or Secretary, statement of claim (production of evidence and examination of witnesses, cross-examination by respondent and panel), respondent's reply to the claim - evidence, witnesses, cross-examination, final statements.

The survey sought to determine whether the hearings were conducted in a comprehensible and acceptable manner. The first focus was upon the behaviour of the Chairman. The responses are summarised below:

Table 6.3. **Conduct of the Chairman of the RJIB Disputes Committee**

Positive responses to the question ....

	Employee Responses	Employer Responses
Did he ...	n = 29	n = 12
explain his role to the parties?	27	12
allow you enough time to state your case?	25	12
allow enough opportunity to put questions?	22	12
ask questions himself?	25	12
conduct the hearing to your satisfaction?	22	11

Source: Postal Survey

These results indicate a very high level of satisfaction overall, with applicants somewhat less positive than respondents. A quarter of the applicants felt they had been given insufficient opportunity to put questions during the hearing, and this seems to be the principal cause of dissatisfaction with the Chairman. However, the general conduct of the members of the Board was explored in more detail, using a form of question adapted from the Brown study of arbitration (Brown, 1992: 228). The responses to this question are given in the following table.

Table 6.4. **Behaviour of the Members of the RJIB at the Hearing**

(Applicant returns only)

Did the members of the Board ...	Agree	Partially agree	Disagree	n
act impartially ?	22	2	4	28
handle matters confidentially ?	21	1	4	26
gain your trust ?	14	6	8	28
understand the issues involved ?	17	7	6	30
have sufficient industrial relations experience ?	19	5	4	28
behave courteously ?	25	2	2	29
act according to your expectations ?	15	5	8	28

Source: Postal Survey

These results point to a problem over the credibility of the RJIB members if only half of applicants agreed that the Board had gained their trust. More important, perhaps is the indication that more than a quarter of applicants felt they did ***not*** trust the Board members. There was, however, a higher level of recognition that the members had sufficient industrial relations expertise. This reflects the point made in several interviews that a major advantage of the JIB procedure lay in the fact that disputes were resolved by those intimately involved with the industry.

Brown studied the perception of ACAS arbitrators in the eyes of the employer and trade union parties to arbitration proceedings, and found that almost 90 per cent of both groups acknowledged the impartiality of the arbitrator (Brown, 1992, 228). The somewhat lower level of such acknowledgement in the RJIB hearing is perhaps due to the fact that the applicants have no choice at all in the composition of the Board. Arbitrators, moreover, start their deliberations with the advantage that they have already been accorded a degree of approval by both parties. An RJIB disputes committee is seen by at least one of the parties as a potential obstacle to be overcome!

It was considered unlikely that those replying to the postal survey would be able to recall in detail the progress of their case before the disputes committee. This is primarily because no minutes are published, nor are the decisions of the committee recorded in the public domain. It has therefore been assumed that the sequence of events in a disputes committee hearing is as described in Section 5 of the JIB guidance booklet (JIB, 1993).

6.3.5. The Decision of the RJIB Disputes Committee

A decision will generally be given on the day of the hearing, though if there is insufficient time, or if the case is particularly complex, a written decision will be posted to the parties. According to the JIB guidance booklet, after the committee have reached a decision, 'the Parties will be invited back into the hearing and the decision will be read out. The decision will not, however, be the subject of further discussion' (JIB, 1993: 7). This does not, of course, preclude one of the parties lodging an appeal against the decision.

The Dismissal Procedure Agreement requires that 'the decision of a Regional Board ..... shall be recorded in a document signed by the Chairman which shall contain the reasons for the decision' (JIB, 1989: 7). Furthermore, where a complaint is found to be well-founded, the Board (in fact, the Chairman of the Disputes Committee) must explain to the applicant what orders for re-instatement or re-engagement might be made and ask if such a remedy is desired (*ibid*: 9). The JIB guidance booklet enlarges upon this to some extent, by indicating a structure for the decision.
The decision should say:

1. Why the claim fails or succeeds.
2. The reasons why that claim fails or succeeds.
3. The remedy awarded by the Disputes Committee.
4. The reason the Disputes Committee feels the remedy is appropriate.

Particular reference should be made, when giving the decision, to the relevant parts of the Dismissal Procedure Agreement and the ***JIB National Working Rules*** (JIB, 1993: 7)

Before recording the opinions of those who replied to the postal survey, regarding the decision in their own case, it is instructive to note the overall statistics of cases recorded in the JIB annual reports.

Table 6.5. **Outcomes of Exemption Procedure Applications Heard by RJIB Disputes Committees.**

	Total applic'ns	Settled by conciliation	Claim rejected or ruled out of time	Applicant re-instated	Compensation awarded	Outcome unknown	Average compensation (if known) £
1991	97	44	14	4	30	5	2737
1992	96	54	10	1	31	-	1200
1993	73	24	13	-	34	2	1150
1994	57	41	5	1	10	-	-
Totals	323	163	42	6	105	7	

Compiled by the author from JIB Annual Reports of Industrial Disputes 1991 - 1994

As earlier noted, approximately half of the cases brought under the exemption procedure were settled by conciliation. Unfortunately, the statistics do not make clear whether 'claims rejected' refers only to those claims which were heard but not found in the complainant's favour, or whether it includes claims which a Chairman was not prepared to hear for jurisdictional or other reasons. What the records do show is that just over a third of all claims were awarded in the complainant's favour. By comparison, in 1994/5, 31 per cent of all industrial tribunal applications alleging ***unfair dismissal*** resulted in a hearing, and in 39 per cent of these cases (only 12 per cent of total applications) the applicant's claim was upheld (derived from IRLIB, 1996: 15). The JIB procedure clearly results in a significantly higher proportion of complainants winning their cases.

The proportion of complainants under the JIB procedure who were re-instated by decision of an RJIB disputes committee (including re-engagement) was approximately 2% in the total period under review. However, the figure varies considerably from year to year. The JIB was able to claim to the authors of the Green Paper (DoE, 1994: 25) that over the three financial years 1991/92 to 1993/94 employees were re-employed in 8 per cent of cases brought under the exempted procedure. The earlier study by Rico, it will be recalled, showed 9.4 per cent of complainants achieving re-employment during the period 1980 to 1984. By comparison, the industrial tribunals statistics published for 1994/95 show that only 1.6 per cent of successful

applicants achieve reinstatement or re-engagement; an almost negligible proportion of total unfair dismissal applicants.

The postal survey attempted to measure the **level of satisfaction of the parties** with the outcome of the case in which they were involved. Satisfaction was to be determined by the clarity of the decision, its fairness, how well-understood were the reasons for the decision, and the question of whether any difficulties arose in implementing the award. The results are set out in Table HH in the appendix, and show the numbers of 'Yes' and 'No' responses from employee and employer participants.

So far as the **clarity** of the Board's decision was concerned, there was almost complete unanimity of view; it was thought clear and to the point. There was much less support, at least from employees (complainants), for the view that the decision took full account of each party's case. Similar reservations were found to the suggestion that the decision **addressed fully** the issue in dispute. It can be inferred, from the supplementary comments made to this question, that it was largely those employees who lost their case that held negative opinions about the comprehensive nature of the decision and the manner in which it was explained.

Both employees and employers were divided on the question of whether the Board's decision was **ambiguous**. Some 30 per cent of all responses viewed the decision as ambiguous. **All** the employees who considered the decision unambiguous also considered it fair; several employers who thought the decision ***ambiguous*** nonetheless regarded it as fair! Overall, 54 per cent of employees thought the Board's decision in their case to be fair; and 75 per cent of employers (not necessarily involved in the same cases) thought ***their*** case to have been decided fairly.

Generally speaking, no problems arose in **explaining** the nature of any award made by the Board, though employees reported, in almost one third of cases, that difficulty had arisen in **implementing** the award. Additional comments by employee respondents to the survey were instructive on this point. Three employees said that the firm involved in their case had had to be threatened with further JIB or court action before paying the award; four more reported that they had never received the sums awarded. Employers responding to the survey did not add any comments on the nature of the award, though some made broader commentary at the conclusion of the questionnaire.

6.4. Further stages of procedure

Unfortunately, only three of the employees responding to the questionnaire were concerned with cases which continued beyond the RJIB disputes committee to the National Appeals Committee, and only one with a case which went to the ACAS arbitrator. Two employer responses also related to cases which proceeded to the National Appeals Committee. The sample is not large enough to draw any general conclusions, though it is considered worthwhile recording the views of the employees and companies concerned.

6.4.1. The National Appeals Committee

Appeal may be made to the National Appeal Committee on three grounds (noted in Chapter Four) which broadly parallel the grounds upon which an industrial tribunal decision may be appealed to the Employment Appeal Tribunal. A hearing at the NAC is usually arranged much more quickly than in the EAT (within about three months, according to Kay (1993)), and this is unsurprising in view of the small number of cases. In the years under review, the exemption procedure cases which were taken beyond the RJIB stage were as given below:

Table 6.6. **Exemption Cases Proceeding to National Appeals Committee and/or ACAS Arbitrator**

	Number of cases heard by the National Appeals Committee	Number of cases heard by the ACAS Arbitrator
1991	6	1
1992	4	3
1993	4	-
1994	5	-
Total	19	4

Source: Compiled by the author from JIB Annual Reports of Industrial Disputes 1991 - 1994

The NAC hearing took place, in the five cases referred to in survey returns, between one and three months after the appeal was lodged. In four out of the five cases the original decision of the RJIB disputes committee was confirmed; in the fifth case the applicant's appeal was upheld and the RJIB decision over-ruled.

Although the postal survey yielded little information about the National Appeals Committee, something can be learned from a paper written by a member of that Committee, G.H. Kay, whose degree dissertation has been kindly made available (Kay, 1993). He argues that the NAC 'cannot be directly equated to any appellate body within the tribunal system'. It exercises greater discretion than the EAT in the conduct of its hearings, and will 'if necessary .. act in an investigatory role and decide facts left open by the dispute committee' (*ibid:* 16). According to Kay, the NAC will not usually send cases back to the RJIB for re-hearing; this was done only once in the seven years to 1993. Procedure at the NAC is evidently as informal as at the disputes committee, though for the convenience of those involved hearings generally take place in London (the JIB Head Office in Sidcup) or in Belfast.

6.4.2. ACAS Arbitration

One applicant among those responding to the survey carried his appeal to the final stage - the ACAS-appointed arbitrator. This was, however, an atypical case (if such an expression can be used of a procedure so seldom used!). The applicant's case was considered by the RJIB and the NAC within the procedural time limits, during 1992. He then sought to appeal to the ACAS arbitrator, but his grounds of appeal - though several times re-submitted - were not considered to fall within the remit of the arbitrator, as defined in Appendix A, paragraph 2 (e), (f) and (g) of the Unfair Dismissal Procedure (JIB, 1993: 15). He persisted in his claim until January 1995, when the arbitrator (Mr. J.V. Davies, sitting without assessors) conducted a preliminary hearing, to consider whether the applicant had established proper grounds for a full appeal. The conclusion was that he had not; and so the case ended with the applicant unsatisfied. This case, though concluded in 1995, is counted in Table 6.7 as a 1992 case.

