Before beginning the study of individual areas of employment law, it is useful to explore the forum in which employment disputes are settled: the courts and tribunals. The employment law student should also appreciate the sources of that law and the role of the institutions which oversee its operation.

An aggrieved employee, union or employer initially brings a claim in the County Court, High Court or Employment Tribunal. This chapter begins by highlighting the reasons for a claim being brought in either a court or the Employment Tribunal and considers the roles of the:

- County Court and High Court
- Employment Tribunal
- Employment Appeal Tribunal.

Thorough knowledge and appreciation of the sources of employment law are essential in a subject that is constantly changing. The sources of employment law are:

- common law
- legislation
- European law
- codes of practice
- regulations.

Guidance is given on how to read and interpret employment law reports and statutes. Other sources such as textbooks, case books, journal articles and the use of the Internet are explored.

Workplace relations are governed by various bodies or ‘institutions’. The composition and roles of these institutions are discussed below. The institutions that oversee and assist in the application of employment law are the:

- Advisory, Conciliation and Arbitration Service (Acas)
- Central Arbitration Committee (CAC)
- Department for Business, Innovation and Skills (BIS) and related government departments
- Department for Work and Pensions (DWP)
- Equality and Human Rights Commission (EHRC)
- Low Pay Commission (LPC)
- Certification Officer (CO)
- Health and Safety Executive (HSE)
- Information Commissioner (IC).
Employment law disputes are initially heard either in the County Court, High Court or the Employment Tribunal. Whether the aggrieved party brings his claim in a court or tribunal will depend on the nature of the dispute. Claims concerning breach of contract, wrongful dismissal and applications for injunctions are brought in the courts. Claims involving unfair dismissal, discrimination, equal pay, redundancy, deductions from wages and maternity rights (amongst others), are heard in the Employment Tribunal (ET).

In other words, claims involving breach of the common law or contract are brought in the courts and claims involving a breach of a statute are brought in the Employment Tribunal.

The exception to this is that there are some claims for breach of contract that can be brought either in the courts or the Employment Tribunal. Before 1994, claims for breach of contract could only be brought in the courts. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 changed this rule and extended tribunal jurisdiction to include some claims for breach of contract. Employees may not issue a breach of contract claim in the Employment Tribunal until their employment has ended but they do not have to make a concurrent statutory claim. An employee does not have to have worked for their employer for any given length of time before being able to bring a claim for breach of contract. Any such claim (in the ET) must be brought within three months of the effective date of termination (the date on which the employment contract is said to have been terminated) or within three months from the last date on which the employee attended work. This time limit may be extended if it was not reasonably practicable for the employee to bring their claim within that three-month period. When dealing with contractual claims the Employment Tribunal is only able to make awards of up to £25,000. It is also important to note that the Employment Tribunal is unable to deal with claims concerning:

- personal injury;
- the breach of a term requiring an employer to provide living accommodation for its employee;
- the breach of a term relating to intellectual property (including copyright, rights in performances, moral rights, design rights, registered designs, patents and trade marks);
- the breach of a term imposing an obligation of confidence; or
- the breach of a term which is a covenant in restraint of trade.

Such claims are able to be heard only in the courts. (See further pages 374–375.)

**County Court or High Court?**

Most claims are heard in the County Court. Whether a claim is brought there or in the High Court will depend on the monetary value attached to the claim. There is a presumption that claims involving possible damages of £25,000 or less will be tried in the County Court. There is a presumption that claims involving damages of over £50,000 will be heard in the High Court. The High Court will not hear cases involving claims of less than £25,000. In personal injury claims the High Court deals with cases involving claims for £50,000 or more. The High Court deals with applications from employers seeking an injunction to prevent strike action. It should be noted that judges in the High Court are able to transfer a case to the County Court (and vice versa) either following an application from one of the parties or by taking the decision to do so themselves.

Figure 1.1 highlights the possible stages involved in a claim for breach of contract.
Any appeal against the County Court’s decision would be heard in the Court of Appeal and then the Supreme Court. As of October 2009 the appellate function of the House of Lords has been undertaken by the new Supreme Court. The House of Lords will retain its function as part of the legislature. If the case involved a question of European law, it might be referred to the European Court of Justice.

### The European Court of Justice (ECJ)

The European Court is staffed by 27 judges, each one representing a member state of the European Union. They are assisted by eight Advocates General. The court sits in Luxembourg. Any national court or tribunal can refer a case to the European Court for a ruling if it involves a question of European law. Decisions of the ECJ have a great impact on national employment law. They are binding on our courts/tribunals and form ‘precedents’ for future cases. The ECJ is not bound by its own previous decisions.

### The European Court of Human Rights (ECHR)

The European Court of Human Rights sits in Strasbourg. It is composed of a number of judges equal to that of the contracting states. At the time of writing there are 46 judges. These judges are elected by the Parliamentary Assembly of the Council of Europe. They are appointed for a term of six years. Applications to have a case heard by the ECHR may be made by either an individual or a contracting state. Either applies stating that they believe themselves to have suffered due to a violation of the European Convention on Human Rights.

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**Example**

Barney has been injured at work. He has broken his ankle and alleges that his employer is in breach of contract for having failed to provide a safe working environment. Barney would bring his claim for damages for personal injury in the County Court (claim could not be brought in the Employment Tribunal because, even though it is a breach of contract action, it involves personal injury and so is excluded).
Human rights


The 1998 Act has provided a framework for the operation of the CHRFF in domestic law. It enables individuals to enforce CHRFF rights against public authorities through the domestic courts. The Act imposes a duty on public authorities or any person whose functions are ‘functions of a public nature’ to act in a way which is compatible with Convention rights. It does not, however, give private individuals or companies the right to take action against other private individuals or companies. Since its enactment in 2000 the Human Rights Act has generally been found to have struck the correct balance between the rights of the individual and that of the wider public interest. However, in 2006 both the then Lord Chancellor, Lord Falconer, and the then Leader of the Opposition, David Cameron, suggested that the time had come to amend the Act. Whilst no such amendments have been forthcoming to date, it will be interesting to see how this debate develops under the Conservative/Liberal Democrat coalition government.

If a court or tribunal is asked to determine a question which has arisen in connection with a right existing under the CHRFF then it must take into account any judgment, decision, declaration or advisory opinion of the ECHR. The court or tribunal must take any earlier decision into account but then has a discretion as to whether or not to follow that decision. This is outlined in s 2 of the 1998 Act. Section 3 of the 1998 Act states that the legislation must be interpreted as far as possible in a way which is compatible with the Convention. Courts and tribunals should decide all cases compatibly with Convention rights unless they are prevented from doing so by primary legislation.

The CHRFF consists of 18 articles and 11 protocols. Not all of the detail contained in the Convention is relevant to employment law. The articles that do relate to employment law are summarised in the following paragraphs. The CHRFF is set out in Schedule 1 to the 1998 Act.

Article 8 - right to respect for private and family life

This article states that ‘everyone has a right to respect for his private and family life, his home and his correspondence’. In the context of employment law this article has been considered in cases relating to sexual orientation and gender reassignment. See further: Smith and Grady v United Kingdom (1999), MacDonald v Ministry of Defence (2001). Both of these cases concerned complaints from individuals who had been dismissed from the RAF due to their homosexuality. Discrimination on the basis of sexual orientation is now prohibited by the Employment Equality (Sexual Orientation) Regulations 2003.

Article 8 was also considered in the case of Halford v United Kingdom (1997). Here, Ms Halford had pursued a sex discrimination claim against her employer, Merseyside police force. During the time leading up to her tribunal hearing the force intercepted telephone calls being made by her from her office. It was held that this interfered with her right to a private life under article 8. The court held that she was entitled to privacy and that as she had been told that she could use her work telephone in order to discuss her claim with, for example, her lawyer that this right had been infringed. Ms Halford had not been given any indication that her telephone calls might be intercepted.

The right under article 8 is subject to qualification. These are:

where the interference is by a public authority in accordance with the law, and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others.
This right would also cover interception of Internet usage and emails. Here, in order to justify any such interception an employer would have to show that its actions were based on one of the above reasons or that it informed its employees that such communication was likely to be intercepted.

This situation has also been regularised by the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000. These regulations were made under the Regulation of Investigatory Powers Act 2000. Under the regulations employers are able to legitimately monitor telephone calls, emails or other telecommunications transmitted over their systems. This can be done without the consent of the employees involved in order to, for example, check whether the communications are relevant to the employer’s business. There is obviously a contradiction between this and the right to privacy under the Human Rights Act 1998.

**Article 9 – right to freedom of thought, conscience and religion**

This article states that:

everyone has the right to freedom of thought, conscience and religion [and that] this right includes freedom to change ... religion or belief and freedom either alone or in community with others and in public or private, to manifest ... religion or belief, in worship, teaching, practice and observance.

The justifications discussed in relation to article 8 (above) also apply to article 9. In *Ahmad v United Kingdom* (1982) Mr Ahmad, a Muslim, was employed as a teacher. He asked his employer if he could take 45 minutes off work every Friday in order to attend prayers at his local mosque. His employer refused this request and instead offered to reduce his working week to four and a half days meaning that he would be free to attend the mosque on a Friday afternoon. He refused this offer and resigned claiming constructive dismissal. The ECHR rejected his appeal stating that by offering to reduce his hours his employer had not infringed his right to practise his religion.

