and give appropriate training, paid time off, and facilities in order that elected representatives can carry out their functions.

It should also be noted that under the ERA, s 100 designated or acknowledged health and safety representatives must not be subjected to detriments, e.g. loss of overtime, for carrying out health and safety activities in the workplace. Dismissal for these reasons is unfair, regardless of service. The provisions also apply to ordinary employees, regardless of service, who leave or refuse to return to the workplace because of a health hazard reasonably thought to exist.

The above Regulations work in tandem with the Safety Representatives and Safety Committee Regulations 1977 (SI 1977/500) which apply to consultations with safety representatives appointed where there is a recognised trade union and appointed by that trade union.

Enforcement

Enforcement is in the hands of the inspectorate of the Health and Safety Executive set up by the Act. Inspectors may issue a prohibition notice if there is a risk of serious personal injury. This operates to stop the activity concerned until remedial action specified in the notice has been taken. They may also issue an improvement notice if there is a contravention of any of the relevant statutory provisions, under which the employer must remedy the fault within a specified time. They may prosecute any person contravening the relevant statutory provision instead of or in addition to serving a notice. Failure to comply with a prohibition notice could lead to imprisonment, though there is an appeal to an employment tribunal. The right of appeal from the employment tribunal is not as might be expected to the Employment Appeal Tribunal but to the High Court, Queen's Bench Division.

R v *Mara*, 1986 – Health and safety: the duty to non-employees (**256**)

Trade union membership and activities

Under the Trade Union and Labour Relations (Consolidation) Act 1992 employers have a duty not to take action against employees just because they are members of, or take part in at an appropriate time, the activities of a trade union which is independent of the employer. According to the decision in *Post Office* v *Union of Post Office Workers* [1974] 1 All ER 229 this includes activities on the employer's premises.

Under the provisions of the 1992 Act, dismissal for failing to join a trade union is always automatically unfair even if there is a closed shop situation within the industry concerned. This provision greatly weakens the maintenance by trade unions of closed shops.

Dismissal will also be automatically unfair if the employee is selected for redundancy on any of the above 'trade union' grounds. Furthermore, the Court of Appeal decided in *Fitzpatrick* v *British Railways Board* [1991] IRLR 376 that a dismissal for trade union activities in a *previous* employment was automatically unfair.

If action is taken against employees, they may complain to a tribunal within three months of the offending act, which can award money compensation of an unlimited amount or make an order saying what the trade union rights of the employee are so that the employer can grant them in the future. If the employee has been dismissed, the unfair dismissal remedies apply.

In addition, the 1992 Act gives job seekers a right not to be refused employment or the services of an employment agency on the ground that they are or are not trade union members. The Act also protects people who will not agree to become or cease to be union members or

to make payments in lieu of membership subscriptions. This means that it is no longer lawful to operate any form of closed shop. Any individual who believes that he or she has been unlawfully refused employment or the service of an employment agency because of union or non-union membership can complain to an employment tribunal within three months of the refusal. If the case is made out, the tribunal can award compensation of unlimited amount.

The compensation will generally be paid by the employer or employment agency concerned, but in cases where a trade union is joined as a party and the tribunal decides that the unlawful refusal resulted from pressure applied by the union, it may order the union to pay some or all of the compensation.

The tribunal can also recommend that the prospective employer or employment agency take action to remedy the adverse effect of their unlawful action on the complainant.

Employer incentives not to join a union

The Employment Relations Act 2004 inserts additional provisions in the Trade Union and Labour Relations (Consolidation) Act 1992 so that a worker has a right not to have an offer made to him or her by the employer with the sole or principal purpose of inducing him or her to give up membership of an independent trade union or to refrain from joining or taking part in the activities or making use of the services of such a union. Further, a worker who is a member of an independent trade union has a right not to be made an offer by the employer where acceptance would result in the terms of the employment no longer being determined by collective bargaining where this is the sole or main purpose of the offer. Where offers made in contravention of the above provisions are accepted by the worker, the employer cannot enforce them as a change in the terms of employment. The provisions apply to those who provide services and do not work under a contract of employment.

