

research paper 02/03

Public sector disputes and third party intervention

Susan Corby

Prepared for Acas

June 2003

Acknowledgements

The author would like to thank all those who have provided information for this report, particularly the interviewees, those at Acas including Jo Molloy, Stewart Gee and Allen Anie and Paul Dennison, University of Greenwich, who analysed some raw WERS data and helped me with SPSS.

Note

The views expressed in this paper are the author's and may not necessarily reflect those of Acas which circulates the paper as a contribution to discussion and debate.

Susan Corby is a Reader in Employment Relations at the University of Greenwich

For further information contact Susan Corby, The Business School, University of Greenwich,
Old Royal Naval College, Park Row, London SE10 9LS
Email: S.R.Corby@gre.ac.uk Tel: 020 8331 8200

June 2003

Public sector disputes and third party intervention

Contents

Executive Summary	1
1. Introduction.....	3
1.1 Aims and objectives	3
1.2 Methodology	3
1.3 Overview of the paper's structure.....	3
2. Definitions.....	4
2.1 The public sector	4
2.2 Disputes.....	5
2.3 Third party intervention.....	6
3. Historical background.....	7
3.1 Early developments	7
3.2 Post World War Two – 1979.....	7
3.3 1979-1997.....	8
4. Current position.....	11
4.1 Employment and union membership.....	11
4.2 The law and industrial action	11
4.3 Strikes.....	13
5. Third party intervention in the determination of terms and conditions	14
5.1 Pay Review Bodies: the mechanisms	14
5.2 Pay Review Bodies: their effectiveness.....	15
5.3 The police	16
5.4 Firefighters.....	16
5.5 Comparisons and evaluation	17
6. Conciliation.....	18
6.1 What is conciliation?	18
6.2 The extent of collective conciliation in the public sector.....	19
6.3 The Civil Service.....	21
6.4 Outcomes.....	21
6.5 User satisfaction	23
7. Mediation.....	25
7.1 What is mediation?	25
7.2 The extent of mediation	25
8. Arbitration.....	27
8.1 Defining arbitration.....	27
8.2 The CAC.....	27
8.3. Types of arbitration.....	28
8.4 Arbitration in practice.....	29
8.5 Arbitration statistics.....	29
8.6 Arbitration and the parties' autonomy.....	31
9. New approaches	32
9.1 Advisory projects	32
9.2 Customer survey of advisory projects	33
9.3 Partnership agreements	33
9.4 Other initiatives	34
10. Conclusions.....	35
10.1 Research question one.....	35
10.2 Research question two	36
10.3 Final comment	37
Appendix A: Key groups in the public sector.....	38
Appendix B: Arrangements in selected areas of the public sector.....	39
B.1 Fire Service	39
B.2 GCHQ.....	40
B.3 HM Prison Service.....	41
B.4 London Underground	42
B.5 The NHS.....	43
B.6 The police.....	44

Appendix C: Abbreviations	46
Appendix D: References	47

Table of figures and tables

Figure 1 Collective conciliation - public sector cases as a percentage of all cases.....	20
Figure 2 Pay & conditions as cause of dispute	20
Figure 3 Positive outcome from conciliation.....	22
Figure 4 Outcome of conciliation - reference to mediation, joint working party etc, arbitration	23
Figure 5 Improvements after Acas conciliation	24
Figure 6 Acas arbitration cases (number per year).....	29
Figure 7 Referral of workplace disputes to outside bodies (WERS).....	30
 Table 1: The largest annual dispute (working days lost) 1979-1996 inclusive	 10

Executive Summary

Scope and objectives

This paper explores the different procedural approaches adopted in respect of public sector employees to prevent and resolve employment disputes through the use of third party intervention. It focuses on two questions:

- What are the mechanisms provided by third parties to prevent and resolve collective disputes in the public sector and how do they work in theory and practice?
- What, if any, differences are there between the public and private sectors in respect of disputes and third party intervention to prevent and resolve them?

It is based on interviews with key informants, analysis of Acas statistics and customer satisfaction surveys and the study of published and unpublished documents.

Background

The paper starts by defining the public sector. Despite the blurring of boundaries, the public sector is characterised by a political dimension, together with uncertainties about who, in effect, is the employer: the Treasury as the ultimate paymaster, the central government department responsible, or the nominal employer, for instance the specific university, National Health Service (NHS) trust or local authority?

The public sector, coal mining apart, was a quiescent area of employment relations from World War Two until the 1970s. This changed after successive governments imposed incomes policies in the 1970s. Furthermore in the period 1979-1997 there were some long public sector disputes when the Conservative government asserted managerial prerogative, restructured many parts of the public sector and eschewed unilateral arbitration for some key public sector workers.