**Article 10 – freedom of expression**

This article states that:

everyone has the right to freedom of expression ... and that this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The justifications discussed in relation to article 8 (above) also apply to article 10.

**Article 11 – freedom of assembly and association**

This article states that:

everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

The justifications discussed in relation to article 8 (above) also apply to article 11. The Convention also allows the use of restrictions on the exercise of these rights by members of the armed forces and the police. In January 2002 the ECHR held that the prohibition of a strike can amount to a restriction on the freedom of assembly and association. See: *University College Hospital NHS Trust v UNISON* (1999).

**Article 14 – prohibition of discrimination**

This article states that:

the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or
Employment Tribunal

other opinion, national or social origin, association with a national minority, property, birth or other status.

This article reinforces the other rights in the Convention and can only be relied upon insofar as it relates to the rights set out elsewhere in the Convention.

Use of other courts

The High Court may become involved in the control of industrial action. It has the power to issue injunctions to restrain unlawful industrial action. The Magistrates’ Court and Crown Court hear cases concerning the enforcement of health and safety legislation.

EMPLOYMENT TRIBUNAL (ET)

Employment tribunals were established under the Industrial Training Act 1964. They are now governed by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004/1861 as amended by the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2004/2351, the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) (No.2) Regulations 2004/1865, the Tribunals, Courts and Enforcement Act 2007 (Transitional and Consequential Provisions) Order 2008/2683, the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2008/3240, the Employment Tribunals Act 1996 and the Tribunals, Courts and Enforcement Act 2007. Employment Tribunals were previously referred to as Industrial Tribunals. Their name was changed by s 1 of the Employment Rights (Dispute Resolution) Act 1998 which took effect on 1 August 1998. In April 2006 the Employment Tribunals Service joined the “Tribunals Service”. This is a government agency within the Ministry of Justice. The Tribunals Service provides administrative support to the main central government tribunals. Further detail on the role of the Service can be found at www.tribunals.gov.uk/. A link to the Employment Tribunals website can be accessed from the Tribunal Service home page.

Cases are heard by a panel of three people: a legally qualified Employment Judge and two lay members. One lay member is drawn from a list representing employer organisations and the other from one representing employee organisations. Legal Aid is not available for representation in the Employment Tribunal. In 2000 the term ‘legal aid’ was renamed ‘legal help’ (referring to legal advice), and ‘legal help at court’ (referring to representation). At this time the Legal Services Commission replaced the Legal Aid Board. The Community Legal Service was also set up in order to supply details of advisers who may be able to assist the individual with employment law problems. It has long been thought that legal help at court should be extended to include representation in the Employment Tribunal. In January 2001 an extension for such representation was given in Scotland. This has been extended to cover ‘complex cases’ only. This extension does not apply to the rest of the United Kingdom. Legal help at court is available for representation in the Employment Appeal Tribunal. Applicants to the Employment Tribunal may seek funding and/or representation from their trade union. Law Centres and Citizens’ Advice Bureaux may also be of assistance. In cases concerning alleged discrimination, the Equality and Human Rights Commission may assist either financially or by providing representation.

Tribunals are bound by the earlier decisions of the Employment Appeal Tribunal (EAT). This means that these have to be taken into account when dealing with new cases. Tribunals are also bound by the decisions of the Court of Appeal, the Supreme Court and the European Court of Justice.

Appeals against tribunal decisions are heard in the EAT. The role and composition of the Employment Tribunal is discussed in more detail in Chapter 10.

Figure 1.2 highlights the possible stages involved in a claim alleging breach of statute.
Any appeal from the Employment Tribunal would be heard in the EAT, from there by the Court of Appeal and then the Supreme Court. If the case involves a question of European law, it may be referred to the European Court of Justice. Claims involving allegations of breach of contract that are brought in the tribunal would follow the same pattern.

**Example**

Jenny alleges that she has been discriminated against at work because she is a woman. She alleges that her employer has directly discriminated against her in breach of the Sex Discrimination Act 1975. Jenny would bring her claim in the Employment Tribunal for breach of a statute.

Any appeal from the Employment Tribunal would be heard in the EAT, from there by the Court of Appeal and then the Supreme Court. If the case involves a question of European law, it may be referred to the European Court of Justice. Claims involving allegations of breach of contract that are brought in the tribunal would follow the same pattern.

**EMPLOYMENT APPEAL TRIBUNAL (EAT)**

The EAT was originally set up in 1975. It is based in London but may sit anywhere in the country. Hearings normally take place in either London or Edinburgh. The EAT hears appeals from decisions of the Employment Tribunal generally on points of law only. It can hear appeals based on fact in only two situations, namely when the appeal concerns the decision of the Certification Officer (CO), or where the CO has refused to list a union. (See page 29.) It may also hear appeals from the decisions of the Central Arbitration Committee arising from the Transnational Information and Consultation of Employees Regulations 1999, the European Public Limited Liability Company (Fees) Regulations 2004 and the Information and Consultation of Employees Regulations 2004. Cases are heard by an Employment Judge who is normally a High Court judge, and either two or four lay members drawn from lists representing employer and employee organisations. The EAT is headed by a President and a Registrar.

The EAT is not bound by its own previous decisions. This means that it does not have to follow its earlier decisions when looking at new cases. It does, however, have to follow decisions made in the Court of Appeal or the Supreme Court.

If a lone Employment Judge has presided over the Employment Tribunal hearing, the appeal need not be heard by a full panel. One High Court judge is nominated to be the President of
Sources of employment law

the EAT. The EAT is also part of the Tribunals Service (the role of the EAT is discussed further at page 372).

SOURCES OF EMPLOYMENT LAW

Employment law can be found in a number of different sources. The main sources are the common law, legislation and European law. Other sources include codes of practice and regulations. Journal articles, the Internet and employment encyclopedias can also be an invaluable source of information. The study of employment law can also be aided by the use of textbooks, case and statute books.

- **Common law**

  Common law is the law made by judges when they announce their decisions in each case. Common law is entirely separate from legislation. Judges may consider sections from legislation during the case and use them to aid in the decision-making process, but their decision forms part of the common law.

  Important decisions are recorded in law reports and form precedents. This means that they may have to be followed in new cases. Whether they are followed depends on the court in which the decision was made and the court in which the new case is being heard. This rule relates to the doctrine of precedent which generally states that courts have to take the decisions of more important courts into account when making their decisions.

- **Legislation**

  Legislation is also referred to as statute law or Acts of Parliament. Legislation is drafted and enacted by the government. Their proposals appear in a Bill and this Bill goes through a reading and committee procedure in both the House of Commons and the House of Lords before it becomes law. Legislation may govern either the civil or criminal law.

  The main statutes encountered on employment law courses are:
  - Employment Act 2008 (EA 2008)
  - Employment Relations Act 1999 (ERA 1999)
  - Employment Relations Act 2004 (ERA 2004)
  - Equality Act 2010 (EA 2010)
  - Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992) (contains most of the law on collective employment rights)
  - Sex Discrimination Act 1975 (SDA 1975)
  - Sex Discrimination Act 1986 (SDA 1986)
  - Race Relations Act 1976 (RRA 1976)
  - Disability Discrimination Act 1995 (DDA 1995)
  - Disability Discrimination Act 2005 (DDA 2005)
  - Health and Safety at Work Act etc. 1974 (HSAWA 1974)
  - Employment Rights (Dispute Resolution) Act 1998
  - Trade Union Reform and Employment Rights Act 1993 (TURERA 1993)
Sources of employment law

- Race Relations (Amendment) Act 2000 (RRAA 2000)
- Data Protection Act 1998 (DPA 1998)

The role of European law

The United Kingdom joined the European Community under the European Communities Act of 1972. It became a member state of the Community on 1 January 1973. Section 2(2) of the 1972 Act states that from that date European law will have legal effect in the United Kingdom.

European law has had a major impact on national employment law particularly in the areas of sex discrimination, equal pay, the transfer of undertakings and health and safety regulation. The following is a basic outline of the sources of European law. Where appropriate the application of specific forms are discussed within this text. Students should refer to a specific European law textbook for more detailed information.

In the event of a conflict between national and European law, the latter takes precedence and must be followed by our courts. If a case is brought before our courts involving a question of European law, it must either be decided in accordance with European principles or referred to the European Court of Justice for further deliberation.

The sources of European Community law are:
- Treaties
- Directives
- Regulations
- Decisions
- Recommendations and Opinions.

Treaties

The main treaties are the European Community Treaty (Treaty of Rome), the Treaty on European Union (Maastricht Treaty) and the Amsterdam Treaty. Treaties contain articles which list the legal principles involved. Any national law that conflicts with a treaty can be challenged in the courts. The Amsterdam Treaty inserted the Social Chapter into the Treaty of Rome. This treaty came into force on 1 May 1999 and (amongst other amendments) was responsible for the renumbering of the articles of the Treaty of Rome. What was article 119 (relating to equal pay for equal work) is now referred to as article 141. On 1 December 2009 the Treaty of Lisbon came into force. This treaty amends the current treaties but does not replace them. Further information on the content of the new treaty can be found at www.europa.eu/lisbon_treaty/index_en.htm.