If the employer goes further than the making of an offer and takes steps to prevent the above contacts with the union, the worker suffers a detriment for which a claim could be brought.

Union recognition – generally

Employers were formerly free to decide for themselves whether they wished to recognise trade unions regardless of the wishes of their employees, and irrespective of the level of union membership among their workers. Under the provisions of the Employment Relations Act 1999, which take effect as Sch A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, employers will have to recognise trade unions where a majority of those voting in a ballot and at least 40 per cent of those eligible to vote are in favour of recognition. However, in those organisations where more than 50 per cent of the workers are members of the union, there will be automatic recognition on the ground that there is a manifest demonstration that the employees wish to be represented by the union for the purposes of collective bargaining. The Employment Relations Act 1999 will give protection against dismissal for those campaigning on behalf of recognition and unions will be allowed reasonable access to the workforce to seek their support and to inform employees about ballots. Those who employ less than 21 workers are exempt from the recognition procedures.

The areas for which compulsory recognition is required embrace negotiations relating to pay, hours of work, holidays and training.

Union recognition – disputes

Disputes are referred to the Central Arbitration Committee. An example of such a reference is to be found in *UNIFI* v *Bank of Ceylon* (2000) 652 IRLB 16. In that reference the CAC accepted

a recognition application by the Union for the Investment Finance Industry in respect of workers, including managers, employed by the Bank of Ceylon under contracts based in the UK. The Bank employed at least 21 workers on the day the union lodged its recognition request with the Bank, even if employees based in Sri Lanka and in Britain on separate assignments were excluded. The CAC accepted the union's evidence that it had 14 members out of the 22 remaining staff in the proposed bargaining unit and statements from 13 staff that they wanted the union to seek recognition.

The CAC found that at least 10 per cent of the staff in the proposed bargaining unit were union members and that a majority of the relevant staff would be likely to favour collective bargaining and accepted UNIFI's recognition application.

Deduction from pay of union subscriptions

Employers may agree with a recognised union to deduct union subscriptions from pay and hand the relevant sum over to the trade union concerned. Employers must get the written authorisation of the relevant workers before starting what are known as check-off deductions and they must continue to give employees the usual itemised pay statement showing the amount of any check-off deduction. Furthermore, employees are free to withdraw from check-off at any time.

However, the Deregulation (Deduction from Pay of Union Subscriptions) Order 1998 (SI 1998/1529) removes from employers the requirement to:

- obtain repeat authorisations from employees at least every three years as confirmation that they wish to continue to pay their union subscriptions from wages; and
- notify employees at least one month in advance of any increase in the amount that will be deducted.

Citizen's right

Although not strictly speaking a matter of employment law, it is worth noting that under s 235 of the 1992 Act (as amended) any individual who is deprived, or likely to be deprived, of goods or services because of unlawfully organised industrial action, can bring proceedings before the High Court to restrain the unlawful act. Such an individual can apply to the Commissioner for Protection against Unlawful Industrial Action for assistance.

The first case to receive financial assistance concerned strike action threatened by members of a teaching union as a protest against the re-admission of a pupil to a secondary school after his parents' successful appeal against the decision of the head teacher and the school governors to exclude him.

Termination of the contract of employment

Unfair dismissal: generally

Before a person can ask an employment tribunal to consider a claim that another has unfairly dismissed him or her, it is once again essential to establish that the relationship of employer and employee exists between them. In this connection, the ERA provides that an employee is a person who works under a contract of service or apprenticeship, written or oral, express or implied.