6.5. What has been learned?

How far do the results of the survey indicate that the JIB procedure has met the 'Donovan criteria' for the effectiveness of an unfair dismissal procedure, i.e.:

> easily accessible, informal, speedy and inexpensive, and which gives [the parties] the best possible opportunity of arriving at an amicable settlement of their differences. (Donovan 1968, para 572)?

On the question of **accessibility**, the JIB procedure is as straightforward to initiate as is a claim in the industrial tribunal; indeed, since an AEEU official will almost always be involved from an early stage, it could be said to be easier to access than the tribunals. There is, however, some evidence that even after almost eighteen years of operation the JIB procedure is still not as widely understood as it might be. There is a case for clarifying terminology, in

that the document which sets the procedure in motion (Form JIB 201) is variously described as an 'Originating Application' and an 'Application form for a Disputes Committee'. Completed copies of such forms were not, of course, available to this research, being confidential to the JIB.

Hearings under the JIB exempted procedure are said, by those who have participated in both, to be less **formal** than industrial tribunals. Certainly there no evidence from the survey that participants considered the hearings formal, or were over-awed by the proceedings. Most respondents considered the Chairman had conducted the hearing well.

The procedure is undoubtedly **speedy** in comparison with the industrial tribunals; though it should be said that the tribunals are 'improving their act' (1997) and shrinking the timescale before a hearing is listed. Delays have, however, occurred in the seldom-used later stages of the procedure involving the ACAS arbitrator. This appears to be because cases are so rare that the officers involved have to virtually re-learn the procedure each time it is invoked; and there has not until recently been continuity in the choice of arbitrator by ACAS.

The JIB procedure may be considered even **less expensive** than the industrial tribunals, since hearings almost always take place close to the origin of the complaint and the use of professional lawyers is minimal. Awards are made on the same basis as tribunal awards, though a slightly higher proportion of successful claims result in re-employment, without financial award. None of the complainants surveyed made comments about the cost of the procedure.

The remaining factor in the 'Donovan criteria' which calls for comment is whether the JIB procedure promotes **'amicable' settlement** of disputes. The level of satisfaction with outcomes is not high, and a number of the complainants surveyed added comments to their returns which were strongly antipathetic to the JIB (Appendix 11). There is, as has been mentioned in Chapter Four, a legacy of resentment in some quarters concerning the way in which the JIB was originally established. Unfair dismissal complainants who lose their cases are very likely to recall and express this resentment. In an industry where employers and employees are unusually closely bound, it is perhaps especially important to promote amicable settlement of disputes. The JIB procedure, in its prompt and informal way, tries to achieve this outcome. Whether the procedure has any relevance in the broader debate about alternative dispute resolution is an issue to which we turn in the following chapter.

PART THREE

Conclusions

CHAPTER SEVEN:
Summary of Findings, and the Future of Unfair Dismissal Dispute Resolution

7.1. Introduction

The Joint Industry Board's unfair dismissal procedure has now occupied its special position, exempted from industrial tribunals, for almost twenty years. Those same years have seen a very substantial - and scarcely foreseen - growth in the use of tribunals in the industrial relations field. A number of initiatives have been taken, and others have been proposed, to ease the workload of the industrial tribunals; yet the alternative that appears to offer real benefits in terms of speed, cost and informality has been essentially ignored. Does this reluctance to consider the exemption route arise from fear, inertia, ignorance, or some other cause? Have other industries genuinely considered applying for exemption orders, and faltered at the edge of the precipice? Are the other alternatives so attractive as to make the effort of obtaining exemption not worthwhile? Do the tribunals offer a sufficient and acceptable means of resolving disputes? Is the experience of other developed countries relevant? These are among the questions to which we shall turn in detail, following a summary of the main conclusions of the preceding six chapters.

7.2. The spectrum of dispute resolution methods

Part One examined in turn the industrial tribunal system operating in the United Kingdom, the individual conciliation service of ACAS, and the ACAS arbitration service, insofar as they are used to resolve unfair dismissal complaints. All three of these mechanisms pre-date the introduction into the UK of the legal right not to be unfairly dismissed, and could not therefore be said to have been designed for the specific purpose of resolving unfair dismissal disputes. Yet the successful record of conciliation and the industrial tribunals is widely acknowledged; no-one seriously suggests major change to either mechanism, though many proposals have been made to reform the tribunals (see, for example, Justice, 1987). The advent of new individual employment rights has, however, placed existing methods of dispute resolution under pressure, and alternatives are now being debated and refined. Two broad approaches are proposed in the Green Paper (DoE, 1994); one is to reduce the number of cases coming to hearing by improved 'filtering', the other is to divert more and more cases into new methods of 'alternative dispute resolution' such as compromise agreements, streamlined tribunal hearings, and a revised arbitration option.

Chapter One concluded that the industrial tribunals do generally meet the 'Donovan criteria', despite the criticism from some quarters that 'legalism' is intruding unduly into tribunal procedure. Tribunals have not been particularly successful, however, in achieving the outcome of re-employment for an unfairly dismissed individual; the process of arranging and conducting a full hearing almost always delays a decision beyond the date when a broken employment relationship can be repaired.

Chapter Two described the 'success story' of British dispute resolution, if statistics are taken alone; that is, the individual conciliation service provided free of charge by ACAS in unfair dismissal and certain other potential industrial tribunal cases. We saw how the service has evolved from an arm of the Ministry of Labour into a truly independent operation. ACAS now claims to be the main instrument in preventing 70 per cent of industrial tribunal applications (ACAS, 1995: Table 10) coming to a formal hearing. This has been achieved without the degree of compulsion associated with third-party conciliation in some other EU states; for example in Germany, where conciliation is conducted within the context of the labour tribunals. Nevertheless, 'independence' is not the only quality that disputing parties seek in those who purport to assist them in dispute resolution; sometimes technical expertise, and local and industry knowledge can be of equal utility.

Chapter Three moved on to examine the more formal process of arbitration, whose application to dispute resolution in employee relations can be traced back to the industrial revolution (Mumford, 1996: 290). For at least 100 years labour arbitration has relied upon the unique formula of being 'binding in honour only' and hence not enforceable in the courts. In view of the British preference for voluntary procedures it is perhaps surprising that arbitration has not been more extensively used in individual employment rights disputes such as unfair dismissal. One reason for this, as we saw, is that arbitration has tended to be the preserve of the trade unions, and hence has been brought into play for unfair dismissal cases largely when there are multiple dismissals, or at least significant collective consequences arising from the dismissal. Arbitration has, however, strong advocates arguing that the expertise of ACAS arbitrators should be made easier to apply to individual unfair dismissal claims. We saw how the 'arbitral alternative' proposed by Lewis and Clark has been the subject of a consultation process by the recent Conservative government and has recently been incorporated into draft legislation, with the support of the current Labour government. However, opinions vary as to whether the encouragement of ACAS conciliation officers, or more generally the potential advantages of arbitration over the tribunals, will convince many more disputing parties to place their cases before an arbitrator. ACAS itself is preparing details of an arbitration scheme, in confidence, against the possibility of a change in the law.

The JIB's exempted procedure occupies an unique place in the UK system of employment dispute resolution. In the first place, it specifically exists to replace **individual** employment rights conferred by legislation, though it is built upon a procedure which owes its origins to collective bargaining arrangements which were first established under a National Joint Council. Secondly, the exempted procedure is designed to keep the resolution of the dismissal dispute in the hands of the parties **or their collective representatives** throughout. Even in its final stage, involving the appointment of an ACAS arbitrator, an element of industry involvement is preserved by the appointment of two industrial assessors. Thirdly, and as a consequence of the last point, the procedure inevitably emphasises **pragmatic** rather than legalistic solutions to the issues which come before it. No other dispute resolution arrangement currently in use in the United Kingdom brings together quite the same formula.

In Chapter Four the historical background to the Joint Industry Board and its disputes procedures was described in some detail. The special nature of the electrical contracting industry and its industrial relations in the 1960's and 1970s was the context for a unique experiment in setting up what might be called an 'institutional national joint council', with its own independent staff and offices. Thirty years later this institution continues to prosper, and for more than half that time it has operated the exempted unfair dismissal procedure.

Chapter Five describes the design and conduct of a survey carried out by the author into the working of the exempted procedure during the calendar years 1991 to 1994 inclusive, involving the whole population of employees and employers who took part in cases heard under the procedure. While the response to the survey was somewhat disappointing, sufficient evidence was accumulated to draw conclusions about the effectiveness of the JIB procedure.

The results of the survey were set out in general terms in Chapter Six, supplemented by the full results contained in Appendix 11. Our provisional examination of the JIB procedure shows that it may be said to have been a success. The **level of satisfaction** expressed by those employees and employers who have used it bears favourable comparison with levels of satisfaction found among industrial tribunal protagonists. There is no evidence of a move within the JIB to have the exemption order rescinded; indeed, the forthcoming legislation on the arbitration alternative is likely to include a minor provision especially included to clarify and enhance the working of the JIB exemption (DTI, 1996: 13). Even the chorus of disapproval from left-wing groups within the union at the time the exempted procedure was introduced has now been silenced. The evidence of the present survey is that very few employees are critical of their lack of access to industrial tribunals. Before we discuss further the question of why the exemption has not 'caught on' in other similar sectors, we need to

describe more fully where the JIB procedure stands in relation to the criteria we have used to evaluate dispute resolution methods.

7.3. Criteria for evaluation

The general 'yardstick' by which this comparison of industrial tribunals and the JIB exempted procedure has been conducted has been the so-called 'Donovan criteria' used by other commentators to assess the record of the tribunals alone (Dickens *et al.*, 1985; Justice, 1987; Clark and Lewis, 1993; etc.); i.e. that they should be 'easily accessible, informal, speedy and inexpensive, and [give the parties] the best possible opportunity of arriving at an amicable settlement of their differences (Donovan, 1968: para 572). These are themselves based upon the list of tribunal qualities identified by the Franks Committee: 'cheapness, accessibility, freedom from technicality, expedition and expert knowledge (Franks, 1957: para. 406). We shall return to these criteria in due course.

7.3.1. The Donovan criteria

The advantages of tribunals, as put forward by the Donovan Commission, may be summarised in four criteria

- **accessible**
- **informal**
- **speedy**
- **inexpensive**

In all these aspects, except the cost of operating the JIB procedure, we have accumulated evidence which allows a comparison of that procedure with the provisions available to other employees who may be in dispute with their employer.