Directives

Directives issued by Europe have to be followed by member states and they have a duty to implement them within a specified time limit. This means that they have to take the principles contained in the Directive and create national legislation that adheres to it. Member states can choose how to implement the Directive. In this country implementation may take the form of legislation or statutory instrument. Directives must be followed by member states from the time of their issue and bind individuals once incorporated into national law.

Examples of Directives influential in employment law are the Equal Pay Directive and the Equal Treatment Directive.
How to read employment law reports and statutes

**Regulations**

Regulations apply to member states without them having to pass additional implementing legislation. They are binding and enforceable once drafted. The health and safety at work regulations are an example of European Regulations.

**Decisions**

Decisions have to be followed only by those to whom they are addressed. They can be addressed to member states, individuals or companies.

**Recommendations and Opinions**

Recommendations and Opinions have no binding force and so do not have to be followed. However, they may be of persuasive authority, meaning that they can be followed as examples of good practice in courts and tribunals. An example of a Recommendation influential in employment law is that on the ‘Protection of the Dignity of Women and Men at Work’ of 1991.

**Codes of practice**

Codes of practice do not have the same legal significance as legislation. If a party breaches a code, he will not be liable for any civil or criminal wrong. However, as the codes in employment law are meant to guide the parties as to what is and is not good practice, the breach of a code will be considered in evidence in the court or tribunal. The court or tribunal will not look favourably on a party who has ignored the guidance of a code of practice.

Draft codes of practice have to be approved by the Secretary of State (BIS). Codes of practice can be produced by the:

- Advisory, Conciliation and Arbitration Service
- Equality and Human Rights Commission
- Health and Safety Executive.

The Secretary of State (BIS) also has the power to draft and implement codes of practice. Codes of practice exist in the areas of, for example, sex, race, disability and age discrimination, equal pay, the employment of immigrants, data protection, industrial action ballots, disciplinary and grievance procedures, disclosure of information to trade unions for collective bargaining purposes and time off for trade union duties and activities.

**Regulations**

General regulations are not to be confused with the European Regulations (outlined above). General regulations are laws that are made in addition to the main principles contained in legislation. An example of regulations in employment law are the health and safety regulations made under the Health and Safety at Work etc. Act 1974. The Act sets down the general principles of health and safety provision and the regulations apply to specific hazards, such as noise in the workplace. Further examples include the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003.

**HOW TO READ EMPLOYMENT LAW REPORTS AND STATUTES**

All law libraries keep copies of law reports and statutes. While employment law students may be able to rely on a textbook, statute, online provision or a case book during some of their course, the time will inevitably come when they will be expected to locate and read a case or statute for
How to read employment law reports and statutes

themselves. As the law changes, books become out of date and for this reason students should ensure that they are able to do effective library research. The following provides guidance on how to locate and interpret employment law reports and statutes.

Employment law reports

Employment cases can be found in standard law reports. There are also two types of specialist report devoted only to employment cases. The general law reports containing employment cases are:

- **All England Law Reports** (All ER)
- **Weekly Law Reports** (WLR).

The specialist reports are:

- **Industrial Relations Law Reports** (IRLR)
- **Industrial Cases Reports** (ICR).

Most cases are reported in one or more report and the reader is able to select one to read. Appeal cases and decisions from the European Court are also found in the above volumes. Cases are also reported on a selective basis in *The Times* and *The Independent* newspapers.

Case citation

The term ‘citation’ is that given to the way the name and location of a case is written down. The citation of a case provides information on where it can be located within the law reports.

Example


This citation shows the names of the parties involved in the case, Shepherd and Jerrom. It also shows that the case was reported in 1986 in:

- the third volume of the *Weekly Law Reports* at page 801;
- the *Industrial Cases Reports* at page 802;
- the third volume of the *All England Law Reports* at page 589;

Most cases are to be found in either the *All England Law Reports* or the *Industrial Relations Law Reports*. For this reason the following examples concentrate on these two types of report and give guidance on how to read and interpret a law report.

An All England law report

The case in Figure 1.3 is an extract from Malik *v* Bank of Credit and Commerce International SA [1997] 3 All ER 1.

This citation shows that the case was reported in 1997 in the third volume of the *All England Law Reports* at page 1. The key explains what is meant by each number reference on the case.

An Industrial Relations law report

Figure 1.4 is an extract from the case of Faccenda Chicken *v* Fowler [1986] IRLR 69 (CA).
Malik v Bank of Credit and Commerce International SA (in liquidation)

Mahmud v Bank of Credit and Commerce International SA (in liquidation)

HOUSE OF LORDS

LORD GOFF OF CHIEVELEY, LORD MACKAY OF Clashfern, LORD MUSTILL, LORD NICHOLLS OF BIRKENHEAD AND LORD STEYN

24, 25, 26 FEBRUARY, 12 JUNE 1997

Employment – Contract of service – Implied term – Implied term in contract of employment that employer would not conduct itself in manner likely to damage relationship of trust and confidence between employer and employee – Bank employees – Bank involved in fraudulent activities – Employees made redundant by liquidators – Employees claiming damages for stigma suffered in search for future employment as former employees of bank – Whether damages recoverable in law.

The two appellants were long-serving employees of a bank which collapsed as the result of a massive and notorious fraud perpetrated by those controlling the bank. The appellants were unaware of and had no part in the fraud. After the bank went into liquidation the appellants were made redundant by the liquidators and thereafter they found difficulty in obtaining employment in the banking field because of their association with the bank. The appellants lodged a claim in the liquidation for ‘stigma compensation’ arising out of the fact that they had been put at a disadvantage in the employment market. The appellants appealed to the court against the liquidators’ rejection of their claim, contending that it was an implied term of their contracts of employment that an employer would not conduct his business in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. The judge held on the trial of a preliminary issue that a claim for stigma compensation did not disclose a reasonable cause of action or a sustainable claim for damages because the term contended for could not be implied in a contract of employment as it was not part of that contract that the employer should prepare an employee for employment with future employers or that he should ensure that employees were not put at a disadvantage in the employment market in the event of their employment being terminated. On appeal, the Court of Appeal held that although the employees had an arguable case that there had been a breach of the implied mutual obligation of trust and confidence the employees had no remedy as damages were not recoverable in contract for damage to or loss of an existing reputation except in certain limited situations which did not apply. The Court of Appeal accordingly dismissed the appeal. The appellants appealed to the House of Lords. The liquidators contended that injury to reputation was protected by the law of defamation,

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<td>1. Names of the parties involved in the case</td>
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<td>3. Judges who heard the case</td>
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<td>4. Year in which the case was reported</td>
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<td>5. Summary of the main legal issues of the case</td>
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<td>6. The headnote, brief statement of the case and the nature of the claim</td>
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<td>7. Court’s decision, with a summary of reasons</td>
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<td>8. Other cases that were referred to during the hearing</td>
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<td>9. This is an appeal case: details of appeal</td>
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<td>10. Lawyers who represented the parties</td>
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<td>11. Judgments of the Law Lords, setting out the reasons for their decision</td>
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the implied obligation of trust and confidence was not breached if the employer’s dishonest behaviour was directed at defrauding third parties, not the employees, and that the employee had to have been aware of such conduct while he was an employee.

Held – The appeal would be allowed for the following reasons—
1. In appropriate cases damages could in principle be awarded for loss of reputation caused by breach of contract. Furthermore, provided a relevant breach of contract was established and the requirements of causation, remoteness and mitigation were satisfied; financial loss in respect of damage to reputation caused by breach of contract could be recovered for breach of a contract of employment (see p 3 j to p 4 a, p 11 h, p 21 d e j and p 22 d e, post).
2. An employer was under an implied obligation that he would not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, and an employer who breached the trust and confidence term would be liable if he thereby caused continuing financial loss of a nature that was reasonably foreseeable. Thus, if it was reasonably foreseeable that conduct in breach of the trust and confidence term would prejudicially affect employees’ future employment prospects and loss of that type was sustained in consequence of a breach, then in principle damages in respect of the loss would be recoverable.
3. The trust-destroying conduct need not be directed at the employee, either individually or as part of a group, in order to attract liability, nor was it necessary that the employee must have been aware of the employer’s trust-destroying conduct while he was an employee (see p 3 j to p 4 a, p 5 f to j, p 6 g h, p 7 g, p 11 h, p 15 d, p 16 a, p 17 a and p 22 c, post; Addis v Gramophone Co Ltd [1908–10] All ER Rep 1 explained; Marke v George Edwards (Daly’s Theatre) Ltd [1927] All ER Rep 233 approved; W ilkens v General Theatre Corp Ltd [1933] All ER Rep 385 overruled.

Decision of the Court of Appeal [1993] 3 All ER 545 reversed.

Notes
For damages recoverable for breach of contract of employment, see 16 Halsbury’s Laws (4th edn reissue) paras 306–307, and for cases on the subject, see 20(1) Digest (2nd reissue) 394–401, 1749–1785.