Massey v *Crown Life Insurance Co*, 1978 – Unfair dismissal claims and the self-employed (**257**)

In addition to showing that he is an employee, the claimant had to comply with an *age requirement*. The unfair dismissal provisions did not apply to the dismissal of an employee from any employment if the employee had on or before the effective date of termination attained the age which, in the undertaking in which he is employed, was the normal retiring age for an employee holding the position which he held, or for both men and women age 65. This exclusion is now repeated by the Age Discrimination Regulations 2006 and there is now no age limit.

As regards the period of employment, the unfair dismissal provisions do not apply to the dismissal of an employee from any employment if the employee, whether full or part-time, has not completed one year's continuous employment ending with the effective date of termination of employment unless the dismissal is automatically unfair.

Automatically unfair dismissals

Having noted some of these in various parts of the text, it may be useful to bring them together in a list, remembering that dismissals of this kind do not require any particular period of service with the employer.

The main reasons which make a dismissal automatically unfair can briefly be listed as follows:

- trade union membership or activities including dismissal during official strike action;
- not belonging to a trade union or particular union;
- pregnancy, maternity and dependant leave, adoption leave, paternity leave and parental leave;
- selection for redundancy on any of the above grounds;
- the transfer of the undertaking or a reason connected with it (unless there is an ETO (economic, technical or organisational reason)). It should, however, be noted at this point that the one-year qualifying period does not apply where the complaint is based on dismissal for one of the automatically unfair reasons, though if the dismissal related to the transfer of an undertaking the one-year qualifying period does apply;
- asserting a statutory employment right under ERA 1996, s 104 e.g. in regard to minimum notice;
- exercising rights as a part-time worker or fixed-term worker or in connection with flexible working;
- in health and safety cases involving union safety representatives and now including being an employee safety representative or putting up for election to be one;
- performing the duties of a member-nominated trustee under the Pensions Act 1995;
- being an employee representative in redundancy consultation or putting up for election to be one (ERA 1996, s 103);
- refusing (in certain circumstances) to do shop or betting work on a Sunday;
- exercising rights under the Working Time Regulations including rights as an employee representative in connection with the workforce agreements (s 101(A), ERA 1996, as inserted by the Regulations);
- asserting rights under the National Minimum Wage Act 1998 (s 104(A), ERA 1996, as inserted by the NMW Act 1998);
- asserting rights to time off for study and training under s 63A of the ERA 1996, as inserted by the Teaching and Higher Education Act 1998;
- protection of whistleblowers under the Public Interest Disclosure Act 1998.

Other exceptions

The following are ineligible and cannot claim.

(a) Any employee dismissed while taking unofficial strike or other industrial action is unable to complain of unfair dismissal (Trade Union and Labour Relations (Consolidation) Act 1992, s 237). Where the strike or other industrial action is official, the Employment Relations Act 1999 inserts additional provisions into the Trade Union and Labour Relations (Consolidation) Act 1992 so that it is automatically unfair to dismiss employees or select them for redundancy for the first 12 weeks of their participation in official and otherwise lawfully organised protected industrial action. Dismissal during unofficial action is not protected and action is also not protected if it involves unlawful secondary action.

Dismissals after the 12-week period are still unfair where the employer has not taken reasonable steps to resolve the dispute. Where the employer has not taken such steps or where the action was not lawfully organised, a worker who has been dismissed will normally be able to claim unfair dismissal where the employer has not dismissed all workers taking part in the action or has offered re-engagement to some but not all of the employees within a three-month time limit.

(b) Certain other categories are excluded by the ERA, e.g. members of the police force.

(c) It was once the case that a worker who under his or her contract of employment ordinarily worked mainly outside Great Britain could not claim unfair dismissal. The ERA 1999 abolished this exclusion but it remains for those who work *wholly* outside Great Britain, unless the employment contract is in Great Britain the worker having been merely posted abroad or the work is connected with Great Britain as where it is at a UK military base (*Lawson* v *Serco* [2006] 1 All ER 823).