Accessibility and speed are inevitably bound together; and here the nationally used mechanisms of ACAS conciliation and industrial tribunals concede little to the industry-based JIB procedure. Both approaches are necessarily run on regional and national lines, and postal and telephone contact places the same restraints upon the JIB as it does the COIT and ACAS. The JIB procedure, however, can do two things which the national mechanism cannot; it can exercise pressure to ensure that 'internal' or 'domestic' procedures are fully exhausted first, and it can more quickly proceed to a hearing involving a third party (the RJIB disputes committee).

As far as formality is concerned, the evidence is that participants in the JIB procedure are not over-awed with the conduct of RJIB hearings. On the other hand there is evidence that the criticism of the tribunals' 'legalism' has some force in regard to procedure. In contrast, the process of conciliation scores well in regard to informality; indeed, ACAS conciliation officers rarely seem to meet the parties face to face. The survey did not provide a clear picture of the role of the JIB National Officer in conducting conciliation prior to a hearing. More evidence (perhaps from a full interview programme with the National Officers) would be needed to establish whether the intervention of the National Officer, and perhaps also the trade union full-time official, would significantly alter the proportion of cases which continue to a full RJIB hearing.

Conciliation is a clear winner, too, in relation to the cost of dispute resolution to the parties. It is also the cheapest process to administer and operate. The cost to an employer of achieving a conciliated settlement has been shown to be, on average, very much lower than the cost of a tribunal hearing, regardless of outcome. The JIB procedure is run, as are the tribunals, on the basis of each party bearing their own costs. While there is a power for tribunals to make a costs order against a frivolous or vexatious party, it is rarely used. An analogous power does not appear to be available to the JIB, except in the broadest sense through its Rules.

7.4. The JIB and the Section 110 exemption

The Donovan Commission clearly distinguished between collective procedures and the type of individual employment rights issues which it saw as the province of its proposed 'labour tribunals'. 'We do not propose that [the tribunals] should be given the job of resolving industrial disputes or differences arising between employers or employers' associations and trade unions or groups of workers.' (Donovan, 1968: para. 576). In view of this, it might be thought surprising that the Industrial Relations Act 1971 made any provision at all for collective agreements pertaining to unfair dismissal to be exempted from the national framework. The clue may lie in the following paragraph, in which the Commission called for decisions made under the provisions of collective agreements to be admissible as evidence to tribunals.

> .. in order to ensure that nothing in our proposals encroaches upon the operation of voluntarily agreed procedures for the settlement of disputes, we recommend that the tribunals should be authorised to admit as evidence of the intention of the parties to a collective agreement an award or other decision concerning its interpretation rendered

> by a tribunal, committee or other similar body established by the parties to the agreement. (*ibid:* para 577)

The relationship between voluntary procedures and the industrial tribunals has been debated for 25 years, and from time to time the tribunals have lent support to the idea that an employer who adheres to an established voluntary dispute procedure will be found to have acted 'reasonably'; for example, in *East Hertfordshire District Council v. Boyton* [1977] IRLR 347. The 1994 Green Paper ***Options for Reform*** raised the question of whether the job of tribunals would be made easier or harder if there was a mandatory requirement for applicants to pursue their grievance through internal procedure before initiating a tribunal claim (DoE, 1994: paras. 4.19 *et seq.*). The point was made that some procedures might be inadequate, and a requirement to use them might not be in an applicant's best interests.

A national, or industry-based, disputes procedure presents further problems. It has been suggested by Bourn that one reason for the poor take-up of the provision for statutory exemption of unfair dismissal procedures (at the time he wrote, there were none) might be the difficulty of awarding financial compensation - or rather the difficulty of enforcing such awards (Bourn, 1979: 92). The Donovan Commission itself saw this problem as an argument for statutory regulation, according to Evans *et al.* (1985: 4). Bourn also argued that the requirement for an exempted procedure ultimately to provide recourse to arbitration places many national collective agreements in difficulty. Where they might already allow for the option of independent arbitration it will always **by agreement of both parties**. The exemption clause envisages that arbitration is an automatic, and hence **unilateral**, reference when one party chooses to appeal. 'Most national agreements would need amendment in at least this respect if they were to comply with the requirements for exemption' (Bourn, 1979: 92). Finally, Bourn commented that trade unions do not always wish to be party to a formal discipline and dismissal procedure; a fact which the author has noted in almost 30 years of experience in industrial relations.

Despite all this, of course, the JIB agreements provided the basis for such an exemption, and it has proved workable. Why should this be so?

7.5. The historical context.

There can be no doubt that the relationship between the Electrical Contractors' Association and the trade union is unique; even in the lively days preceding the High Court case and the defeat of the communists in the ETU executive, the very fact that the employers only had to deal with a single union made for an unusually close identification of interest between the

parties to the National Joint Council. The political stance of those who took control of the ETU in the mid-sixties only served to engender a real spirit of co-operation. As we have seen, the moves towards the establishment of the JIB were cautious, but widely supported in the industry. Those taking views in opposition to the JIB from both sides found little common cause. Moreover, and perhaps fundamentally, the financial structure upon which the JIB was built had the effect of locking the parties ever closer together.

The JIB was born, too, in a period of statutory incomes policy, and yet was able to find ways to achieve advances in terms and conditions of employment for electricians that outstripped many other groups of skilled workers. Its very uniqueness allowed national negotiators to argue for special treatment by the government; here, after all, was a formula with the apparent potential to cure the 'British disease' of industrial strife. If the clause in the Industrial Relations Act 1971 which allowed for the exemption of voluntary dismissals procedures was not written for the JIB, then who was it written for? The answer may lie in the question; perhaps one might suggest that the crucial clause **was** written - especially - for the JIB. This is an suggestion that is now impossible to test. The Conservative government ministers of the day (1971) are not available to say how influenced they were by the model of cordial industrial relations involving a trade union that was widely perceived as right-wing.

Further research, too, would be needed to clarify why the various industries who have considered applying for a Section 110 exemption have not followed it up. The Engineering Construction NJC, responsible for industrial relations on large sites, discussed the possibility with the Department of Employment in 1994 and 1995 (Interview, Louisa Gomes, 5 July 1995), but no decision had been made at the time of writing. This sector is multi-union, though very much dominated by the AEEU. However, it has been informally suggested to the author that the non-EETPU part of the AEEU executive is not enamoured of the JIB model, and would not want to be seen to extending its influence into other industry sectors. Other components of the construction industry, where the AEEU has little influence, are also multi-union; and though they do operate similar holiday and benefit schemes there have been no reported attempts to set up independent bodies analogous to the JIB. Without such a body it is difficult to see how an exempted dismissal procedure agreement could be made to work.

7.6. The future of alternative dispute resolution.

This thesis has focused upon the procedures for resolving a particular category of individual employment rights disputes, namely unfair dismissal claims. Such claims are now made against a background of 26 years of case-law, and it perhaps not surprising that there has some criticism of the industrial tribunals alleging excessive 'legalism'. We are dealing , after

all, with a legal right and not with a generalised concept such as 'good management' or 'orderly industrial relations'. Many disputes arise in the working place, however, which have no direct connection with legal rights; disputes about working practices, pay, hours, holidays, consultation and communication (or lack of it), and many other issues. The industrial tribunals may have a large and growing number of jurisdictions, but they do not become involved in many of the matters that arise every day in places of work and give rise to disputes. The resolution of most of these disputes is not amenable to the judicial model which industrial tribunals represent.

The JIB unfair dismissal procedure is an attempt to **retain within this domain of practical industrial relations** a whole family of employment disputes which would otherwise fall to be dealt with in a judicial manner. It utilises, when working at its best, the well-tried methods of conciliation and, in effect, mediation to achieve a pragmatic solution to unfair dismissal disputes. When all else fails, ACAS arbitration is applied to impose a binding solution. The procedure thus removes from the jurisdiction of industrial tribunals all types of unfair dismissal claim save those concerned with dismissal on grounds of pregnancy (which category must be exceedingly rare in an industry with fewer than ten female operatives).

Can such procedures be encouraged in other sectors in such a way as to stem the tide of legalism? Or are the industrial tribunals inevitably going to find their jurisdiction extended into areas, referred to above, which are to do with practical human resource management? The debate on **alternative dispute resolution** (ADR) is driven by this imperative, since it seems that, even with their current jurisdictions, industrial tribunals are reaching saturation point. ADR explores methods which are, to paraphrase Donovan, 'even more accessible, just as informal, even speedier, and preferably even cheaper', yet which do not impair the essential rights of disputants.

The present study lacks a substantial ethnographic basis, and it is possible that a detailed case study approach to the JIB procedure could allow a different kind of comparison with typical industrial tribunal cases. More needs to be done, in this author's view, to investigate the attitude of individuals to having their unfair dismissal claims put to ACAS arbitration. Nevertheless, this thesis has demonstrated that, given certain favourable pre-conditions, it is possible to apply to the resolution of unfair dismissal disputes a technique which avoids the 'legalism' trap, which is pragmatic and fair, which is expeditious and inexpensive, and is also inexpensive to operate.

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List of persons interviewed

	Position at the time of interview	Date of interview
Ron Allender	Secretary of the JIB	11 October 1996
Ainsley Barton	former Industrial Relations Officer, ECA	18 October 1996
Betty Cairns	Senior Industrial Relations Officer, ECA	3 August 1994
Lord (Frank) Chapple	former General Secretary, EETPU	31 January 1996
Prof. Jon Clark	ACAS arbitrator	9 February 1996
John Davies	ACAS arbitrator	4 December 1996
Louisa Gomes	Research Officer Department of Employment	5 July 1995
Simon Gouldstone	Head of ACAS arbitration section	23 February 1996
Eric Hammond	former General Secretary, EETPU	19 April 1996
William Hawes	Head of Research, ACAS	15 August 1995
Laurie Horsey	JIB National Officer	11 October 1996
Geoffrey King	former Director, ECA	8 August 1995
Peter Martin	Head of Legal Affairs, EEF	31 January 1996
Julian Richards	AEEU Electrical Section. Research Officer	13 October 1995
Colin Welch	Conciliation Manager, ACAS South/ S-West	20 October 1995

This thesis contains 68,872 words, including appendices.

APPENDIX ONE

Standard ACAS letter to a party to an industrial tribunal claim.

Dear Sir/Madam,

INDUSTRIAL TRIBUNAL CLAIM - CASE No. xxxxx/1997
J. BLOGGS V. ACME UTILITIES LTD.

A copy of the above claim has been received from the Industrial Tribunal Office. Claims are copied to ACAS in order that both parties can consider resolving the complaint without the need for a Tribunal Hearing.

ACAS Conciliation Officers act impartially and have no vested interest in the outcome of a case; they operate independently of the Tribunal and our services are free. The enclosed leaflet explains the Conciliation Service in more detail.

I understand that you are representing the [applicant] in this matter. One of our conciliation team will be in touch with you before the case comes to a full Tribunal Hearing. If however you would like to make early contact with a conciliation officer, or would like further details of our service, then please contact ..... by telephone or letter at the above address.