Cases referred to in opinions
Addis v Gramophone Co Ltd [1909] AC 488, [1908–10] All ER Rep 1, HL.
Aerial Advertising Co v Batchelors Peas Ltd (Manchester) [1938] 2 All ER 788.
Brandt v Nixdorf Computer Ltd [1991] 3 NZLR 750, NZ HC.
Clayton (Herbert) v Jack Waller Ltd v Oliver [1930] AC 269, [1930] All ER Rep 414, HL.
Centrax v Myham & Son [1913] 2 KB 320.
Foaminol Laboratories Ltd v British Artid Plastics Ltd [1941] 2 All ER 393.
GRK Centrax Gears Ltd v Matbro Ltd [1976] 2 Lloyd’s Rep 555, CA.

Figure 1.3 continued
How to read employment law reports and statutes

Figure 1.3

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<td>Withers v General Theatre Corp Ltd [1933] 2 KB 536, [1933] All ER Rep 385, CA.</td>
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9 Appeal

e Qaiser Mansoor Malik and Raisan Nasir Mahmud appealed with leave granted by the Appeal Committee from the decision of the Court of Appeal. (Glidewell, Morritt and Aldous LJ) [1995] 3 All ER 545, [1996] ICR 406 delivered on 9 March 1995 dismissing their appeal from the decision of Evans-Lombe J [1994] TLR 100 delivered on 16 February 1994 whereby, on the trial of a preliminary issue, the judge held that proofs of debt submitted to the respondents, the provisional liquidators of Bank of Credit and Commerce International SA, did not disclose a reasonable cause of action or a sustainable claim for damages and had been properly rejected by the liquidators. The facts are set out in the opinions of Lord Nicholls of Birkenhead and Lord Steyn.

f Eldred Tabachnik QC and Andrew Stafford (instructed by Manches & Co) for the appellants.

g Patrick Elias QC and Christopher Jeans (instructed by Lovell White Durrant) for the liquidators.

h Their Lordships took time for consideration.

i 12 June 1997. The following opinions were delivered.

11 LORD GOFF OF CHIEVELEY. My Lords, for the reasons given in the speeches to be delivered by my noble and learned friends Lord Nicholls of Birkenhead and

j Lord Steyn, which I have read in draft and with which I agree, I would allow these appeals.

LORD MACKAY OF Clashfern. My Lords, I have had the privilege of reading in draft the speeches prepared by my noble and learned friends Lord Nicholls of Birkenhead and Lord Steyn. I agree that this appeal should be allowed for the reasons that they give.

Figure 1.3 continued
LORD MUSTILL. My Lords, for the reasons given in the speech to be delivered by my noble and learned friend Lord Steyn, which I have read in draft and with which I agree, I would allow this appeal.

LORD NICHOLLS OF BIRKENHEAD. My Lords, this is another case arising from the disastrous collapse of Bank of Credit and Commerce International SA (BCCI) in the summer of 1991. Thousands of people around the world suffered loss. Depositors lost their money, employees lost their jobs. Two employees who lost their jobs were Mr Raiman Nasir Mahmud and Mr Qaiser Mansoor Malik. They were employed by BCCI in London. They claim they lost more than their jobs. They claim that their association with BCCI placed them at a serious disadvantage in finding new jobs. So in March 1992 they sought to prove for damages in the winding up of BCCI. The liquidators rejected this ‘stigma’ head of loss in their proofs. Liability for notice money and statutory redundancy pay was not in dispute.

Mr Mahmud had worked for the bank for 16 years. At the time of his dismissal he was manager of the bank’s Brompton Road branch. Mr Malik was employed by the bank for 12 years. His last post was as the head of deposit accounts and customer services at BCCI’s Leadenhall branch. On 3 October 1991 they were both dismissed by the provisional liquidators, on the ground of redundancy.

Mr Mahmud and Mr Malik appealed to the court against the liquidators’ decision on their proofs. The registrar directed the trial of a preliminary issue: whether the applicants’ evidence disclosed a reasonable cause of action or sustainable claim for damages. The judge, Evans-Lombe J, gave a negative answer to this question. So did the Court of Appeal ([1995] 3 All ER 545, [1996] ICR 406), comprising Glidewell, Morriss and Aldous LJ.

Before this House, as in the courts below, the issue is being decided on the basis of an agreed set of facts. The liquidators do not admit the accuracy of these facts, but for the purpose of this preliminary issue it is being assumed that the bank operated in a corrupt and dishonest manner, that Mr Mahmud and Mr Malik were innocent of any involvement, that following the collapse of BCCI its corruption and dishonesty became widely known, that in consequence Mr Mahmud and Mr Malik were at a handicap on the labour market because they were stigmatised by reason of their previous employment by BCCI, and that they suffered loss in consequence.

In the Court of Appeal and in your Lordships’ House the parties were agreed that the contracts of employment of these two former employees each contained an implied term to the effect that the bank would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Argument proceeded on this footing, and ranged round the type of conduct and other circumstances which could or could not constitute a breach of this implied term. The submissions embraced questions such as the following: whether the trust-destroying conduct must be directed at the employee, either individually or as part of a group; whether an employee must know of the employer’s trust-destroying conduct while still employed; and whether the employee’s trust must actually be undermined. Furthermore, and at the heart of this case, the submissions raised an important question on the damages recoverable for breach of the implied term, with particular reference to the decisions in Addis v Gramophone Co Ltd [1909] AC 488, [1908–10] All ER Rep 1 and Withers v General Theatre Corp Ltd [1933] 2 KB 536, [1933] All ER Rep 385.

Figure 1.3 continued
Figure 1.4 An Industrial Relations law report

Key
1 Citation, the 1986 volume of cases at page 69
2 Name of the case
3 Details of the legal principles involved in the case
4 Facts of the case
5 Decision from the previous High Court hearing
6 Decision of the Court of Appeal and the names of the judges who made the decision
7 Summary of the Court’s decision
8 Cases referred to during the hearing
9 Lawyers who represented the parties
10 Beginning of the first judgment in the case from Lord Justice Neil

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How to read employment law reports and statutes

Courts and tribunals, sources and institutions of employment law

Figure 1.4 continued

matters which will qualify as trade secrets or their equivalent. Secret processes of manufacture provide obvious examples, but immeasurable other pieces of information are capable of being trade secrets, though the secrecy of some information may be only short-lived. In addition, the fact that the circulation of certain information is restricted to a limited number of individuals may throw light on whether the information and its degree of confidentiality:

(c) What the employer impressed on the employee the confidentiality of the information. Thus, though an employer cannot prevent the use or disclosure merely by telling the employee that certain information is confidential, the attitude of the employer towards the information provides evidence which may assist in determining whether or not the information can properly be regarded as a trade secret.

(d) Whether the relevant information can be easily isolated from other information which the employee is free to use or disclose. The separability of the information in question is not conclusive, but the fact that the alleged "confidential" information is part of a package and that the remainder of the package is not confidential is likely to throw light on whether the information in question is really a trade secret.

In the present case, neither the sales information as a whole which the defendant had acquired while in the employ of the plaintiffs – the names and addresses of customers, the most convenient routes to be taken to reach individual customers, the usual requirements of individual customers – nor the sales information which an employee is bound by an implied term of his contract of employment or otherwise not to use or disclose after his employment has come to an end. The argument on behalf of the defendants that any information about the prices charged to individual customers was confidential, and that, as this information formed part of the package of sales information, the package taken as a whole was confidential too could not be accepted. Although in certain circumstances information about prices can be invest as with a sufficient degree of confidentiality so that information a trade secret or its equivalent, in the present case the following factors led to the conclusion that neither the information about prices nor the sales information as a whole had the degree of confidentiality, necessary to support the plaintiffs' case: the sales information contained some material which the plaintiffs conceded was not confidential if looked at in isolation; the information about the prices was not clearly severable from the rest of the sales information; neither the sales information in general, nor the information about prices in particular, though of some value to a competitor, could reasonably be regarded as plainly secret or sensitive; the sales information, including the information about prices, was not protected by the defendants in order that they could do their work and each salesman could quickly consult the whole of the sales information relating to his own area of memory; the sales information was generally known among the van drivers who were employees, as were the secretaries, at quite a junior level, so that this was not a case where the relevant information was restricted to senior management or to confidential staff; there is no evidence that the plaintiffs had ever given any express instructions that the sales information or the information about prices was to be treated as confidential.

Cases referred to:

United Indus Chemical Co v Robinson (1832) 43 RPC 173

The Wragge Co v Cooper (1869) 1 AER 290

Ander Son & Chemical Co v Monell (1861) 2 Ch 209

Herbert Harris Ltd v Baxenden (1930) 1 AC 688

Fre W Leng & Co v Andrews (1906) 1 Ch 763

Thomas Marshall (Directors) v Gland (1921) EDLR 174

Vokes Ltd v Beedie (1946) 42 RPC 131

Robb v Green (1993) 2 QB 315

Wates Group Ltd v Eshel (1992) 2 KB 66

Reed & Sargent Ltd v Moss and Meadham Ltd (1923) 48 RPC 461

Prouse & Frankish Ltd v Halliday (1960) RPC 209

Littlewoods Organisation Ltd v Morris (1971) 1 WLR 1470

Lord Justice Neil! This is the judgment of the court.