Disputes in the public sector have a high media profile for a number of reasons. First, the public sector is a monopoly, or near monopoly provider of services. Second, organisations in the public sector are mostly large and national in scope and thus newsworthy. Third, there are often many facts in the public domain because the government, as direct or indirect employer, is answerable to parliament so media reporting is relatively easy. Fourth, three out of five public sector employees belong to a trade union, compared to one out of five private sector employees, so collective concerns are more likely to surface to a proportionately greater extent in the public sector.

The common law and statutory provisions on industrial action apply equally to the public and private sectors. There are, though, some restrictions applying to certain public sector groups. Thus it is a criminal offence for those in the armed forces and police officers to take industrial action. Other special cases, albeit in respect of civil not criminal law, relate to the inducing of disruption at Government Communications Headquarters (GCHQ) and in prisons.

Third party intervention

Third party mechanisms in respect of the determination of terms and conditions are discussed: at the time of writing these are the six pay review bodies and the independent chairs for the Police Negotiating Board and the firefighters' National Joint Council. The review bodies have certain similarities, for instance they have the same method of working and make recommendations to the minister. Yet there are differences, principally in the amount of collective bargaining that takes place alongside them. There is no collective bargaining for the armed forces or those covered by the senior salaries review body but there is a considerable amount of collective bargaining in respect of those

covered by the NHS review bodies. Perhaps the ultimate consideration, however, is whether the review bodies have prevented strikes. In short essentially they have done so.

Whereas the third party mechanisms in the pay determination process are standing, conciliation is ad hoc. It is provided almost entirely by the Advisory, Conciliation and Arbitration Service (Acas) and is aimed at dispute resolution. Acas Head Office provides conciliation in disputes with a national dimension and handles a proportionately greater percentage share of public sector, compared to private sector cases than Acas overall. Interestingly, Acas has seldom provided conciliation in the mainstream civil service, though it has for non-departmental public bodies.

Looking at the five years from 1 April 1997, conciliation in private sector collective cases was more likely than in public sector collective cases to result in a resolution of the issue in dispute or its withdrawal. A large majority of both public sector and private sector respondents to a user survey, however, reported satisfaction with Acas conciliation.

Mediation in collective disputes is provided by Acas but it is little used. Somewhat more use is made of arbitration, but this disguises variations in usage. For instance the Prison Officers' Association on several occasions used their right of unilateral access to arbitration in the first year of such a right being given (2001-2002). On the other hand at GCHQ, the right of unilateral access to arbitration has only been used once in the five years 1997-2002. Another factor that influences usage are the access arrangements. For instance there is unilateral *and* compulsory access in respect of police officers and joint access in respect of Royal Mail employees.

Acas, while providing traditional dispute resolution mechanisms, has pioneered what it now calls advisory projects, where employer and employee representatives work in a joint problem solving mode assisted by an Acas official. Both public and private sector users responding to an Acas customer survey in 2002 overwhelmingly signified their satisfaction. Other new dispute prevention arrangements provided by third parties include the partnership deals brokered by the Involvement and Participation Association and the TUC's Partnership Institute.

Conclusions

The form of third party intervention varies in extent and nature in response to circumstances and no two groups of public sector workers are treated exactly the same. Using different mechanisms and in different contexts, however, an impartial 'outsider' often plays a key role in aiding the parties to reach agreement, whether using the traditional Acas devices of collective conciliation, mediation and arbitration or new approaches often encapsulated in partnership agreements.

There are only a few, but nevertheless significant differences between public and private sector disputes and third party mechanisms. These include the following:

- Third party mechanisms for the determination of terms and conditions, such as review bodies and independent chairs of negotiating bodies, are only found in the public sector. Essentially this is because the fundamental relationship between capital and labour is not present in the public sector in the same way as it is in the private sector. For instance government derives the revenue to pay its employees primarily from taxation, rather than payment for goods/services that the employees provide.
- Public sector disputes are more likely than private sector disputes to have a national dimension.
- Conciliation in public sector disputes is less likely to result in resolution and thus more likely to result in further third party intervention such as mediation, a joint working party, a committee of inquiry or arbitration than in private sector disputes, according to Acas statistics.
- The government predominates in public sector pay determination, whether or not it is legally the employer and in many areas this predominance is manifested formally and overtly; for instance review body reports are in the form of recommendations to the minister, as are Police Negotiating Board agreements. In addition, this predominance is sometimes manifested covertly through discussions between civil servants and the nominal employers or even intervention by ministers in pay negotiations. The government does not have the same role in private sector negotiations. It may take an interest and even express a view privately, but it does not predominate.