Yours faithfully

.....
Conciliation Manager

APPENDIX TWO

The form used by ACAS to initiate an arbitration or mediation.

ADVISORY, CONCILIATION AND ARBITRATION SERVICE

REFERENCE TO ARBITRATION / MEDIATION

We hereby make application jointly for a difference between the undermentioned parties to be referred to:-

* A Single Arbitrator / * A Single Mediator

* A Board of Arbitration / * A Board of Mediation

* The Central Arbitration Committee

in the terms stated below:-

EMPLOYER PARTY (including name, address and telephone number of representative)

.....

.....

EMPLOYEE PARTY (including name, address and telephone number of representative)

.....

.....

TERMS OF REFERENCE (defining the specific difference referred)

[if space is insufficient, insert 'As attached' or 'As stated overleaf']

.....

.....

.....

** [Furthermore we accept jointly that where the members of the * Board of Arbitration/*CAC are unable to agree as to their award the Chairman shall act as Umpire and give a ruling decision]

Signed as authorised on behalf of the Employer Party

.....

Status .....

Date .....

Signed, with the authority of my National Executive, on behalf of the Employee Party

.....

Status .....

Date .....

(NB This statement should be signed by a full-time official of the union(s) concerned)

---

* Delete as appropriate

** Delete this entry if the reference is to a single arbitrator or mediator or a Board of Mediation.

APPENDIX THREE

The text of the original exemption order.

EMPLOYMENT PROTECTION (CONSOLIDATION) ACT 1978 (c.44)

IN THE MATTER OF THE EXCLUSION OF CERTAIN PERSONS EMPLOYED IN THE ELECTRICAL CONTRACTING INDUSTRY FROM THE UNFAIR DISMISSAL PROVISIONS OF THE EMPLOYMENT PROTECTION (CONSOLIDATION) ACT 1978.

WHEREAS on the 31st day of May 1979 the Joint Industry Board for the Electrical Contracting Industry entered into the Dismissal Procedures Agreement annexed hereto in respect of the employees referred to in paragraph 1(2) of the said agreement,

AND WHEREAS an application has been made to the Secretary of State on behalf of the Electrical Contractors" Association and the Electrical Electronic Telecommunication and Plumbing Union, being parties to the said agreement, for an order designating the said agreement under section 65 of the said Act,

AND WHEREAS the Secretary of State is satisfied as to the matters set out in section 65(2) of the said Act,

NOW THEREFORE, THE SECRETARY OF STATE, in exercise of the powers conferred upon him by section 65 of the said Act, hereby designates the said agreement for the purposes of the said section with effect from the first day of October 1979; accordingly, in respect of the persons referred to in paragraph 1(2) of the said agreement dismissed on or after the said date the provisions of the said agreement shall apply in substitution for the right not to be unfairly dismissed under section 54 of the said Act.

Signed by Order of the Secretary of State

Dated this 14th day of September 1979

(Patrick Mayhew)
Joint Parliamentary Under Secretary of State
Department of Employment

APPENDIX FOUR

The exemption order currently in force.

STATUTORY INSTRUMENTS

1991 No. 1105

TERMS AND CONDITIONS OF EMPLOYMENT

The Dismissal Procedures Agreement Designation (Electrical Contracting Industry) Order 1991.

Made	29th April 1991
Laid before Parliament	7th May 1991
Coming into force	1st June 1991

Whereas on 19th July 1990 the constituent parties of the Joint Industry Board for the Electrical Contracting Industry, namely the Electrical Contractors' Association and the Electrical, Electronic, Telecommunication and Plumbing Union entered into a Dismissal Procedures Agreement ('the Agreement') in respect of employees referred to in paragraph 1(2) of the agreement;

And whereas a joint application has been made to the Secretary of State by the Electrical Contractors' Association and the Electrical, Electronic, Telecommunication and Plumbing Union, being parties to the Agreement, for an order designating the Agreement under section 65 of the Employment Protection (Consolidation) Act 1978 [a] ('the Act');

And whereas the Secretary of State is satisfied as to the matters set out in section 65(2) of the Act;

And whereas a joint application has been made to the Secretary of State by the Electrical Contractors' Association and the Electrical, Electronic, Telecommunication and Plumbing Union, being parties to the Dismissal Procedures Agreement designated by order of the Secretary of State with effect from 1st October 1979, for an Order to be made under section 66 (2)(a) of the Act [b] revoking the order designating that Agreement;

Now, therefore, the Secretary of State, in exercise of the powers conferred upon him by sections 65 and 66 of the Act, and all other powers enabling him in that behalf, hereby makes the following Order:-

---

[a] 1978 c.44

[b] Section 66 was amended by paragraph 13 of Schedule 1 to the Employment Act 1980 (c.42)

Citation and Commencement

1. This Order may be cited as the Dismissal Procedures Agreement Designation (Electrical Contracting Industry) Order 1991 and shall come into force on 1st June 1991.

Interpretation

2. In this Order -

'the Act' means the Employment Protection (Consolidation) Act 1978;

'the Agreement' means the Dismissal Procedures Agreement entered into by the constituent parties of the Joint Industry Board for the Electrical Contracting Industry on 19th July 1990, namely the Electrical Contractors' Association and the Electrical, Electronic, Telecommunication and Plumbing Union, on signature by the Director and the Chairman, Labour Relations Committee of the Electrical Contractors' Association and by the President and General Secretary of the Electrical, Electronic, Telecommunication and Plumbing Union;

'the 1979 Agreement' means the Dismissal Procedures Agreement entered into by the constituent parties of the Joint Industry Board for the Electrical Contracting Industry on 31st May 1979 and designated by order of the Secretary of State on 14th September 1979 with effect from 1st October 1979;

'the 1979 Order' means the Order designating the 1979 Agreement entitled 'IN THE MATTER OF THE EXCLUSION OF CERTAIN PERSONS EMPLOYED IN THE ELECTRICAL CONTRACTING INDUSTRY FROM THE UNFAIR DISMISSAL PROVISIONS OF THE EMPLOYMENT PROTECTION (CONSOLIDATION) ACT 1978' (c) and signed by order of the Secretary of State on 14th September 1979.

Designation

(c) Section 154 of the Employment Protection (Consolidation) Act 1978 was amended by paragraph 22 of Schedule 1 to the Employment Act 1980; prior to the amendment the power to make an order under sections 65 or 66 of the Act was not exercisable by statutory instrument.

3. The Agreement is designated; and accordingly the provisions of the Agreement shall have effect in substitution for any rights under section 54 of the Act (right of an employee not to be unfairly dismissed) unless the right not to be unfairly dismissed for any reason mentioned in section 60 (1) or (2) of the Act (dismissal on ground of pregnancy) applies.

Revocation and transitional provision

4. (1) Subject to paragraph (2) of the Article, the 1979 Order is revoked.
(2) A claim, by an employee referred to in paragraph 1(2) of the 1979 Agreement, that he has been unfairly dismissed, shall be determined in accordance with the 1979 Agreement, if the effective date of termination as defined by paragraph 2(4) of the 1979 Agreement falls on a date before 1st June 1991.

Signed by order of the Secretary of State

Eric Forth
Parliamentary Under Secretary of State,
Department of Employment.
29th April 1991

APPENDIX FIVE

Extract from JIB document W.12354 dated 13 November 1989

Annex.

JOINT INDUSTRY BOARD
for the
ELECTRICAL CONTRACTING INDUSTRY
UNFAIR DISMISSAL PROCEDURE

1. RIGHT NOT TO BE UNFAIRLY DISMISSED

Every Employee Participant in the Joint Industry Board to whom the Dismissal Procedures Agreement applies (as defined by paragraph 1 of this Agreement) has the right not to be unfairly dismissed by his employer and complaints of unfair dismissal shall be dealt with under the provisions of this Agreement and determined by the Joint Industry Board.

It is expected that where an Employee Participant considers he has been unfairly dismissed he will have sought the advice of his EETPU Area Official before the last stage of his firm's appeals procedure has been reached in accordance with the provisions of the Joint Industry Board's Code of Good Practice - Discipline.

2. PROCEDURE

(a) In the event of the complaint of unfair dismissal not being resolved it shall immediately be referred to the Joint Industry Board in the form of a full written report.

(b) On receipt of a complaint under the Dismissals Procedure Agreement the Secretary of the Regional Board shall use his best endeavours to reach a conciliated settlement, but failing such settlement he shall report to the Chairman of the Regional Board who, after consultation with the Deputy Chairman, must order an investigation to be carried out within 10 days by the Regional Board which shall ascertain the facts and reach a decision in accordance with the terms of this Agreement. The decision of the Regional Board will be implemented subject to the right of appeal to the National Board.

(c) The Notice and Statement of Grounds of Appeal against a decision of a Regional Board must be lodged, in writing, with the Secretary of the Joint Industry Board within twenty-eight days from the receipt of the written

confirmation of the decision of the Regional Board and shall be decided by reference to a meeting of the National Board.

(d) Where a decision which involves the payment of monies is the subject of an Appeal, the appropriate amount may be required to be paid to the Joint Industry Board and will be held in a JIB Suspense Account until such time as the Appeal is finally settled.

(e) The decision of the National Board will implemented subject to the right of appeal to a legally qualified arbitrator to be appointed by the Advisory, Conciliation and Arbitration Service, at the request of either party, if any such party to the appeal is dissatisfied with -

(i) the determination or direction of the National Board in respect of the Dismissal Procedures Agreement, or

(ii) the admission or rejection of any evidence.

(f) The Notice and Statement of Grounds of Appeal against a decision of the National Board must be lodged in writing with the Secretary of the Joint industry Board within twenty-eight days from the date of receipt of the written confirmation of the decision of the National Board and seek to show that in reaching its decision the Regional Board or the National Board or both made some error in interpretation or application of the Dismissal Procedures Agreement to the matter with which the appeal is concerned.

(g) Appeals shall not lie upon grounds which could have been raised at the Regional Board or the National Board and the Arbitrator shall have no jurisdiction to reverse the decision of the Regional Board or the National Board upon grounds not so raised.

(h) On the hearing of an appeal the arbitrator may

(i) order a re-hearing of the complaint, or

(ii) make a decision in respect of any party, or

(iii) make an order on such terms as he thinks proper to ensure that the determination is on the merits of the real question in dispute between the parties.

(i) The Arbitrator shall be assisted by a representative of the Electrical Electronic Telecommunication and Plumbing Union and of the Electrical Contractors' Association who shall:-

(i) have had no direct involvement at any stage with the appeal.

(ii) advise the Arbitrator in respect of technical and practical aspects of the electrical contracting industry, and

(iii) not participate in the Arbitrator's decision.

APPENDIX SIX

Explanatory letter accompanying the Pilot Survey - 1991 cases.