In these two appeals it will be necessary to consider the interaction of three separate legal principles:

(1) The duty of an employer during the period of his employment to act with good faith towards his employees:

(2) The duty of an employee not to use or disclose after his employment has ceased any confidential information which he has obtained during his employment about the employer’s affairs:

(3) The rights of any person in using and impartializing the purposes of earning his living all the skill, experience and knowledge which he has acquired in the course of previous periods of employment.

The two appeals are against the orders of Mr Justice Goulding dated 8.11.83, whereby he rejected the claims by Pacenta (Charming Ltd) (Pacenta’s) and its employees to the appeals had improperly used confidential information obtained during their employment by Pacenta and had contrived together to injure Pacenta.

The events which gave rise to the claims are the subject-matter of these appeals are set out with admirable clarity in the judgment of Mr Justice Goulding reported in [1984] RLR 61.
We propose therefore from time to time in the course of this judgment to adopt passages from the judgment of the courts in such a case as is primarily appropriate because we are not referring to any specific context of the evidence, and both sides accepted before us that, for the purpose of ascertaining any matter of fact, we should not look beyond the evidence before the Judge.

We are not treating such a case as that of the evidence, and both sides accepted before us that, for the purpose of ascertaining any matter of fact, we should not look beyond the evidence before the Judge.

Facenda carry on the business of breeding, rearing, slaughtering and selling chickens. Facenda’s premises are at Brackley, in the county of Northampton. The chickens are sold as fresh chickens which means that, though after being slaughtered they are chilled in refrigerators until sale, they are not actually frozen.

At all material times Mr Balon Michael Facenda has been the chairman and managing director of Facenda. In about 1973 Facenda engaged Mr Barry Fowler as the first manager.

The judge described the subsequent development of the business of Facenda in these terms:

"At that time in 1973, and for some time afterwards, the company sold its chickens to whitekets, and did not approach retailers directly. Mr Fowler, who is agreed to by a businesswoman of considerable ability, proposed to Mr Facenda the establishment of a chain of van sales operations, whereby chicken-reared chickens would thus offer fresh chickens to such traders as butchers, supermarkets and catering establishments. Starting at first in a small way, Mr Fowler built up this branch of the business until it came to represent a substantial part, though always the smaller part, of the company’s sales. Those in all 10 refrigerated vehicles, each driven by a uniformed and travelling in a small way, Mr Fowler built up this branch of the business until it came to represent a substantial part, though always the smaller part, of the company’s sales.

Each van sales unit had its own manager, the manager of each van sales unit having a list of customers and customers of the van. The manager of each van sales unit had his own list of customers and customers of the van. The manager of each van sales unit had his own list of customers and customers of the van. The manager of each van sales unit had his own list of customers and customers of the van.

The evidence shows in my judgment that each manager was freely permitted to take less than his standing order when the salesman called, or to increase, or vary the composition of, his order if the goods he wanted on the particular day were available in the van when it called. Firm orders were placed on special premises or by large customers by telephoning to the manager of Facenda’s Chicken Ltd at Brackley, but the 'van salesman played no part in their negotiations.'

It seems clear that in 1980 the van sales operation was profit-making. The average weekly profit for the period which covered approximately the second half of 1980 was about £5,000. On 11.11.80, however, Mr Fowler was arrested, together with another man, on a charge of stealing some of Facenda’s chickens. Mr Fowler resigned immediately as sales manager, and, though at his trial in September 1981, he was acquitted of the charge of theft, his work at Facenda was at an end.

During the early part of 1981 Mr Fowler considered the purchase of an hotel in Donegal, but the project fell through. Shortly afterwards he decided to set up his own van sales business of selling fresh chickens from refrigerated vehicles.

This business was to be carried on in the Brackley area. Though he had no source of supply under his own control, there was no shortage of fresh chickens available for bulk purchase.

In about May 1981 Mr Fowler advertised for employment under a box number in a local newspaper. As a result of this advertisement, eight employees of Facenda applied to join Mr Fowler’s new enterprise. This was not surprising, because, although a box number was used, the eight employees knew of Mr Fowler’s intentions before the advertisement appeared.

The applications were successful. Mr Fowler was pleased to be able to obtain staff where he knew he had experience and competence and who had worked with him before. In the course of the next few weeks the eight employees, consisting of a supervisor (Mr Fizell), six van salesmen (that is, half the van salesmen then employed by Facenda) and two ladies who had been employed in the offices of Facenda, gave notice and joined Mr Fowler.

The new business started its operations on 6.7.81, although Mr Fowler’s company (Fowler Quality Poultry Products Ltd) was not incorporated until August.

The loss of such a high proportion of his experienced staff had a serious effect on Facenda. Indeed, on 19.9.81, the date of death of Mr Fowler’s hospital, an action was started by Facenda in the Chancery Division against Mr Fowler and his company and the eight former employees of Facenda.

In these proceedings two alleged causes of action were relied upon:

(a) A breach of implied terms of the contract of employment that the new employees would faithfully serve Facenda and would not use confidential information and trade secrets gained by them and each of them whilst in Facenda’s employment to the detriment of Facenda, whether during the currency of such employment or thereafter.

(b) An action for conspiracy to injure (Facade’s) goodwill and reputation by unlawfully mak- ing the statements and omissions and imparting the confidential information and trade secrets of Facenda gained by the individual defendants whilst in Facenda’s employment.

A year later, on 16.9.82, Mr Fowler issued a writ in the Queen’s Bench Division claiming nearly £20,000 in respect of damages which he said he was due to him. In those proceedings Facenda served a counterclaim which in effect repeated the allegations of breach of contract and conspiracy and also included a claim for £450 in respect of the chickens which it was said Mr Fowler had wrongly converted in 1980 and which had been the subject-matter of the criminal proceedings in which Mr Fowler had been acquitted.

The Queen’s Bench action was transferred to the Chancery Division in March 1983.

On 22.8.83 the two actions were joined for hearing together before Mr Justice Goddard. After a hearing lasting 39 days, the learned judge, in a reserved judgment delivered on 6.11.83, dismissed the claim by Facenda for damages for breach of contract and conspiracy. At the same time he gave judgment for Mr Fowler for £13,125 in respect of his claim for compensation and interest after making such a deduction in respect of the amount claimed by Facenda in conversion, where a sum was recovery by way of set-off without an admission of liability.

Figure 1.4 continued
19

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This citation shows that the case was an appeal case (CA), and that it was reported in 1986 in the Industrial Relations Law Reports at page 69. The key explains what is meant by each number reference on the case.

Employment legislation

Statutes can be found on the Office of Public Sector Information website (www.opsi.gov.uk/acts.htm) or in libraries in volumes sorted by year. Statutes are normally referred to by a shortened version of their title and the year of publication: for example, the Equal Pay Act 1970.

This Act is cited as:

Equal Pay Act 1970
1970 Chapter 41

Every Act published in a year is given a ‘chapter number’. The chapter number 41 means that the Act was the forty-first to become law in 1970.

The extract in Figure 1.5 is a copy of the first two pages from the Equal Pay Act 1970. The key explains what is meant by each number reference on the statute.

Note that this represents the Act as it was when first enacted. It has since been amended.

Figure 1.4 continued

It was submitted on behalf of Fanavarda that this gave information could be regarded as a package which, taken as a whole, contained confidential information which could not be used to the detriment of Fanavarda.

In addition, however, particular attention was directed to the proof charged to individual customers, because, it was submitted, information as to prices was itself confidential information, quite apart from the fact that such information formed a constituent element of the package of sales information. Thus, our attention was drawn to the following passage in the judgment:

Counsel for Fanavarda ... in the course of evidence and argument, paid special attention to the importance of knowing the prices paid by the respective customers ... There has been much controversy, regarding the extent to which one trader’s prices are generally known to his rivals in the fresh chicken market. I find that an experienced salesman quickly acquires a good idea of the prices obtained by his employer’s competitors, but usually such knowledge is only approximate; and in this field accurate information is invaluable, because a difference of even a penny a pound may be important.

It was further said on behalf of Fanavarda that by wrongfully making use of that confidential sales information Mr Fowler and his colleagues had seriously damaged Fanavarda’s business.

We understand that at the trial it was suggested that the damages amounted to no less than £120,000, though it may be noted that the judge enunciated that, even if he had decided the issue of liability in favour of Fanavarda, he would have assessed the damages at £2500.

In his judgment Mr Justice Goulby dealt with the allegations made by Fanavarda in these terms:

Figure 1.5

23 At the trial the claims for injunctions which had been included in the writ in the Chancery action were not pursued owing to the lapse of time. No injunctions had been granted and certain undertakings had been given at an interlocutory stage, but it is not necessary for us to make any further reference to these matters, as it is agreed that the interlocutory orders have no relevance to the issues now before the court.