1. Introduction

1.1 Aims and objectives

With headlines such as “Blair faces union summer of discontent” (Watt and Maguire, 2002), public sector disputes were very much in the news in 2002. Yet away from the public eye, there are mechanisms employed by independent third parties to prevent, contain and control such disputes. Whatever mechanisms are employed, however, disputes in the public sector are often complex because of the political dimension and the intricacies of financial and managerial control. They therefore pose particular problems in respect of third party intervention and require separate, detailed description and analysis.

Against that background, this paper focuses both on the procedures and practices of third party intervention in public sector disputes, as well as exploring the relationship between third party involvement and the autonomy of the parties. Its objective is to raise awareness and stimulate discussion. The research questions addressed are:

- What are the mechanisms provided by third parties to prevent and resolve collective disputes in the public sector and how do they work in theory and practice?
- What, if any, differences are there between the public and private sectors in respect of disputes and third party intervention to prevent and resolve them?

1.2 Methodology

This paper is based on information derived through a number of research methods. First, published and unpublished documents were examined. The latter included procedure agreements and mediation and arbitration reports. Second, seven interviews were held with key informants who had had experience of third party involvement in the public sector, either as independents or employer or union representatives. These interviews, which were conducted in the summer of 2002, lasted for at least an hour and were taped and transcribed. Third, Advisory, Conciliation and Arbitration Service (Acas) management statistics for the five year period from 1 April 1997 were analysed. These covered collective conciliation, mediation and arbitration statistics for every case handled by Acas in the period, both public and private sector. Public/private sector splits were obtained by transposing the data to the Statistical Package for the Social Sciences (SPSS). In addition, the Acas Research and Evaluation section provided the results of recent user satisfaction surveys in respect of collective conciliation and advisory projects in the form of a public sector/private sector breakdown.

1.3 Overview of the paper's structure

The paper starts by defining its scope and in particular, what is meant by the public sector. It also looks at the historical background to place the present position in context and for analytical purposes distinguishes three periods - up to the end of the second world war, the end of the second world war up to 1979, 1979-1997. The paper next examines the current position summarising the law relating to industrial action generally and the law relating to industrial action for specific groups.

Having considered the context, it turns to third party intervention in the determination of terms and conditions: pay review bodies and the negotiating bodies for police officers and firefighters, both of which are currently chaired by independents. It then considers third party mechanisms to resolve disputes: conciliation, mediation and arbitration. Finally it explores new ways in which unions and public sector managers are working together with assistance from a third party to forestall conflict. These include mechanisms such as advisory projects by Acas and partnership arrangements.

2. Definitions

2.1 *The public sector*

This paper, which considers public sector disputes and third party intervention, starts by defining its terms and, in so doing, outlines its scope.

Distinctions between the public and private sectors are not clear-cut. The difference does not relate to the absence of profit, as that is a characteristic which is found both in the public sector and in 'not for profit' organisations in the private sector. Nor does it relate to the higher trade union density in the public sector compared to the private sector, as this has not always been the case. Also in some parts of the public sector, ie the armed forces, police officers and police cadets, trade unions are outlawed. Nor does the difference relate to government control. For instance the private train operating companies are subject to the Strategic Rail Authority, a government appointed body, and the utilities have regulators and would probably meet the European Court of Justice's definition of 'emanations of the state' (*Foster v British Gas plc*, 1990). Moreover, both public and private sector employers are subject to the outcomes of political power through economic and social policies and legislation. In addition, there is no division between the law of public sector employment and that of private sector employment, as exists in some other European countries.

Indeed, "there is no absolute frontier between the public and private sectors" (Cabinet Office, 1995:127). Furthermore, the boundary has become even more blurred since these words were written as a result of, for instance, public/private partnerships and continuing organisational changes in the public sector such as privatisation and competitive tendering. Beaumont (1992:10), however, is of the view that there are some key distinctions "such as:

- (a) Market information, signals and incentives are relatively absent for public sector organisations, although they are subject to much greater influence by external political and governmental institutions.
- (b) Public sector organisations are exposed to more scrutiny and accountability than their private sector counterparts.
- (c) Public sector organisations' goals are more numerous, intangible and conflicting than is the case in the private sector.
- (d) Public sector managers have less autonomy due to constraints such as civil service rules.
- (e) Public sector organisations have relatively more elaborate, formal rules, reporting requirements and more rigid hierarchical arrangements."