☎ (01252) 542376

54 Ashley Road,
Farnborough,
Hants.
GU14 7HB

27th November 1995

Dear

Survey Questionnaire: JIB Unfair Dismissal Procedure

I am conducting an enquiry, as part of a research degree at the University of Southampton Faculty of Social Sciences, into the effectiveness of the Unfair Dismissal Procedure of the Joint Industry Board for the Electrical Contracting Industry.

The JIB has allowed me to approach you concerning this research, as I understand that you were involved in a dispute brought before that procedure at some time between January 1991 and December 1993.

I should greatly appreciate it if you could complete the following questionnaire - which I estimate may take about 20 minutes - and return it to me at the above address, preferably before 31st December 1995. A stamped addressed envelope is enclosed for your convenience.

As you will see, the intention is not to 'kick over the traces' about a dispute which is now settled and a thing of the past. The focus is upon the way in which the Unfair Dismissal Procedure **operated in your case;** for example:

- whether you were satisfied with the administration and with the conduct of the hearing or hearings,
- whether you felt your case was fully heard,
- whether you consider the final decision reasonable and workable;
- in short, whether you believe the procedure allowed for a FAIR resolution of the dispute.

My research is of a private character, directed towards an MPhil. degree, though I shall be glad to make the results available to you in due course, if you so wish. **Individual responses will, of course, remain strictly confidential: the JIB will not see your returned questionnaire.** It would, however, be helpful to know whether you would be willing for me to contact you by phone or letter with any follow-up questions; if so, please indicate on the questionnaire.

I hope to shed light on the question of whether the experience of the JIB can be of value in the continuing debate about the role and function of Industrial Tribunals. Your co-operation will be of great value. Thank you in anticipation.

Yours sincerely,

Stephen Chowns BSc(Eng) FIPD

APPENDIX SEVEN

Questionnaire used in the Pilot Survey.

JIB Unfair Dismissal Procedure	**Survey Questionnaire**	Confidentiality Code:

Relating to the Case of .....on ..... (Date)

Tick as appropriate

Question 1 — How many employees were directly affected by this dispute?
- One ☐
- Two - Five ☐
- More than Five ☐

Question 2 — Was the issue raised at an internal company hearing before being referred to the JIB?
- Yes ☐
- No ☐

Question 3 — If it was not raised internally, why was this?

Question 4 — Was a Full-time official of the Union involved in the internal hearing?
- Yes ☐
- No ☐

Question 5 — Who formally notified the JIB of the existence of the dispute?
- Employer ☐
- Union ☐
- Employee(s) concerned ☐

Question 6 — How soon after this notification were you contacted by the JIB?
- Less than 1 Week ☐
- Between 1 wk. & 1 month ☐
- Over 1 month ☐

Question 7 — What form did the first contact from the JIB take?
- A phone call ☐
- A letter ☐
- A visit ☐

Question 8 — Who made the first contact on behalf of the JIB?
- A National Officer ☐
- The JIB Secretary ☐
- Another JIB staff member ☐
- Don't know ☐
- Other (please specify)

Question 9 — Was any explanatory literature about the JIB Unfair Dismissal Procedure sent to you at this time by the JIB?
- Yes ☐
- No ☐

Question 10 — Were you, before this dispute, already familiar with the JIB Unfair Dismissal Procedure?
- Yes ☐
- No ☐

Question 11 Did you understand, at the time this dispute arose, that it fell within the scope of the JIB Procedure and NOT the Industrial Tribunals?

- Yes ☐
- No ☐
- Can't recall ☐

Question 12 How did the JIB explain to you that the dispute had to de dealt with under the JIB Procedure and not in the Industrial Tribunals?

- In a letter ☐
- Over the telephone ☐
- When JIB officer visited ☐
- Some other way (specify)

Question 13 Did a JIB officer attempt to achieve a settlement of the dispute by conciliation? (i.e. before arranging a formal hearing)

- Yes ☐
- No ☐

Question 14 Was the JIB Officer successful in obtaining a conciliated settlement?

- Yes ☐
- No ☐

If not, why do you think this was?

Question 15 How soon after the JIB was first told of the dispute was a hearing arranged?

- Number of Weeks ☐

Question 16 Where was the hearing held?

- Company's Offices ☐
- Site where dispute arose ☐
- JIB Regional Office ☐
- JIB Head Office (Sidcup) ☐
- Somewhere else (specify)

Question 17 Was the location of the hearing convenient to you and/or your witnesses?

- Very ☐
- Fairly ☐
- Not at all ☐

Question 18 Was the date of the hearing convenient to you and/or your witnesses?

- Very ☐
- Fairly ☐
- Not at all ☐

Question 19 How much notice were you given of the date, time and location of the hearing?

- Less than one week ☐
- Less than two weeks ☐
- Between 2 and 4 weeks ☐
- More than 4 weeks ☐

Question 20 Were you represented before or during the dispute hearing?

- Before the hearing ☐
- During the hearing ☐
- Both before AND during ☐
- Not represented ☐

Question 21 If you were represented at any stage, who was your representative?

Trade Union Official ☐
Solicitor or Barrister ☐
Personnel Officer ☐
Personal friend ☐
Other (please specify)

Question 22 Were you satisfied with your representative's work on your behalf?

Before the hearing. Yes ☐ No ☐

During the hearing. Yes ☐ No ☐

After the hearing. Yes ☐ No ☐

Question 23 Did you receive advice about the documentary evidence you would need to produce?

Yes ☐ No ☐

If so, from whom?

Question 24 Did you take witnesses to the JIB hearing to support your case?

Yes ☐ No ☐

Question 25 On the day of the hearing, were you satisfied with the physical arrangements overall?

Very ☐ Fairly ☐ No ☐

Question 26 Was a private room provided in which you could prepare / consult your representative?

Yes ☐ No ☐

Question 27 Did anyone explain the procedure to you before the hearing began?

Yes ☐ No ☐

Question 28 Do you consider NOW that you were well-prepared for the hearing?

Yes ☐ No ☐

Question 29 How many people sat on the Board which heard your case?

Three ☐
More than three (specify)

Question 30 Did the Chairman of the Board:

Explain his/her own role? ☐
Allow you time to state your case? ☐
Allow enough opportunity to ask questions? ☐
Ask questions of both parties? ☐
Conduct the hearing to your satisfaction? ☐

Please comment, if you wish, on any of these points.

For the following question, please write in the box the appropriate code:

A - agree **P** - partially agree **D** - disagree ⇓

Question 31 Did the members of the Board:

Act impartially?	
Handle matters confidentially?	
Gain your trust during the hearing?	
Sufficiently understand the issues involved?	
Have enough experience of industrial relations	
Behave courteously?	
Act according to your expectations?	

Question 32 At what stage did you learn the decision of the JIB hearing?

On the same day	
Within two days	
Within one week	

Other (please specify)

For the next question please answer in each box:

YES / NO / Don't Know ⇓

Question 33 Concerning the Board's decision:

Was it clear, and to the point?	
Did it take full account of each party's case?	
Did it address fully the issue in dispute?	
Did it explain why the Board decided as it did?	
Was the decision unambiguous?	
Did you consider the decision fair?	
Did any problem arise in explaining the award?	
Did difficulty arise in implementing the award?	

Please add any explanatory comment

Question 34 Did you appeal against the award/decision to the National Board of the JIB?

Yes	
No	

Question 35 If so, how long was it before a National hearing took place?

One month	
Between 1 and 3 months	
More than 3 months	

Question 36 If an Appeal hearing took place, was the earlier decision altered or over-ruled?

Yes	
No	
To some extent	

Were you satisfied with the Appeal hearing?

Yes	
No	

If not, please say why:

Question 37 Did the case proceed further, to the ACAS Arbitrator?

Yes ☐
No ☐

If, so, how long was it, after the case was first referred to the JIB, that the ACAS arbitrator considered the case?

Less than 6 months ☐
Between 6 & 12 months ☐
Between 12 & 18 months ☐
More than 18 months ☐

Thank you very much indeed for the time you have taken to complete this questionnaire. I should like to assure you that your responses will remain confidential. If you are prepared for me to contact you by phone or letter, for follow-up or clarification, please give details here:

Address: **Phone:**

Stephen Chowns

*[***Note that this representation of the questionnaire is textually complete but does not replicate the exact layout***]***

APPENDIX EIGHT

Questionnaire used in the Main Employee Survey: 1992-1994 cases

JIB Unfair Dismissal Procedure	**Survey Questionnaire (employee participants)**	Confidentiality code:

Relating to the Case involving .....Ltd. occurring in 19 .....

Tick as appropriate

Question 1 — How many employees were directly affected by this dispute?
- One ☐
- Two - Five ☐
- More then Five ☐

Question 2 — Was the issue raised at an internal company hearing before being referred to the JIB?
- Yes ☐
- No ☐

Question 3 — If not raised internally, why was this?

Question 4 — If there WAS an internal hearing, were you represented at it by a Union official?
- Yes ☐
- No ☐

Question 5 — Who formally notified the JIB of the existence of the dispute?
- You ☐
- The Union ☐
- The employer ☐

Question 6 — How soon after this notification were you contacted by the JIB?
- Less than 1 week ☐
- 1 week to 1 month ☐
- Over 1 month ☐

Question 7 — What form did the first contact from the JIB take?
- A phone call ☐
- A letter ☐
- A visit ☐

Question 8 — Who made the first contact **on behalf of** the JIB?
- JIB National Officer ☐
- The JIB Secretary ☐
- other JIB staff ☐
- Don't know ☐
- Other (please specify) ☐

Question 9 — Was any explanatory literature about the JIB Unfair Dismissal Procedure sent to you at this time by the JIB?
- Yes ☐
- No ☐

Question 10 Were you, before this dispute, familiar with the JIB Unfair Dismissal Procedure?

Yes ☐
No ☐

Question 11 Did you understand, when this dispute arose, that it fell only within the scope of the JIB Procedure and NOT the industrial tribunals?

Yes ☐
No ☐
Can't recall ☐
No-one explained ☐

Question 12 HOW did the JIB explain that the dispute had to de dealt with under the JIB Procedure and not in the Industrial Tribunals?

In a letter ☐
Over the telephone ☐
When JIB visited me ☐
Some other way (specify)

CONCILIATION

Question 13 Did a JIB officer attempt to achieve a settlement of the dispute by conciliation? (i.e. before arranging a formal hearing)

Yes ☐
No ☐

Question 14 Was the JIB Officer successful in obtaining a conciliated settlement?

Yes ☐
No ☐
If, not, why do you think this was?

Question 15 What form did this settlement take?

I withdrew my claim ☐
I was re-instated ☐
I got compensation ☐
(*please specify details*)

A FORMAL HEARING

Question 16 How soon after the JIB was first told of the dispute was a hearing arranged?

Number of Weeks ☐

Question 17 Where was the hearing held?