(d) To claim unfair dismissal a worker must have been continuously employed for one year at the date of termination. There is no longer a requirement to have worked a specific number of hours in a week to qualify.

Under the ERA, s 192, members of the armed forces are now covered by the unfair dismissal provisions of that Act provided they have first availed themselves of service redress procedures.

It should also be noted that s 9 of the Employment Tribunals Act 1996 contains provisions to test the strength of the case of each party before a full hearing proceeds. Pre-hearing reviews are introduced at which the chairman of the tribunal may sit alone without the two lay assessors. The chairman may, at his discretion and following an application by one of the parties, or of his own motion, require a deposit of up to £500 from the other party as a condition of proceeding further if it is considered that his or her case has no reasonable prospect of success, or that to pursue it would be frivolous, vexatious or otherwise unreasonable.

Employment Tribunal Regulations also provide for pre-hearing assessments, and if a party to the proceedings before an employment tribunal considers that an application, or a particular contention, is unlikely to succeed or be accepted he can ask for a pre-hearing assessment to be made. A tribunal can make such an assessment of its own volition. Following the pre-hearing assessment, at which the parties may submit written representations and put forward oral argument but not evidence, the tribunal may indicate its opinion that if the party who is unlikely to succeed carries on with the application or persists in the contention an order for *costs* may be made against him. The opinion is placed before the tribunal which conducts the full hearing if it takes place. No member of the tribunal which gave the opinion may be a member of the tribunal which takes the full hearing.

A pre-trial review may therefore impose a *deposit* requirement and give a warning order as to *costs* if the case proceeds.

Dismissal – meaning of

An employee cannot claim unfair dismissal unless there has first been a dismissal recognised by law. We may consider the matter under the following headings.

Actual dismissal

This does not normally give rise to problems since most employees recognise the words of an actual dismissal, whether given orally or in writing.

A typical letter of dismissal appears below.

> Dear Mr Bloggs
> I am sorry that you do not have the necessary aptitude to deal with the work which we have allocated to you. I hope that you will be able to find other work elsewhere which is more in your line. As you will recall from your interview this morning, the company will not require your services after the 31st of this month.

Constructive dismissal

This occurs where it is the employee who leaves the job but is compelled to do so by the conduct of the employer. In general terms the employer's conduct must be a fundamental breach so that it can be regarded as a repudiation of the contract. Thus, if a male employer were to sexually assault his female secretary then this would be a fundamental breach entitling her to leave and sue for her loss on the basis of constructive dismissal.

It would also occur if the employer changed the terms of the contract without the employee's consent, e.g. by reducing wages payable under the contract – see *Rigby* v *Ferodo* [1987] IRLR 516. Furthermore, the EAT decided in *Whitbread plc (t/a Thresher)* v *Gullyes* (1994) 509 IRLB 14 that an employee who resigned from a management position because her employer did not give her proper support – since, among other things, the most experienced staff were transferred out of her branch without consultation with her – was constructively dismissed.

Fixed-term contracts

When a fixed-term contract expires and is not renewed, there is a dismissal.

Under the provisions of the Employment Rights Act, the ERA 1996 is amended so that an employee can no longer waive his right to claim unfair dismissal where a contract for one year or more is not renewed. It used to be possible to forgo the right to claim a redundancy payment at the end of a fixed-term contract that was of at least two years' duration. This is no longer possible by reason of the Fixed-Term Employees Regulations 2002 (see p 444).

Grounds for dismissal

If an employer is going to escape liability for unfair dismissal, he must show that he acted *reasonably* and, indeed, s 92 of the ERA requires the employer to give his reasons for dismissal to the employee in writing.

It should be remembered that the question of whether a dismissal is fair or not is a matter of *fact* for the particular tribunal hearing the case, precedents are not rigidly applied and one cannot predict with absolute accuracy what a particular tribunal will do on the facts of a particular case. Basically, when all is said and done, the ultimate question for a tribunal is – 'was the dismissal fair and reasonable' in fact.