24 Moreover, we need only make passing reference to the fact that at the trial a substantial amount of time was taken to deal with allegations put forward on behalf of Fanavarda to the effect that documents in the possession of some of the employees during the period of their employment had been wrongfully used or copied.

25 The learned judge came to the conclusion that none of these allegations had been substantively proved.

26 We can therefore concentrate our attention on the matters round which the argument before us principally received.

27 The main case put forward on behalf of Fanavarda before Mr Justice Goulby, and the only factual basis for the claim relied upon before us, was that Mr Fowler and the other former employees of Fanavarda as well as the new Fowlers company had wrongfully made use of confidential information which Mr Fowler and his colleagues had acquired while in the employment of Fanavarda.

28 This information, which was described by the judge as 'the sales information', can be listed under five headings:

(1) the names and addresses of customers;
(2) the most convenient routes to be taken to reach the individual customers;
(3) the usual requirements of individual customers, both in quantity and quality;
(4) the days of the week and the time of the day when deliveries were usually made to individual customers;
(5) the prices charged to individual customers.

29 It was submitted on behalf of Fanavarda that this sales information could be regarded as a package which, taken as a whole, contained confidential information which could not be used to the detriment of Fanavarda.

30 In addition, however, particular attention was directed to the proof charged to individual customers, because, it was submitted, information as to prices was itself confidential information, quite apart from the fact that such information formed a constituent element of the package of sales information. Thus, our attention was drawn to the following passage in the judgment:

31 Counsel for Fanavarda ... in the course of evidence and argument, paid special attention to the importance of knowing the prices paid by the respective customers ... There has been much controversy regarding the extent to which one trader’s prices are generally known to his rivals in the fresh chicken market. I find that an experienced salesman quickly acquires a good idea of the prices obtained by his employer’s competitors, but usually such knowledge is only approximate; and in this field accurate information is invaluable, because a difference of even a penny a pound may be important.

32 It was further said on behalf of Fanavarda that by wrongfully making use of that confidential sales information Mr Fowler and his colleagues had seriously damaged Fanavarda’s business.

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In his judgment Mr Justice Goulby dealt with the allegations made by Fanavarda in these terms:
Equal Pay Act 1970

CHAPTER 41

ARRANGEMENT OF SECTIONS

Section
1. Requirement of equal treatment for men and women in same employment.
2. Disputes as to, and enforcement of, requirement of equal treatment.
3. Collective agreements and pay structures.
4. Wages regulation orders.
5. Agricultural wages orders.
6. Exclusion from ss. 1 to 5 of pensions etc.
7. Service pay.
8. Police pay.
9. Commencement.
10. Preliminary references to Industrial Court.

Figure 1.5 The first two pages of the Equal Pay Act 1970
(Crown Copyright 1970. Parliamentary copyright material from Acts of Parliament is reproduced with the permission of the Controller of Her Majesty’s Stationery Office and the Queen’s Printer for Scotland.)

Key
2. Chapter number – the 41st Act of 1970
3. List of the sections contained in the Act
4. Date of Royal Assent – 29th May 1970
5. Enacting formula
6. Section number and subsection
7. Marginal explanatory note
8. Subsection
1970 CHAPTER 41

An Act to prevent discrimination, as regards terms and conditions of employment, between men and women.
[29th May 1970]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1.—(1) The provisions of this section shall have effect with a view to securing that employers give equal treatment as regards terms and conditions of employment to men and to women, that is to say that (subject to the provisions of this section and of section 6 below)——
   (a) for men and women employed on like work the terms and conditions of one sex are not in any respect less favourable than those of the other; and
   (b) for men and women employed on work rated as equivalent (within the meaning of subsection (5) below) the terms and conditions of one sex are not less favourable than those of the other in any respect in which the terms and conditions of both are determined by the rating of their work.

The following provisions of this section and section 2 below are framed with reference to women and their treatment relative to men, but are to be read as applying equally in a converse case to men and their treatment relative to women.

(2) It shall be a term of the contract under which a woman is employed at an establishment in Great Britain that she shall be given equal treatment with men in the same employment, that is to say men employed by her employer or any associated employer at the same establishment or at establishments in Great Britain which include that one and at which common terms and conditions of employment are observed either generally or for employees of the relevant class*.

Figure 1.5 continued
OTHER SOURCES OF INFORMATION

Apart from cases and statutes, there are many secondary sources of employment law that can be an aid to study. There are various employment law textbooks available. Where appropriate, guidance on extra reading is given at the end of each chapter in this book. Apart from textbooks, the employment law student may also find the use of a case and statute book beneficial.

Case books contain copies of all of the relevant cases on each employment law topic. Comment is also made on the decisions made in the cases. There are several good case books on the market, the most recent being *Cases and Materials on Employment Law* by Richard Painter and Ann Holmes (Oxford University Press, 2008).

Statute books contain copies of the relevant sections from both national and European legislation. Again there are several on the market. One that also includes copies of codes of practice is *Routledge Student Statutes 2010–2011* (Janice Nairns). This text is updated annually.

Journals

Journal articles are an invaluable source of up-to-date employment law information. Most libraries stock at least some of the journals listed below. Guidance on extra reading from journals is given at the end of each chapter in this text. The main sources of employment law articles are found in:

- *Business Law Review*
- *Industrial Law Journal*
- *IDS Brief*
- *Economic and Labour Market Review*
- *Equal Opportunities Review*
- *Employers’ Law*
- *The New Law Journal*
- *Legal Action*
- *Industrial Relations Law Bulletin*.

Some journal articles can be complex and difficult to follow. Those in the *Business Law Review*, *IDS Brief* and *The New Law Journal* tend to set out the law in a very accessible way. Incomes Data Services, publishers of the *IDS Brief*, also produce handbooks which accompany the Brief. These concentrate on individual areas of employment law and are very comprehensive and easy to follow.

The Legal Journals Index

The Legal Journals Index provides details on all employment law articles which have been published over the last two decades. The index may be found in paper format in the library or more often appears as part of networked information. It can often be accessed as part of the Current Legal Information package noted below.

Online resources

Current Legal Information

Depending on the type of computer facilities available, students may be able to access the Current Legal Information package. This database is normally accessible on the network and provides current information on journal articles, cases and legislation. The system allows searches
Other sources of information

to be made specifically on employment law and is able to convey recent cases and developments in minutes.

**IDS Brief**

*IDS Brief* is a journal which is published every two weeks. It contains articles and case reports. There is also an online service. In order to access the full range of facilities you need access to a subscription password. This gives you access to case reports and information on all sections of employment law. It is worth enquiring as to whether your law library subscribes to this service.

**LexisNexis**

This service is part of the Butterworths online information services. It can be accessed via subscription using a password. It contains an online employment law service giving access to cases, legislation and references to journal articles.

**Westlaw**

This online service provides access to cases, articles, newspaper reports and legislation. This is a subscription service, which requires a password in order to gain entry to the site.

**Athens**

You will often find access to the above services via an ‘Athens’ password. This is an academic network which allows access to various sites. It is worth finding out what services are provided by your university or college.

**www.emplaw.co.uk**

This site deserves a particular mention. It provides user-friendly information on employment law. There is a ‘free section’ which can be accessed without a password. You can also purchase a password to gain entry to the ‘professional’ section of the site. The information on the site is very comprehensive and easy to follow. You can also register for ‘What’s new?’ email updates. I would strongly recommend that you make yourself familiar with this site early in your study of employment law.

### Useful websites

There are various websites containing information on employment law in general, recent cases and legislation. The following list reflects only some of those available:

**www.bis.gov.uk** The Department for Business, Innovation and Skills: link to the ‘Employment Matters’ section which contains information on employment law topics, information on proposed new legislation/campaigns, access to leaflets/publications and a link to the ‘directgov/employment guidance’ website (see below). The site also contains a link to a useful ‘A–Z of Employment’.

**www.direct.gov.uk** Government website containing information on all aspects of employment law. There is a link on the homepage to the ‘Employment’ section of the site which provides details on such areas including work and families, redundancy, employment terms and conditions, Employment Tribunals and discipline and grievance at work.