Company's Offices ☐
Site where dispute arose ☐
Hotel or similar ☐
JIB Head Office ☐
Somewhere else (*specify*)

Question 18 Was the location of the hearing convenient to you and/or your witnesses?

Yes ☐
No ☐

Question 19 Was the date of the hearing convenient to you and your witnesses?

Yes ☐
No ☐

Question 20 How much notice were you given of the date, time and location of the hearing?

- Less than one week ☐
- Less than two weeks ☐
- Two to four weeks ☐
- Over four weeks ☐

Question 21 Were you represented before or during the hearing, or both, or not at all.

- Before the hearing ☐
- During the hearing ☐
- Before AND during ☐
- Not represented ☐

Question 22 If you were represented at any stage, who was your representative?

- Trade Union Official ☐
- Solicitor ☐
- Personnel Officer ☐
- Personal friend ☐

Other (*please specify*)

Question 23 Were you satisfied with your representative's work on your behalf - before the hearing?

- Yes ☐
- No ☐

During the hearing?

- Yes ☐
- No ☐

After the hearing?

- Yes ☐
- No ☐

Question 24 Did you receive advice about the documentary evidence you would need at the hearing?

- Yes ☐
- No ☐

If so, from whom?

Question 25 Did you take witnesses to the JIB hearing, to support your case?

- Yes ☐
- No ☐

Question 26 On the day of the hearing, were you satisfied with the physical arrangements overall?

- Yes ☐
- No ☐

Question 27 Was a private room provided in which you could prepare / consult your representative?

- Yes ☐
- No ☐

Question 28 Did anyone explain the procedure to you before the hearing began?

- Yes ☐
- No ☐

Question 29 Do you consider NOW that you were well-prepared for the hearing?

- Yes ☐
- No ☐

Question 30 The normal Board consists of two members plus the JIB National Officer. Was this true in your case?

Yes ☐
No ☐

If not, do you know why not?

Question 31 Did the Chairman of the Board: *(tick if true)*

Explain his/her own role?	☐
Allow you time to state your case?	☐
Allow enough opportunity to ask questions?	☐
Ask questions of both parties?	☐
Conduct the hearing to your satisfaction?	☐

Please comment, if you wish, on any of these points:

For the following question, please write the appropriate letter code in the box

A - agree **P** - partially agree **D** - disagree ⇩

Question 32 Did the members of the Board:

Act impartially?	
Handle matters confidentially?	
Gain your trust during the hearing?	
Sufficiently understand the issues involved?	
Have enough experience of industrial relations	
Behave courteously?	
Act according to your expectations?	

THE RESULT OF THE HEARING

Question 33 At what stage did you learn the decision of the JIB hearing?

On the same day ☐
Within two days ☐
Within one week ☐
Other (*please specify*)

For this question please answer: **Yes / No / Unsure** ⇩

Question 34 Concerning the decision of the Board.

Was it clear, and to the point?	
Did it take full account of each party's case?	
Did it address fully the issue in dispute?	
Did it explain why the Board decided as it did?	
Was the decision unambiguous?	
Did you consider the **decision** fair?	
If an **award** was made, did you think it fair?	
Did you understand the reason for the award?	
Did difficulty arise in implementing the award?	
Have the terms of any award been carried out?	

Please add any explanatory comment

Question 35 Did you appeal against the award/decision to the National Board of the JIB?

Yes ☐
No ☐

Question 36 If so, how long was it before a National hearing took place?

One month ☐
Between 1 and 3 months ☐
More than 3 months ☐

Question 35 If an Appeal hearing took place, was the earlier decision altered or over-ruled?

Yes ☐
No ☐
To some extent ☐

Were you satisfied with the Appeal hearing?

Yes ☐
No ☐

If not, please say why not:

Question 36 Did the case proceed further, to the ACAS Arbitrator?

Yes ☐
No ☐

If so, how long was it, after the case was first referred to the JIB, that the ACAS arbitrator considered the case?

Less than 6 months ☐
6 to 12 months ☐
12 to 18 months ☐
More than 18 months ☐

If the case was considered by the ACAS arbitrator, were you satisfied with the result?

Yes ☐
No ☐

Thank you very much indeed for the time you have taken to complete this questionnaire. I should like to assure you that your responses will remain confidential (I do not have access to your address unless you give it to me below). I hope to make a summary of the overall findings of this research available in due course.

If you are prepared to be contacted later please give your address or phone number below.

Stephen Chowns
54 Ashley Road,
Farnborough,
Hants.
GU14 7HB
(01252) 542376

[Note that this representation of the questionnaire is textually complete but does not replicate the exact layout]

APPENDIX NINE

Questionnaire used for the Employer Survey.

Joint Industry Board for the Electrical Contracting Industry

Unfair Dismissal Procedure

(exempted under the provisions of the Employment Act 1996, Section 110)

The following survey questions are addressed exclusively to JIB Employer Participants who have been party to cases brought under the above procedure during the years 1991 to 1995 inclusive. Please complete as fully as possible.

NB. If your company has been involved in more than one case during the survey period, only ONE questionnaire need be completed. The aim is to learn your company's view of the procedure in general - though you may find it helpful to have the MOST RECENT case in mind when responding to the questions.

1 On how many occasions has your company been party to a case under the above procedure (during 1991 - 1995 incl.) ☐

2 Into which category(ies) would you place the disputes involved?

- Unfair dismissal ☐
- Redundancy ☐
- Other (please specify)

3 In the most recent case, how many employees were involved?

- One ☐
- Two to Five ☐
- More than Five ☐

4 In that case, was the issue raised first at an internal hearing (before being referred to the JIB)?

- Yes ☐
- No ☐

If not, why was this?

5 Was a Full-time official of the Union involved at the internal stage?

- Yes ☐
- No ☐

6 Who formally notified the JIB of the existence of the dispute?

7 How soon after this notification were you contacted by the JIB?

- less than a week ☐
- between 1 week & 1 month ☐
- over one month ☐

8 What form did that first contact from the JIB take?

- Phone call
- Letter
- Visit

9 Who made the first formal contact on behalf of the JIB about this case?

- A National Officer
- The JIB Secretary
- Don't recall

10 Were you, before this dispute, already familiar with the JIB Unfair Dismissal procedure?

- Yes
- No

11 Did you understand, at the time this dispute arose, that it fell within the scope of the JIB procedure and NOT the industrial tribunals?

- Yes
- No
- Don't recall

12 Did a JIB National Officer attempt to achieve a settlement of the dispute by conciliation?

- Yes
- No

If so, was a settlement reached by conciliation?

13 How soon after the JIB was involved in the dispute was a hearing arranged?

Number of weeks ...

14 Where was the hearing held?

- Company offices
- Site where dispute arose
- JIB head office (Sidcup)

Other (please specify)

15 Was the location of the hearing convenient to the company?

- Yes
- No

16 Was the date of the hearing convenient to the company?

- Yes
- No

17 Who represented the company at the hearing of the Regional JIB disputes committee?

- Director
- Personnel Manager
- Company solicitor

Other (please specify)

18 Do you consider NOW that the company was well-prepared for the hearing?

Yes
No

19 Did the Chairman of the RJIB disputes committee ....

Explain their role to the parties?
Allow you enough time to state your case?
Allow enough opportunity to put questions?
Ask questions themselves?
Conduct the hearing to your satisfaction?

20 Did the members of the RJIB disputes committee ....

Act impartially?
Handle matters confidentially?
Gain your trust during the hearing?
Sufficiently understand the issues involved?
Have enough experience of industrial relation?
Behave courteously?
Act according to your expectations?

21 At what stage did the company learn the decision of the RJIB disputes committee?

On the same day
within 2 days
within a week
Other (please specify)

22 Concerning the decision of the RJIB disputes committee ... YES/NO

Was it clear and to the point?
Did it take account of each party's case?
Did address full the issue in dispute?
Did it explain why the board decided as it did?
Was the decision unambiguous?
Did you consider the decision fair?
Did any problem arise in explaining the award?
Did difficulty arise in implementing the award?

Please add any explanatory comment:

23 Did either party appeal against the decision or the award to the National Board Appeals Committee?

Yes
No
If so, which party appealed?

24 If there was a hearing of the National Board Appeals Committee, how long after the original hearing did this take place?

Number of weeks ...

25 Did the Appeals Committee change the decision in any way?

Yes
No
If so, in what way?

26 Were you satisfied with the hearing of the National Board Appeals Committee?

Yes ☐
No ☐

27 Did the case proceed further, to the ACAS arbitrator?

Yes ☐
No ☐

If so, how long after the original hearing did the arbitrator hear the case?

28 Were you satisfied with the arbitration hearing?

Yes ☐
No ☐

29 Were you satisfied with the decision of the arbitrator?

Yes ☐
No ☐

30 Is your company in favour of the JIB procedure remaining outside the scope of the industrial tribunals?

Yes ☐
No ☐

31 Please add any further comments you wish to make about the operation of the JIB Unfair Dismissal procedure.

[Note that this representation of the questionnaire is textually complete but does not replicate the exact layout]

APPENDIX TEN

Covering letter from the JIB Secretary for the Main Employee Survey.

[JIB Letterhead]

Our Reference: D3110/RSA/MMD

Date as postmark

Dear Sir,

JIB Unfair Dismissal Survey

The JIB has been approached by Mr. S. Chowns of Southampton University who would like to survey operatives who have pursued complaints of Unfair Dismissal through the JIB Dismissal Procedure Agreement. As you may know the JIB Dismissals Procedure Agreement is granted exemption from the Industrial Tribunal System and information based upon the experience of complainants who used the procedures could form a valuable basis upon which to instigate any changes which may be necessary.

I can assure you that Mr. Chowns has not been supplied with any specific information about your case, nor with any personal details about you whatsoever (other than your name). Your response will be strictly confidential to him - the JIB will not be given any details of your individual replies.

The JIB support this survey and as such would appreciate your co-operation over completing the survey form.

Should you require any further information please do not hesitate to contact either the undersigned or Mr. Chowns.

Yours faithfully

R.S. Allender
JIB Secretary

APPENDIX ELEVEN

The Full Results of the Questionnaire Surveys.

The following paragraphs record the responses to each question in the employee survey in tabular form. The Tables are lettered for purposes of cross-reference with chapter Six of the thesis.

Table A

Question 1:

How many employees were directly affected by this dispute?

	One	Two to Five	More than Five	No response or Don't know	n
1991	10	5	4		19
1992	4	1	6		11
1993	4	2	5		11
1994	6	1	2		9
TOTAL	24	9	17		50
Employers	14	2		4	20

Table B

Question 2:

Was the issue raised at an internal company hearing before being referred to the JIB?

	Yes	No	No response or Don't know	n
1991	6	13		19
1992	5	6		11
1993	8	2	1	11
1994	3	6		9
TOTAL	22	27	1	50
Employers	11	4	5	19

Question 3:

If not raised internally, why was this?