Section 98 of the ERA includes in the test of reasonableness required in determining whether a dismissal was fair, the 'size and administrative resources of the employer's

undertaking'. This was included as a result of fear that the unfair dismissal laws were placing undue burdens on small firms and causing them not to engage new workers. Earlier legislation also removed the burden of proof from the employer in showing reasonableness so that there is now no 'presumption of guilt' on the employer and the tribunal is left to decide whether or not the employer acted reasonably.

In this connection, the tribunal may think that the dismissal was severe but the question is was it within the band of reasonable responses open to the employer? (Within this band an employer might reasonably retain the employee, while another employer might dismiss him or her.) If so, there is no unfair dismissal even if the members of the tribunal would not have dismissed the claimant (see *British Leyland (UK)* v *Swift* [1981] IRLR 91 – a decision of the Court of Appeal). The EAT has challenged this approach as wrong and has decided that the view of the tribunal is the test (see *Haddon* v *Van den Berg Foods Ltd* [1999] IRLR 672). That decision was, however, questioned in *Midland Bank* v *Madden* (2000) 638 IRLB 2 where a differently constituted EAT said that the decision in *Swift* must stand and could not be overruled by the EAT. Thus, the rule of the possible reasonableness of the perverse employer goes on until the matter is resolved by the Court of Appeal.

The Court of Appeal heard an appeal in the *Madden* case in which the 'reasonable responses' test was affirmed, though the response of a perverse employer is excluded (see *HSBC Bank plc (formerly Midland Bank plc)* v *Madden* [2000] IRLR 827).

Reasons justifying dismissal

These are as follows.

(a) Lack of capability or qualifications. This would usually arise at the beginning of employment where it becomes clear at an early stage that the employee cannot do the job in terms of lack of skill or mental or physical health. It should be remembered that the longer a person is in employment, the more difficult it is to establish lack of capability.

By way of illustration, we can consider the case of *Alidair* v *Taylor* [1978] IRLR 82. The pilot of an aircraft had made a faulty landing which damaged the aircraft. There was a board of inquiry which found that the faulty landing was due to a lack of flying knowledge on the part of the pilot who was dismissed from his employment. It was decided that the employee had not been unfairly dismissed, the tribunal taking the view that where, as in this case, one failure to reach a high degree of skill could have serious consequences, an instant dismissal could be justified.

However, it was decided in *British Sulphur* v *Lawrie* [1987] IRB 338 that the dismissal of an employee who was alleged to be unwilling or incompetent to do a particular job could still be unfair if the employee was not provided with adequate training.

As regards qualifications, this could occur where a new employee does not have the qualifications claimed or fails to get a qualification which was a condition of employment, for example in the case of legal and accounting trainees who fail to complete their examinations.

It should also be noted that the Court of Appeal decided in *Nottingham County Council* v *P* (1992) *The Times*, 18 May, that even though an employee had become unsuitable it could still be unfair dismissal if the employer failed to make a reasonable investigation of possible alternative employment. P was an assistant groundsman at a girls' school and had pleaded guilty to a charge of indecent assault on his daughter. Obviously, he could not be allowed to continue to work at the school but the Council should have considered alternative employment within the authority. Failure to do so could amount to unfair dismissal. The case was sent back to the employment tribunal to see what efforts the Council had made, if any, in this regard.

(b) Conduct. This is always a difficult matter to deal with and much will depend upon the circumstances of the case. However, incompetence and neglect are relevant, as are disobedience and misconduct, e.g. by assaulting fellow employees. Immorality and habitual drunkenness could also be brought under this heading and, so it seems, can dress where this can be shown to affect adversely the way in which the contract of service is performed.