**www.opsi.gov.uk** The Office of Public Sector Information: contains information on a wide range of official publications, links to other government sites and access to UK Acts of Parliament.
Other sources of information


www.equalityhumanrights.com  Equality and Human Rights Commission: outlines the role of the Commission and provides information on all forms of discrimination legislation/campaigns and government initiatives. Also contains a useful link to ‘legal updates’ which informs on developing areas of discrimination/human rights law.

www.hse.gov.uk  Health and Safety Executive: source of press releases, leaflets and other publications, information on recent safety campaigns, enforcement action and the role of the Executive. The site also has a useful section on health and safety legislation and new legal developments.

www.tribunals.gov.uk  The Tribunals Service: provides administrative support to both the Employment Tribunals Service and the Employment Appeal Tribunal. Provides information on the service’s role and functions. Also provides useful addresses and links to both the Employment Tribunals and Employment Appeal Tribunal websites.

www.employmenttribunals.gov.uk  Employment Tribunals: information on how to apply to the Employment Tribunal, leaflets and publications, locations of tribunal offices, information on tribunal hearings. There is also a facility by which you can apply to a tribunal online or complete a ‘notice of appearance’.

www.employmentappeals.gov.uk  The Employment Appeal Tribunal: information on procedure, forms and judgments.

www.hmcourts-service.gov.uk  The Court Service: provides guidance on how to make a claim, outlines the role of various courts and explains some legal terminology.

www.legalservices.gov.uk  Legal Services Commission: provides information on the role of the Commission which administers the Community Legal Service and Criminal Defence Service.

www.communitylegaladvice.org.uk  Community Legal Advice: provides information on ‘legal aid’ and on the location of various advice agencies. The site also provides information on employment law. From the ‘Employment’ link you are able to access information on employment rights, discrimination, dismissal/redundancy and health and safety at work.

www.europa.eu  The European Union: information on the Institutions, an overview on the composition and workings of the EU, access to official documents and news stories.

www.echr.coe.int  The European Court of Human Rights: information on the role and composition of the court, pending cases, judgments and decisions.

www.curia.europa.eu  The European Court of Justice: information on the composition and role of the court, procedures, judgments and press releases.

www.acas.co.uk  Advisory, Conciliation and Arbitration Service: a really useful site which outlines the role of Acas and provides advice on the main employment law topics. Also gives access to publications, handbooks, leaflets and codes of practice.

www.tuc.org.uk  Trades Union Congress: outlines the role of the TUC, provides information on a range of employment law issues, campaigns, recent developments and publications. Site also contains a free registration ‘email alert’ facility.

www.lowpay.gov.uk  Low Pay Commission: Commission was formed to advise the Government on the National Minimum Wage, provides information on minimum wage rates, reports and publications.

www.incomesdata.co.uk  Incomes Data Services: information on a wide range of employment related issues including international comparisons, comment on legislation and procedure and a link to the IDS Brief site.
The operation and development of employment law is regulated and assisted by selected government departments and other institutions working in specific fields.

Various government departments are responsible for employment law issues. These include the Department for Business, Innovation and Skills (BIS) and the Department for Work and Pensions (DWP). Each Department is headed by a Secretary of State.

**Advisory, Conciliation and Arbitration Service (Acas)**

The 2008/9 Acas annual report states that the organisation’s priorities are to ‘enhance awareness and take up of dispute resolution and conflict management in the workplace’ and to ‘provide information and practical advice and guidance to employers and employees’. The report states that Acas provides ‘impartial expertise to businesses and their employees’ and ‘dispute resolution services if an organisation needs help to resolve conflict arising within the workplace’.

Acas was established in 1974 to improve industrial relations. It is now governed by s 247 of the Trade Union and Labour Relations (Consolidation) Act 1992. The service is headed by a chairman and overall guidance is provided by the Acas Council. At the time of writing the Acas Council has 12 part-time members. Several members represent employee organisations such as trade unions. Several represent employer organisations and the remainder are those with particular experience in employment issues such as personnel officers and academics. The Acas Council is responsible for determining the strategic direction, policies and priorities of Acas and for ensuring that its statutory duties are carried out effectively.

Appointments are initially for a period of five years but can be reviewed after this time. The chairman is appointed by the Secretary of State and although the Service is funded by the government, it remains independent. Acas is based in London but has offices in all of the major regions.

As its name suggests, the functions of Acas are threefold. It provides advice, conciliation and arbitration in employment cases.
Advice

Acas gives general employment advice over the telephone, and produces a mass of leaflets on employment law and personnel-related issues. Copies of these leaflets can be obtained from the Acas address noted in the Appendix. Copies of Acas publications are also available on their website. These can be ordered online. Many can also be printed direct from the site. Since December 2002 Acas have also administered a national public helpline. At the time of writing the telephone number for this service is 08457 47 47 47.

Acas is able to give advice on collective matters and run conferences and seminars dealing with industrial relations issues. It may charge for some services including handbooks. It does not, however, charge for advice on employment matters.

Acas produces codes of practice, advisory booklets and handbooks. The main advisory handbooks are: *Discipline and Grievances at Work*, and the *A–Z of Work* which provide details on most employment issues. The three Acas codes of practice are:

- No. 1 Disciplinary and Grievance Procedures (2009)
- No. 2 Disclosure of Information to Trade Unions for Collective Bargaining Purposes (revised 1997)
- No. 3 Time Off for Trade Union Duties and Activities (2010).

Conciliation

In 2008/9 Acas conciliated in almost 79,000 individual applications to Employment Tribunals. The majority of tribunal applications are sent to Acas. When an application is received by Acas, it appoints a conciliation officer to the case. This person tries to negotiate between the parties to promote a settlement of the dispute before it is heard in the tribunal. Either party to a dispute may also ask Acas to intervene before any application is made to the tribunal. Conciliation is voluntary and both parties have to agree to the involvement of Acas. The 2008/9 Acas annual report states that 76 per cent of cases were resolved before going to a tribunal hearing.

Acas may also conciliate in collective disputes involving employers and unions. The aim of such conciliation is to prevent or stop industrial action. In such cases one party must ask for conciliation to take place.

The Employment Act 2002 modified the role of the conciliation officer. From October 2002 their duty to conciliate was limited to seven weeks for certain claims, e.g. breach of contract and redundancy, and 13 weeks for most other claims. These time periods were referred to as the ‘short’ and ‘standard’ conciliation period. However, these restrictions were abolished by the Employment Act 2008. Acas now exercises its power to conciliate in all cases right up to the date of the tribunal hearing.

Acas has also recently piloted a new approach to early conciliation. This pilot took place in the Newcastle, Nottingham and Manchester areas in 2008. The scheme proved successful and at the time of writing this new ‘Pre-Claim Conciliation’ service is currently being made available throughout the United Kingdom. The aim of the new service is to offer free and impartial pre-claim conciliation to assist the parties in the pursuance of an early settlement of their dispute.

The pre-claim conciliation service is available for any type of workplace dispute that may result in a claim to the Employment Tribunal. This will include disputes relating to, for example, unfair dismissal, discrimination, redundancy, and equal pay. If the parties are unable to reach an agreement at the pre-claim conciliation hearing they are still able to pursue their claim in the Employment Tribunal.

Arbitration

If both parties consent, their dispute may be referred to Acas for arbitration. This will only happen if the possibility of reaching a settlement by way of conciliation has been pursued and was unsuccessful.
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Acas officers do not arbitrate themselves, but appoint an independent arbitrator to hear the case. The arbitrator is selected from a list kept by Acas or the Central Arbitration Committee. The arbitrator will hear both sides to the dispute and attempt a compromise between the parties that will lead to settlement of the case. The decision of the arbitrator is not binding and the parties may choose not to accept it and pursue the case further. Cases may also be referred to the Central Arbitration Committee.

Acas also administers an arbitration scheme relating only to complaints involving alleged unfair dismissal or flexible working disputes. This scheme initially became operational in 2001 and is further discussed at page 261.

Central Arbitration Committee (CAC)

The Central Arbitration Committee was established under the Employment Act 1975. It is an independent source of arbitration and is now governed by s 259 of the Trade Union and Labour Relations (Consolidation) Act 1992. The Committee is staffed by a chairman, 10 deputy chairmen and 50 representatives from both sides of industry. Twenty-seven of these representatives are ‘experienced representatives of employers’ and the other 23 ‘members experienced as representatives of workers’.

All members of the Committee are appointed by the Secretary of State for Business, Innovation and Skills following consultation with Acas. The Committee’s main function is to adjudicate on applications relating to the statutory recognition or derecognition of trade unions for collective bargaining purposes. The Committee also hears complaints from trade unions alleging that an employer has failed to disclose information for collective bargaining purposes and also adjudicates on certain disputes arising out of the provisions of the Information and Consultation Regulations 2004 and the Transnational Information and Consultation of Employees Regulations 1999. It also has a statutory role in disposing of claims and complaints regarding the establishment and operation of European Works Councils. The Central Arbitration Committee encourages parties to reach a settlement by suggesting solutions to their dispute. It can also arbitrate over matters concerning industrial disputes referred to it by Acas. However, the parties in the dispute have to agree to the Committee becoming involved. A decision of the Committee cannot be appealed.

The Department for Business, Innovation and Skills and related government departments (BIS)

The government created this new department in June 2009. It was created by a merger of the Department for Business, Enterprise and Regulatory Reform (BERR) and the Department for Innovation, Universities and Skills (DIUS). The key role of this department is to build on Britain’s capabilities to compete in the global economy.

The Department for Business, Innovation and Skills and the Department for Work and Pensions are each staffed by a Secretary of State. These are government ministers appointed to deal with and be a spokesperson for employment issues. They may issue codes of practice and approve draft codes. The minister in charge of BIS also receives notification of proposed redundancies and approves agreements concerning the allocation of redundancy payments. They also review financial limits, for example on unfair dismissal payments.

Equality and Human Rights Commission (EHRC)

The Equality Act 2006 received Royal Assent on 16 February 2006. This Act established the new Equality and Human Rights Commission (EHRC). The EHRC replaced the Equal Opportunities Commission (EOC), the Commission for Racial Equality (CRE) and the Disability Rights Commission (DRC).