Responses to this question included:

- 'It was not company procedure'
- 'My line manager refused to take the matter further'
- 'I was just given a letter [of dismissal]'
- 'I don't know as I was ill at the time of the dispute'
- 'Because I was made redundant without any notice'
- '[Employer's] attitude was if you didn't like their policies you can go elsewhere'
- 'No internal procedure'
- 'Because they thought they could walk all over us'
- 'I approached the Union immediately after the dismissal'
- 'No formal approach was made by me to have [employer] consider my case'
- 'They said they didn't owe me any money'
- 'Because [employer] did not recognise the union and its practices'
- 'We went straight to the union'
- 'Company not interested'
- 'Because we had already left the company before we found out the facts'

This representative sample of the responses indicates that sometimes applicants and sometimes employers were responsible for dismissal cases being inadequately considered at internal, or 'domestic' level.

Table C

Question 4:

Was a full-time official of the union involved in the internal hearing?

(1991 survey version)

If there ***was*** an internal hearing, were you represented by a Union official?

(amended version)

	Yes	No	No response or Don't know	**n**
1991	10	5	4	19
1992	4	4	3	11
1993	9	0	2	11
1994	4	2	3	9
TOTAL	27	11	12	50
Employers	4	11	5	20

Table D

Question 5:

Who formally notified the JIB of the existence of the dispute?

	Employer	Union	The employee involved	No response or Don't know	n
1991	1	5	14		20*
1992	-	8	2	1	11
1993	1	10	1		11*
1994	-	5	5		9*
TOTAL	2	28	22	1	50
Employers	3	6	6	5	20

* multiple response

The replies to this question raise the issue of how the union fulfils its role in relation to aggrieved members. Bearing in mind that the procedure only applies to union members, it might be expected that all cases would come to the notice of the union first - and they would then notify the JIB of a 'failure to agree'. It would appear, however, that a substantial proportion of applicants had to inform the JIB themselves that they were in dispute with their employer over a dismissal. The JIB does not keep a record of the means by which it was notified of dismissal cases.

Table E

Question 6:

How soon after this notification were you contacted by the JIB?

	less than one week	one week to one month	more than one month	No response or Don't know	n
1991	6	11	2		19
1992	-	3	3	5	11
1993	1	2	5	3	11
1994	3	4	2	-	9
TOTAL	10	20	12	8	50
Employers	1	13	-	6	20

There are few surprises in the responses to this question, in that the normal exigencies of the post and administrative procedure might be expected to lead to a response time of between a week and one month. That almost a quarter of all applicants waited more than one month for evidence that their case was being dealt with, suggests that the procedure could be improved; the industrial tribunals generally acknowledge applications almost by return of post.

Table F

Question 7:

What form did the first contact from the JIB take?

	A telephone call	A letter	A visit	No response or Don't know	**n**
1991	6	12	1	-	19
1992	-	7	1	3	11
1993	1	9	-	1	11
1994	1	8			9
TOTAL	8	36	2	4	50
Employers	1	13	-	5	19

It is understood, from the JIB Secretary that the normal action on receipt of an application is to write to the applicant informing him of the nature of the Unfair Dismissal procedure and advising that a National Officer will be in touch. Clearly, in some cases, this letter is not to hand by the time the National Officer visit or telephones the applicant.

Table G

Question 8:

Who made the first contact on behalf of the JIB?

	JIB National Officer	JIB Secre-tary	Other JIB staff	Other (specify)	Don't know or N/R	n
1991	5	1	3	1	9	19
1992	3	-	-	-	8	11
1993	-	-	-	-	11	11
1994	1	3	1	-	4	9
TOTAL	9	4	4	1	32	50
Employers	9	3	-	-	8	20

These responses reflect both the JIB's perception of their administrative process (i.e. that the National Officer will normally make the first approach to the applicant) but also a surprising level of ignorance or misunderstanding, on the part of the applicant, as to who is contacting them from the JIB. Two thirds of applicants either did not know, or cannot recall, the role of the person who contacted them about their case on behalf of the JIB.

Table H

Question 10:

Were you, before this dispute, familiar with the JIB Unfair Dismissal procedure?

	Yes	No	No response or Don't know	n
1991	2	17	-	19
1992	3	8	-	11
1993	-	11	-	11
1994	4	5	-	9
TOTAL	9	41	-	50
Employers	14	1	5	20

This response suggests that almost one in five of JIB employee participants has some knowledge of the existence of the JIB's exempted procedure for dealing with unfair

dismissal. Since the procedure is quite exceptional, this proportion is perhaps unsurprising; there is after all considerable ignorance among the general public - even after 25 years - about the function of the industrial tribunals in relation to unfair dismissal.
Employers were, in almost every case where a full return was received, already aware of the special JIB procedure. Concerned as they are with the business of managing employee relations it is not surprising that this should be so.

Table J

Question 11:

Did you understand, when this dispute arose, that it fell only within the scope of the JIB procedure and NOT the industrial tribunals?

	Yes	No	No-one explained	Can't recall or N/A	**n**
1991	6	12	-	1	19
1992	5	5	2	-	11*
1993	-	6	3	2	11
1994	5	3	-	1	9
TOTAL	16	26	5	4	50
Employers	15	-	-	5	20

* multiple response

Just over half of respondents say they did not appreciate the special position they were in, *vis à vis* their unfair dismissal claim, when it arose. This was intended to be a question addressing a slightly different issue to the previous one, i.e. that individuals who were alleging unfair dismissal might be expected to enquire about their rights, and the channels by which they could pursue their grievance. It appears, from this response, that the level of awareness of the special nature of the JIB procedure rises (from about 20% to about 50%) once the situation becomes real to an applicant. Even so, this is hardly a satisfactory level, if the applicants are to take a constructive part in the resolution of their dispute. Those who remain confused about, or ignorant of, the procedure **while it is being used** could be at risk of further unfairness.

Table K

Question 9:

Was any explanatory literature about the JIB Unfair Dismissal Procedure sent to you at this time by the JIB?

	Yes	No	No response or Don't know	n
1991	7	10	2	19
1992	1	9	1	11
1993	2	7	2	11
1994	4	5	-	9
TOTAL	14	31	5	50

In the responses to this question may lie some explanation of the apparent lack of understanding on the part of applicants about the Unfair Dismissal procedure. At the time it was introduced and granted exemption there was considerable publicity in JIB newsletters. Some twelve to fifteen years later, however, only a minority of individuals have had occasion to utilise the procedure; and it would appear that those bringing complaints do not fully understand it. There may be a case for a revision of standard letters and leaflets used by the JIB when cases arise; the existing documents will be critically reviewed below.

Table L

Question 12:

How did the JIB explain that the dispute had to be dealt with under the JIB procedure and not in the industrial tribunals?

	by letter	by phone	by a visit	by another way	N/R or don't know	n
1991	8	3	2	1	5	19
1992	4	-	-	2	5	11
1993	3	-	1	5	2	11
1994	5	1	-	3	-	9
TOTAL	20	4	3	11	12	50

N.B. Several respondents added a written comment to this question, to the effect that they had **never** been told of the special exemption applying to their case.

Those who reported that they had learned of the exempted procedure by 'some other way' had received the information from the trade union, or, in one case, from a solicitor. Just over 75% of all applicants were eventually put in the picture about the relationship between the JIB procedure and the industrial tribunals. The Warwick research (Dickens *et al* 1985, 32) showed that applicants to the industrial tribunals learned of the tribunals from the Department of Employment (26%), their workmates and friends (25%) and from the media (21%). Only 12% heard of the tribunals from their trade union. The position in the electrical contracting industry is clearly very different; with the majority hearing about their rights from the JIB itself, and almost 20% from their union.

Table M

Question 13:

Did the JIB National Officer attempt to achieve a settlement of the dispute by conciliation? (i.e. before arranging a formal hearing)

	Yes	No	No response or Don't know	n
1991	7	10	2	19
1992	4	6	1	11
1993	3	5	3	11
1994	3	6	-	9
TOTAL	17	27	6	50
Employers	9	6	5	20

This is the first of two questions probing the extent and success of 'conciliation' as practised by the JIB National Officers. The results suggest that in more than half the cases the applicants were unaware of any conciliation attempt prior to the hearing. 'Conciliation' is of course a jargon term, but the question was phrased so as to suggest an attempt to settle the dispute without the need for a formal hearing.

Table N

Question 14:

Was the JIB National Officer successful in conciliation?

	Yes	No	N/R or Don't know	n
1991	6	8	5	19
1992	1	6	4	11
1993	1	7	3	11
1994	4	2	3	9
TOTAL	12	23	15	50
Employers	3	11	5	19

Table P

Question 15:

What form did this conciliated settlement take?

	I withdrew my claim	I was re-instated	I got compensation	N/R or Don't know	n
1991 *					
1992	-	-	4	7	11
1993	-	-	4	7	11
1994	-	2	2	5	9
TOTAL		12	10	19	41

* question not posed

Table Q

Question 16:

How soon after the JIB was told of the dispute was a hearing arranged?

	2 to 3 weeks	4 to 5 weeks	6 to 8 weeks	over 8 weeks	N/R N/A or Don't know	n
1991	1	1	3	7	7	19
1992	-	1	-	3	7	11
1993	-	-	1	3	7	11
1994	-	1	1	4	3	9
TOTAL	1	3	5	17	24	50
Employers	2	3	2	3	10	20

Table R

Question 17:

Where was the hearing held?

	Company offices	Site *	Hotel or similar	JIB head office	N/R N/A or don't know	n
1991	1	-	5	5	8	19
1992	1	-	4	-	6	11
1993	-	-	5	2	4	11
1994	1	-	5	1	2	9
TOTAL	3		19	8	20	50
Employers	-	-	7	5	8	20

* unfortunately it is not clear whether some respondents categorised a temporary building on a construction site as 'company offices'.

Table S

Question 18:

Was the location convenient to you/your witnesses?

	Yes	No	N/R N/A or Don't know	n
1991	9	4	6	19
1992	5	2	4	11
1993	3	5	3	11
1994	5	2	2	9
TOTAL	22	13	15	50
Employers	10	3	7	20

Table T

Question 19:

Was the date of the hearing convenient to you/your witnesses?

	Yes	No	N/R N/A or Don't know	n
1991	11	2	6	19
1992	5	2	4	11
1993	5	3	3	11
1994	5	3	1	9
TOTAL	26	10	14	50
Employers	13	-	7	20

Table U

Question 20:

How much notice were you given of the hearing?

	< 1 week	< 2 weeks	2 to 4 wks	> 4 weeks	N/R or Don't know	n
1991	1	-	9	2	7	19
1992	-	-	6	-	5	11
1993	-	-	3	5	3	11
1994	-	1	5	2	1	9
TOTAL	1	1	23	9	16	50

Table V

Question 21:

Were you represented ...?