Boychuk v *H J Symons (Holdings) Ltd*, 1977 – A dismissal for conduct (**258**)

Crime inside employment will normally justify a dismissal on the grounds of misconduct. For example, the EAT has decided that an employee was dismissed fairly on the ground of theft from the employer even though the employer could not specifically prove loss of stock but had only a reasonable belief in the employee's guilt. The employee had been seen at night by a security guard at the employer's warehouse loading boxes into his car (see *Francis* v *Boots the Chemist Ltd* (1998) 586 IRLB 11).

Dismissal on the ground of theft may also be fair even though what is stolen is of little value. Thus in *Tesco Stores Ltd* v *Khalid* [2001] All ER (D) 314 (Nov) the employee was dismissed for misappropriation of cigarettes from a petrol station where he worked. His dismissal was held to be fair even though the cigarettes were from damaged stock due for return to the manufacturer. Dismissal was within the range of reasonable responses of an employer.

Crime outside of employment raises more difficult issues and generally speaking the employer will have to show damage to his organisation. Thus in *Post Office* v *Liddiard* (2001) (unreported) a Post Office employee was involved in football violence in France. His dismissal for this was held to be unfair. It would be different of course where a company's accountant was convicted of dishonesty in terms of the funds of a local charity of which he or she was the honorary treasurer or where a teacher was convicted of offences involving violence or child-abuse in his or her non-work environment.

An employee's use of drugs or alcohol outside the workplace is unlikely to amount to a fair reason for dismissal nor will the mere fact that an employee did not reveal that he or she used drugs or alcohol when interviewed for the post. However, use of drugs and/or excessive drinking may constitute grounds for a fair dismissal where the employer believes on reasonable grounds that it makes the employee unsuitable for the position held. An employer who wishes to dismiss employees for drink or drug misconduct should have a drink and drugs policy and make it part of the employee's contract.

(c) Redundancy. Genuine redundancy is a defence. Where a person is redundant, his employer cannot be expected to continue the employment, although there are safeguards in the matter of *unfair selection for redundancy*.

Examples are selection because of pregnancy, or trade union membership or activities, or for asserting statutory rights or on health and safety matters as by selection for redundancy, without other reason, of health and safety representatives.

(d) Dismissals which are union related. These are known as the '*section 152 reasons*'. They are set out in the Trade Union and Labour Relations (Consolidation) Act 1992, s 152. An employee will be regarded as automatically unfairly dismissed if the principal reason for the dismissal was that he was, or proposed to become, a member of a trade union which was independent of the employer; that he had taken part or proposed to take part in the activities of such a union at an appropriate time, i.e. outside working hours or within working hours with the consent of the employer; that he was not a member of any trade union or of a particular one or had refused or proposed to refuse to become or remain a member. Under

the relevant provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 all dismissals to maintain a closed shop are now automatically unfair.

Dismissal will also be automatically unfair if the employee is selected for redundancy on any of the above s 152 grounds. Also the Court of Appeal ruled in *Fitzpatrick* v *British Railways Board* [1991] IRLR 376 that a dismissal for trade union activities in a *previous* employment was automatically unfair.

It is worth noting also that under s 146 of the 1992 Act an employee has a right not to have action taken against him or her short of dismissal such as victimisation in terms, e.g., of not being offered overtime where this is related to union membership and/or activities.

The position in regard to job applicants has already been considered.

(e) Statutory restriction placed on employer or employee. If, for example, the employer's business was found to be dangerous and was closed down under Act of Parliament or ministerial order, the employees would not be unfairly dismissed. Furthermore, a lorry driver who was banned from driving for 12 months could be dismissed fairly.

(f) Some other substantial reason. An employer may on a wide variety of grounds which are not specified by legislation satisfy an employment tribunal that a dismissal was fair and reasonable.

Crime and suspicion of crime may also be brought under this heading, though if dismissal is based on suspicion of crime, the suspicion must be reasonable and in all cases the employee must be told that dismissal is contemplated and in the light of this information be allowed to give explanations and make representations against dismissal.