The EHRC became operational on 1 October 2007. The work of the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission has been
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integrated into the role of the EHRC. The EHRC is also responsible for promoting equality and tackling discrimination in relation to sexual orientation, gender reassignment, age and religion or belief. It is also responsible for the promotion of human rights, providing institutional support for the Human Rights Act 1998.

Section 3 of the Equality Act 2006 covers the ‘general duty’ of the EHRC. This section states that the Commission shall ‘exercise its functions . . . with a view to encouraging and supporting the development of a society in which –

(a) people’s ability to achieve their potential is not limited by prejudice or discrimination,
(b) there is respect for and protection of each individual’s human rights,
(c) there is respect for the dignity and worth of each individual,
(d) each individual has an equal opportunity to participate in society, and
(e) there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.’

The Commission is staffed by up to 16 Commissioners including a Chair, and a Commissioner for Scotland and a Commissioner for Wales. There is also a requirement that one Commissioner be a disabled person. The Commission has the power to appoint advisory committees and can issue codes of practice. The Commission is based at two main sites in Manchester and London. There are also offices in Glasgow and Cardiff and others located throughout the country.

The duties of the EHRC include:

- providing information, advice and assistance on equality and diversity and human rights;
- issuing guidance and good practice that will help employers, service providers, voluntary organisations and trade unions embrace equality and human rights;
- conducting formal inquiries and investigations where there are persistent inequalities, human rights issues or where there is evidence of unlawful discrimination; and
- providing support for individuals making anti-discrimination claims, intervening in cases where equality and human rights arguments need to be made and where appropriate providing conciliation.

The Commission will publish a ‘state of the nation’ report every three years. This will outline those areas in which Britain is failing on equality and human rights issues. The report will also put forward proposals for improvement.

The amalgamation of the existing Commissions into this one ‘super-Commission’ was widely anticipated. It is thought that having a single Commission will have many benefits. These include the bringing together of experts on all forms of discrimination and the provision of a single point of contact for anyone requiring advice or assistance with discrimination issues.

The EHRC website contains information on the work of the Commission and can be accessed at www.equalityhumanrights.com.

The EHRC has supported the campaign for a new Equality Act. This Act introduces a single legal discrimination law framework. The Equality Act 2010 has recently received the Royal Assent. At the time of writing there is no information available on when the relevant employment law sections will come into force.

**Low Pay Commission (LPC)**

The Low Pay Commission was formed in 1997 and given legal status under the National Minimum Wage Act 1998. It is staffed by a Chairman and eight other members. The function of the
Commission is to monitor and evaluate the impact of the national minimum wage. It can also recommend that the set minimum wage be increased. Its current terms of reference are:

- to continue to monitor and evaluate the impact of the national minimum wage, with particular reference to the effect on pay, employment and competitiveness in low paying sectors and small firms; the effect on different groups of workers; the effect on pay structures; and the interaction between the national minimum wage and the tax and benefit systems; and
- to review the levels of both the main national minimum wage rate and the development rate and make recommendations, if appropriate, for change.

The government does not have to accept any of the Commission’s recommendations but in practice many of them are followed.

The permanent status of the Commission was confirmed by the government in 2002 and it was then given a remit for a programme of longer-term research.

**Certification Officer (CO)**

This position was established in 1975 and is governed by s 254 of the Trade Union and Labour Relations (Consolidation) Act 1992. The role of the Certification Officer is to maintain a list of independent trade unions and to issue certificates of independence to such unions. The CO also keeps records of union annual membership, financial returns, and copies of union rules.

The CO may investigate complaints concerning the election of trade-union officials, allegations that proper membership records have not been kept or where there is alleged discrepancy in the balloting procedures for setting up political funds. The CO may also appoint an inspector to investigate union practices where fraud is suspected. The role of the CO was enhanced by Schedule 6 to the Employment Relations Act 1999. Under this provision a union member can complain to the CO if they think that there has been a breach or threatened breach of union rules. The CO has the power to require the union to remedy any such breach.

**Health and Safety Executive (HSE)**

The original Health and Safety Executive was established under s 10 of the Health and Safety at Work etc. Act 1974. The Executive worked alongside the Health and Safety Commission (HSC). The Executive and the Commission were abolished by the Legislative Reform (Health and Safety Executive) Order 2008. As from 1 April 2008 the new organisation (which now covers the work of both the old Executive and Commission) is known as the Health and Safety Executive.

In addition to the Chair, the HSE is composed of a board of not more than 11 members. These are appointed by the Secretary of State.

The duties of the HSE are to further the general purposes of the Health and Safety at Work etc. Act 1974 and in particular to:

- assist and encourage persons concerned with matters relevant to health and safety issues;
- arrange research into health and safety issues;
- promote education, training and information on health and safety issues;
- act as an information and advice service;
- submit proposals for health and safety regulations; and
- issue codes of practice.

The HSE can organise an investigation into any company that it suspects does not provide adequate levels of health and safety protection for its workers.
Summary checklist

The HSE is largely an enforcement agency. It may investigate and report on accidents at work. It uses local authority inspectors to report on and inspect incidents in shops, hotels, catering and sports facilities. Its inspectors report and inspect incidents in factories, building sites, mines, quarries, railways, chemical plants and fairgrounds.

The HSE enforces the provisions of the Health and Safety at Work etc. Act 1974 and the regulations made under it. It may issue improvement or prohibition notices to improve safety standards and may prosecute where employers refuse to raise standards.

The organisation publishes many informative leaflets and booklets on health and safety issues. Copies can be obtained from the Executive’s address in the Appendix.

The Information Commissioner (IC)

The Office of the Information Commissioner was established by the Data Protection Act 1998. The office was previously referred to as that of the Data Protection Commissioner. The IC is there to enforce and oversee the Data Protection Act 1998 and the Freedom of Information Act 2000.

The IC is a United Kingdom independent supervisory authority which reports directly to Parliament. It is responsible for ‘the promotion of good information handling and the encouragement of codes of practice for data controllers’. Data controllers are defined as ‘anyone who decides how and why personal data is processed’. The Commissioner issued a draft code of practice for employers in December 2000.

The final code of practice was issued in four stages. A complete consolidated version of ‘The Employment Practices Code’ was published in June 2005. The code is composed of four parts:

- Part 2 – ‘Employment Records’;
- Part 3 – ‘Monitoring at Work’;
- Part 4 – ‘Information about Workers’ Health’.

SUMMARY CHECKLIST

- Employment cases are brought in either the County Court, High Court or Employment Tribunal.
- The sources of employment law are the common law, legislation, European law, codes of practice and regulations.
- Various institutions regulate and monitor employment law.
- Cases concerning breach of contract, wrongful dismissal or injunctions are brought in the courts.
- Cases concerning claims of e.g. unfair dismissal, discrimination, equal pay and redundancy payments are brought in the Employment Tribunal.
- Some breach of contract claims can be brought in either a court or a tribunal.
- Employment Tribunals are administered by the Employment Tribunals Service, through Regional Offices.
- Appeals from a tribunal decision can be made on a point of law only to the Employment Appeal Tribunal.
- Common law is the law made by judges when they announce their decision in each case.
- Important decisions are reported in law reports.
Legislation is drafted by the government.

Legislation may govern either the civil or criminal law.

European law has had a major impact on our national employment law.

The sources of European law are Treaties, Directives, Regulations, Decisions, Recommendations and Opinions.

Codes of practice do not have the same legal significance as legislation but are important reflections of what is good practice.

Employment law cases are reported in the All England Law Reports, the Weekly Law Reports, the Industrial Relations Law Reports and the Industrial Cases Reports.

The citation given to a case shows its location within the law reports.

Other sources of information include textbooks, case and statute books, journals and the Internet.

Acas provides advice, conciliation and arbitration.

The Central Arbitration Committee hears complaints from trade unions and arbitrates in cases referred by Acas.

The Equality and Human Rights Commission works to combat all forms of discrimination.

The EHRC can issue non-discriminatory notices to stop employers from using discriminatory practices or apply for an injunction where they refuse to do so.

The Low Pay Commission monitors and evaluates the impact of the national minimum wage.

The Health and Safety Executive enforces the Health and Safety at Work etc. Act 1974, advises on health and safety matters, promotes education and training and issues codes of practice. The HSE can also issue improvement or prohibition notices or instigate prosecution.


SELF-TEST QUESTIONS

1. In which courts and tribunals are employment cases heard?
2. What are the sources of employment law?
3. What are the sources of European law?
4. What type of legal significance do codes of practice have?
5. In which law reports are you likely to find reports of employment cases?
6. If a case citation is ‘[1998] 1 All ER 33’ where will it be found?
7. What is the role of the Advisory, Conciliation and Arbitration Service?
8. What is the role of the Equality and Human Rights Commission?
9. What is the role of the Low Pay Commission?
10. What is the role of the Health and Safety Executive?
Further reading

On general principles of English law

On European law

On the use of a law library

Visit [www.mylawchamber.co.uk/nairns](http://www.mylawchamber.co.uk/nairns) to access study support resources including interactive multiple choice questions, practice exam questions with guidance, weblinks, glossary flashcards and legal updates.