	Before the hearing	During the hearing	Before and after	Not repre-sented	N/R or Don't know	n
1991	3	1	8	1	6	19
1992	1	2	3	1	4	11
1993	1	-	8	-	2	11
1994	-	-	7	1	1	9
TOTAL	5	3	26	3	13	50

Table W

Question 22:

Who was your representative?

	Union official	Solicitor	Personal friend	Other	N/R or don't know	n
1991	12	1	-	-	7	20 *
1992	11	-	-	-	-	11
1993	9	1	-	-	1	11
1994	7	-	-	-	2	9
TOTAL	39	2			10	51 *

* multiple response

Table W (continued)

Question 17 (Employer survey)

Who represented the company at the RJIB hearing?

	Director	Personnel Manager	Company Solicitor	Other	N/R or don't know	n
Employers	5	5	-	2	8	20

Table X

Question 23:

Were you satisfied with your representative's work?

	Before hearing		**During hearing**		**After hearing**		N/R or don't know	**n**
	Yes	No	Yes	No	Yes	No		
1991	9	4	10	1	6	5	5	19
1992	4	7	4	4	4	4	-	11
1993	9	-	8	1	5	4	2	11
1994	6	2	6	2	5	3	1	9
TOTAL								

Table Y

Question 24:

Did you receive advice about documentary evidence?

	Yes	No	N/R or don't know	n
1991	5	8	6	19
1992	1	8	2	11
1993	2	7	2	11
1994	3	5	1	9
TOTAL	11	28	11	50

Table Z

Question 25:

Did you take witnesses to the hearing?

	Yes	No	N/R or don't know	n
1991	4	10	5	19
1992	2	6	3	11
1993	1	7	3	11
1994	1	7	1	9
TOTAL	8	30	12	50

Table AA

Question 26:

Were you satisfied with the physical arrangements at the hearing?

	Very	Fairly	No	N/R or don't know	**n**
1991	4	6	1	8	19
	Yes		No		
1992	5		3	3	11
1993	6		-	5	11
1994	3		4	2	9
TOTAL	24		8	18	50

Table BB

Question 27:

Was a private room provided in which you could prepare/consult your representative?

	Yes	No	N/R or don't know	n
1991	8	4	7	19
1992	3	3	5	11
1993	4	2	5	11
1994	5	2	2	9
TOTAL	20	11	19	50

Table CC

Question 28:

Did anyone explain the procedure to you before the hearing began?

	Yes	No	N/R or don't know	n
1991	11	4	4	19
1992	4	3	4	11
1993	4	2	5	11
1994	6	1	2	9
TOTAL	25	10	15	50

Table DD

Question 29:

Do you **now** consider you were well-prepared for the hearing?

	Yes	No	N/R N/A or don't know	n
1991	8	5	6	19
1992	1	7	3	11
1993	4	3	4	11
1994	3	4	2	9
TOTAL	16	19	15	50
Employers	11	2	7	20

Question 30:

How many people were on the Board?

This question was so differently phrased in the various versions of the questionnaire as to give meaningless results. It is in any case, superfluous since the procedure demands that a RJIB disputes committee will comprise two members plus the Secretary (JIB National Officer).

Table EE

Question 31:

Did the Chairman ...? (**positive** responses only)

	Explain role of Chairman	Give you time to state case	Allow you opportunity to put questions	As questions themselves	Conduct the hearing to your satisfaction	n (total responses)
1991	11	10	8	10	9	11
1992	5	4	4	5	4	6
1993	6	6	5	4	6	6
1994	5	5	5	6	3	6
TOTAL	27	25	22	25	22	29
Employers	12	12	12	12	10	12

Table FF

Question 31:

Did the members of the Board .....?

1991 employees n = 11	Agree	Partially agree	Disagree
act impartially?	9	-	2
handle matters confidentially?	9	1	-
gain your trust?	4	4	3
understand the issues involved?	8	2	1
have sufficient industrial relations experience?	8	1	2
behave courteously?	9	2	-
act according to your expectations?	7	2	1

1992 - 1994 employees n = 20	Agree	Partially agree	Disagree
act impartially?	13	2	2
handle matters confidentially?	12	-	4
gain your trust?	10	2	5
understand the issues involved?	9	5	5
have sufficient industrial relations experience?	11	4	1
behave courteously?	16	-	1
act according to your expectations?	8	3	7

Employers n = 12	Agree	Partially agree	Disagree
act impartially?	10	1	1
handle matters confidentially?	11	-	1
gain your trust?	8	2	2
understand the issues involved?	10	1	1
have sufficient industrial relations experience?	10	1	1
behave courteously?	11	-	1
act according to your expectations?	9	1	2

Table GG

Question 33:

At what stage did you learn the decision of the RJIB disputes committee?

	Same day	Within 2 days	Within 1 week	N/R or don't know	n
1991	10	1	2	6	19
1992	3	-	3	5	11
1993	2	2	3	4	11
1994	3	1	1	4	9
TOTAL	18	4	9	19	50
Employers	10	1	1	8	20

Table HH

Question 33 (1991 employees)

Concerning the Board's decision, ..

1991 employees: n = 12	Yes	No	N/R or Don't know
Was it clear, and to the point?	10	2	
Did it take full account of each party's case?	10	2	
Did it address fully the issue in dispute?	9	3	
Did it explain why the Board decided as it did?	8	2	2
Was the decision unambiguous?	7	4	1
Did you consider the decision fair?	8	3	1
Did any problem arise in explaining the award?	2	9	1
Did difficulty arise in implementing the award?	6	5	1

Comments:

- Not satisfied with actual award.
- Never received £1000 award
- Have not received award
- Felt award was poor
- Never received any payment of compensation awarded (£1500)
- Firm had to be threatened with court order before they paid up.

(Table HH continued)

Question 34 (1992 - 1994 employees)

Concerning the board's decision ...

1992 - 1994 Employees: n = 23	YES	NO	N/R or Unsure
Was it clear, and to the point?	21	1	1
Did it take full account of each party's case?	11	2	2
Did it address fully the issue in dispute?	13	7	1
Did it explain why the Board decided as it did?	12	9	1
Was the decision unambiguous?	8	5	9
Did you consider the decision fair?	11	11	-
If an award was made, did you think it fair?	8	7	5
Did you understand the reason for the award?	10	6	4
Did difficulty arise in implementing the award?	5	10	5
Have the terms of any award been carried out?	11	4	5

Comments:

- Company defaulted on part of the compensation - had to have further hearing.
- I appealed against the decision.
- We were sold down the river by JIB and the union.
- Me(a)ger award - did not want to upset client. Employees came a poor second.
- No compensation received (though awarded).
- I was not allowed to appeal though this was my wish.
- I was led to believe I could work before the hearing; I did, and my compensation was reduced.
- Answers represent views of union official - I was not present.
- The decision was supposed to be unanimous yet it took 3½ hours before I was told - long after firm went home. Draw your own conclusions!
- I was given only payment for time out of work, not for harassment and wrongful dismissal.
- My former company appealed and caused much anguish and stress.
- No award was given just to inform me I was sacked after 23 years service.

(Table HH continued)

Question 33 / 22 (Employers)

Concerning the Board's decision, ..

Employers' responses 1991 to 1994 **n = 12**	Yes	No	N/R or Don't know
Was it clear, and to the point?	11	1	
Did it take full account of each party's case?	11	1	
Did it address fully the issue in dispute?	10	2	
Did it explain why the Board decided as it did?	11	1	
Was the decision unambiguous?	6	6	
Did you consider the decision fair?	9	2	1
Did any problem arise in explaining the award?	2	10	
Did difficulty arise in implementing the award?	1	11	

The remaining questions in the postal survey related to the National Appeals Committee and the ACAS arbitration stage of the exempted procedure. There were insufficient responses to warrant presentation, though comment upon this part of the procedure is included in Chapter Six.

The following paragraphs record the handwritten comments made by respondents at the conclusion of the survey questionnaire. Only those whose details would identify the writer have been omitted.

Employee Comments:

"I won the first hearing, ...'s appealed and won. I was then told I had to accept the appeal hearing and could not take the matter further."

"We never really knew of a hearing of any sort; we just made our point to the union and left it up to them. We then had notification that we had been given some compensation and were then paid out by our previous employer."

"Although I was represented by the JIB and was awarded £1500, to date I have not received a penny, therefore I consider their efforts have been virtually worthless as they failed to pressure the company concerned to meet its obligation."

".. when my case went before the JIB Chairman he refused a hearing on the grounds that he accepted the employer's written report ..... I thought it very unfair that I didn't get a chance to have a proper hearing to air my views. I may add that some months later I experienced much the same, and on the union official's advice I didn't bother to put the case into the disputes procedure."
"I contacted the JIB who referred me to the union and I was not contacted by the JIB again other than to send me a claim form which I sent to the union. I was very dissatisfied with the whole procedure."
"I got no help from the JIB at all. JIB is crap."

"We had heard nothing after two months from the JIB and decided to jettison the union official and ask the Equal Ops officer of the union to take on our case. We then applied to the Industrial Tribunal, who referred us to ACAS. We settled through them."

"The EETPU carried out all the groundwork - the JIB did not contact me or give me any help at all. I did phone them, but no other help was given."

"I had left the site and lost contact with all involved, and I really can tell you nothing of what went on. I was surprised when the cheque arrived some months later."

"When this dispute arose it involved over twenty men ..... it all happened within a week and took months to resolve. I and the rest of the men were represented by our Area Union Official, and probably none of us had any direct involvement apart from receiving letters from the union."

"Not many employees have had the guts to take ..... to the tribunal for fear of being blacklisted by them to other companies."

"[the conciliated settlement] was only an offer of re-instatement which my illness prevented me from accepting - and the others were laid off officially 3 months later, which was precisely what was expected to happen by all the employees."

"Although ..... broke the JIB rules I still lost my appeal. In January 1994 I was first made redundant after consulting with the union and was re-instated in April. The company put me on unsatisfactory jobs until they made me again redundant while keeping other employees with less service than me."

Employer Comments:

The employers in the 1992 to 1994 cases were specifically asked whether they were in favour of the JIB procedure remaining outside the scope of the industrial tribunals. Of the nine companies who answered the question all said they were in favour. Other comments were added, however.

"The JIB procedure is fair and is dealt with by people with knowledge of the industry rather than by shop assistants and unqualified people. Also the hearing is dealt with promptly, without undue delay as can occur with an industrial tribunal."

"We believe the disputes committee members should be retired/active persons from appropriate parties AEEU/ECA and that same committee members hear all dispute hearings for the sake of consistency and fairness. Union officials from the same office hearing the case presented by their colleague cannot possibly be impartial."

"Some changes should take place e.g. six months employment [to be eligible to bring a complaint]. And a return to common sense as against case law precedents."