Where an employee has been charged with theft from the employer and is awaiting trial, the best course of action is to suspend rather than dismiss him, pending the verdict. Investigations which the employer must make, as part of establishing a fair dismissal, could be regarded as an interference with the course of justice. It is best, therefore, not to make them, but to suspend the employee. The case of *Wadley* v *Eager Electrical* [1986] IRLR 93 should be noted. In that case husband and wife worked for the same company. The wife was convicted for stealing £2,000 from the company whilst employed as a shop assistant. The husband was a service engineer with the company. Husband and wife were dismissed and it was held that the husband's dismissal was unfair. He was a good employee of 17 years' standing and no misconduct had been made out against him.

The matter of fair or unfair dismissal depends also upon the terms of the contract. If the difficulty is that a particular employee is refusing to do work which involves him, say, spending nights away from home, then his dismissal is likely to be regarded as fair if there is an *express term* in his contract requiring this. Of course, the nature of the job may require it, as in the case of a long-distance lorry driver where such a term would be implied, if not expressed.

Employees who are in breach of contract are likely to be regarded as fairly dismissed. However, this is not an invariable rule. Thus a long-distance lorry driver who refused to take on a particular trip because his wife was ill and he had to look after the children would be unfairly dismissed (if dismissal took place) even though he was, strictly speaking, in breach of his contract.

Dismissal could also be for a substantial reason where a breakdown of relationships either within the office or with a customer have made an employee's position untenable. The following example illustrates the possibilities. In a small office there are two purchase ledger clerks working closely together. They were very good friends. One of them sets up home with the other's wife. The clerks are no longer on speaking terms and cannot work together. The employer has no other office to which one of them can be transferred.

There may be no alternative to dismissal. If no solution can be found in discussion with the clerks one should be dismissed on the basis of length of service and other factors that would be relevant if the one dismissed was being selected for redundancy.

In *Cobley* v *Forward Technology Industries plc* [2003] All ER (D) 175 the Court of Appeal ruled that the chief executive of a public listed company was not unfairly dismissed when the shareholders removed him from his office as a director by a resolution in general meeting. This effected his dismissal as CEO because his contract said that he could not continue as CEO unless he was also a director of the company. His dismissal was, ruled the court, for 'some other substantial reason' under the Employment Rights Act 1996 and that made the dismissal fair. The removal followed a successful hostile takeover of the company and the case shows that business reorganisations such as this can be brought under the heading of 'some other substantial reason'. The new owners clearly cannot be expected to retain the former board members.

Contractual grievance and disciplinary procedures

These are usually part of the contract. The employer must comply with them if he wishes to avoid liability. If a series of oral and written warnings is laid down, the procedure should be observed. However, reasonableness will always prevail.

No matter how good the employer's reason for dismissal may be, there may still be a claim by the employee for unfair dismissal if the dismissal was 'unfair in all the circumstances'.

In *Whitbread & Co plc* v *Mills* [1988] IRLR 43 the President of the Employment Appeal Tribunal (EAT), Mr Justice Wood, gave guidance on the issue of whether an employer had acted reasonably as the law requires. In applying the guidance let us assume that the main reason for dismissal is the acceptable one of incompetence as in the case of a senior member of a publisher's staff who commissions books without proper market research so that they do not sell and the publisher is caused loss.

Having reached the conclusion that the incompetence is established, the employer must according to Mr Justice Wood satisfy a tribunal on four other matters, otherwise the dismissal might still be unfair, though the employee's compensation might be reduced for contributory fault (see below). The four matters are:

(a) Can the employer satisfy a tribunal that he complied with the pre-dismissal procedures which a reasonable employer could and should have applied in the circumstances of the case? If the tribunal finds that the employer has not acted reasonably in this regard, at the date of dismissal, then according to the decision in *Polkey* v *A E Dayton Services Ltd* [1988] ICR 564 it is not open to the tribunal to say that the procedures do not matter since it is clear that the employee was incompetent. The unfairness of the dismissal could still give the employee a successful claim.

The decision of the House of Lords in *Polkey* makes clear the importance of consultation. There may be grounds for the dismissal but if there is no proper consultation the dismissal may still be unfair, though compensation may be reduced if there were grounds for the dismissal.

However, it is not always necessary to consult. Thus in *Eclipse Blinds* v *Wright* (1992) 444 IRLIB 12, Mrs Wright was dismissed because of poor health. The employer received a medical report with her consent. It revealed that she was more seriously ill than she thought. Rather than upset her, the employer wrote her a sympathetic letter ending her employment on the ground of incapacity. The court held she was not unfairly dismissed in spite of the lack of consultation.

(b) Where there is a contractual appeal process, the employer must have carried it out in its essentials. A minor departure may sometimes be ignored but a total or substantial failure entitles a tribunal to find that the dismissal was unfair. Even though no contractual appeal process exists, it may nevertheless be reasonable, as was decided in *West Midland Co-operative Society Ltd* v *Tipton* [1986] ICR 192, for some sort of appeal to be arranged since this is encouraged by the code of practice issued by ACAS.

(c) Where conduct is the main reason, the employer must show, on a balance of probabilities, that at the time of the dismissal he believed the employee was guilty of misconduct and that in all the circumstances of the case it was reasonable for him to do so.

(d) During the disciplinary hearings and the appeal process the employer must have been fair to the employee. In particular, the employee must have been heard and allowed to put his case properly or, if he was not at a certain stage of the procedures, this must have been corrected before dismissal.

Following parliamentary approval of a code of practice on disciplinary and grievance procedures issued by ACAS the government brought into force both the code and the new statutory right of a worker under ss 10–15 of the Employment Relations Act 1999 to be accompanied, if he or she so requests, by a fellow employee or a trade union representative at a disciplinary or grievance hearing. The code supplements the statutory provisions.

These rights allow a trade union official to enter the workplace to represent a trade union member if the member so requests, even though a trade union (or that particular union) is not recognised by the employer. Refusal to allow accompaniment will mean that a tribunal can make an award of up to two weeks' pay against the employer and a refusal of the right followed by a dismissal will result in the chances of a successful unfair dismissal claim being increased. The employer need not tell the worker of the right.

As regards the role of the companion at the hearing, the Employment Relations Act 2004 inserts provisions into the Employment Relations Act 1999 which deal with the rights of the companion.

The employer must permit the companion to put the worker's case on behalf of the worker, to sum up that case, respond on the worker's behalf to any view expressed at the hearing or meeting, and confer with the worker during the hearing.

The employer is not required to permit the companion to answer questions on behalf of the worker, address the hearing if the worker indicates that he or she does not wish the companion to do so, or use the powers given by the Act in any way that prevents the employer from explaining his or her case or prevents any other person at the hearing from making a contribution to it.

Statutory grievance and disciplinary procedures

The Employment Act 2002 in s 29 and Sch 2 provides statutory disciplinary and grievance procedures. These have already been considered earlier in this chapter. Section 30 of the Act of 2002 makes it an implied term of every contract of employment that the statutory procedures are to apply and employers and workers cannot contract out of them. Contractual procedures may continue so long as they are as protective as the statutory procedures and the latter are there anyway if the worker wishes to use them. Provided the statutory procedures are followed in a reasonable manner their fairness will not normally be challenged by the courts and the major case on the requirement for fair procedures – the House of Lords ruling in *Polkey* v *A E Dayton Services Ltd* [1988] ICR 564 – will not apply.

Employee's contributory fault

This can reduce the compensation payable to the employee by such percentage as the tribunal thinks fit. Suppose an employee is often late for work and one morning his employer, who can stand it no more, sacks him. The dismissal is likely to be unfair in view of the lack of warning but a tribunal would very probably reduce the worker's compensation to take account of the situation.