Fredman and Morris (1989) characterise the key distinctions between the state as direct or indirect employer and private sector employers slightly differently. First, they argue, the state, unlike private sector employers, has the power to initiate legislation and to take executive action which impacts directly on employment relations. For instance it legislated to ban the Prison Officers' Association from inducing industrial action in 1994 and established a pay review body for prison officers in 2001. Second, the government derives the revenue to pay its employees primarily from taxation and not primarily from the output of employees. This allows the government when dealing with its employees to give priority to political or macro-economic factors, rather than commercial ones. For instance where industrial action has a financial impact, the state, unlike most private sector employers, has the resources to make a political decision not to accede to the demands of employees. Third the state, unlike private sector employers, can seek to justify its employment relations decisions on the grounds of 'national interest'. Fourth, unlike private sector employers, the state is subject to the constraints of parliament and the electorate. This has particular implications for employment practices, for instance that recruitment and promotion is effected by transparent rules, not nepotism.

In a nutshell, and focusing on employment relations, despite the blurring of boundaries between the public and private sectors, there is a difference and the main difference, this paper argues, is the political dimension. Nevertheless, the degree of political control varies. Civil servants are directly subject to the wishes of government so employment relations changes, such as the introduction of contracting out, may be accomplished by ministerial decree. In other parts of the public sector there are mediating forces which may limit the authority of central government. They range from the

relatively powerful, as in local government where the controlling political party may differ from that of central government, to the relatively weak, such as the boards of National Health Service (NHS) trusts (Corby and White, 1999).

A key concomitant of this political dimension is the uncertainty about who in effect is the employer. This is a characteristic of the public sector but is virtually absent in the private sector. Even in the civil service, where the government is the direct employer, there are complexities. A civil servant is employed by his/her department headed by a minister accountable to parliament but the department obtains its budget from the Treasury and, for instance, before pay negotiations can start the departmental official side's pay remit has to be cleared by the Treasury (Talbot, 1997).

In other areas of the public sector, the position is yet more complicated as the government is the indirect employer. For instance NHS staff are employed by a NHS trust and yet essentially NHS pay is determined nationally with departmental civil servants and the Health Secretary having a key role. This was summed up by Lord McCarthy (1976, para 2) as "employers who do not pay and paymasters who do not employ". Similar considerations apply elsewhere in the public sector. Even universities and local government which have their own sources of income, are dependent on government money. For instance the latter derives over half its funding from central government (Corby and White, 1999).

2.2 Disputes

A dispute according to the Concise Oxford Dictionary is a "difference of opinion". In the employment arena, there is some confusion on the part of academics about what exactly is a dispute. On the one hand the parties are said to be in dispute if a matter is in procedure but has yet to be resolved. On the other hand, the parties are said to be in dispute if they fail to agree at the end of the procedure (Burchill, 1997:2002). This confusion seems to be shared by practitioners. A survey by IRS of 75 employers found that "significant minorities (almost a third each) either argued that a dispute occurred when the use of industrial action is threatened or, conversely that they preferred not to consider any case to be a dispute, only ever a grievance." (IRS 2002:13) . This paper uses the term "dispute" to mean a difference between the parties after the internal procedure has been exhausted.

Some disputes arise out of collective issues and others arise out of individual issues. In practice, however, the boundary between individual and collective issues may be blurred. An issue which affects an individual and may result in him/her taking out a grievance or taking a claim to an employment tribunal, may have implications for others. For instance the results of the equal value speech therapy case of *Enderby v Frenchay Health Authority* (1993) had an impact on the many thousands of speech therapists who work for the NHS. This paper adopts the definition used by Acas. It classifies a dispute as collective or individual not by the issue in dispute, but by the parties. If the dispute is between a trade union and employer (and not an individual and employer) it is a collective dispute.

It should be pointed out that the manifestations of a dispute in industrial action, such as an overtime ban, work to rule, go-slow or strike action are virtually unknown in union free workplaces. Union density is currently higher in the public sector than the private sector; in autumn 2001 it was 40 percentage points higher (Brook, 2002: 345). Accordingly employment disputes in the public sector are more likely to result in organised collective action than in the private sector. Indeed, the 1998 Workplace Employee Relations Survey (WERS) found that industrial action was more likely to have occurred in larger workplaces and in the public sector. "Public sector workplaces were, however, substantially less prone to resignations than workplaces in the private sector" (Cully et al, 1999:127). They were also less likely to have had any ET complaints. Cully et al, (1999:129) found that 13 per cent of public sector workplaces had had ET complaints in the last five years, compared to 33 per cent of private sector workplaces.

There is often a high profile attached to those public sector disputes which result or might result in industrial action because generally the public sector is the monopoly or virtual monopoly provider of a service. If industrial action results in the failure to provide goods or services in the private sector, eg a car, a hotel, a newspaper, then the customer can readily obtain the goods or services from another supplier. If industrial action results in a stoppage of work in education, or the social services, alternative provision cannot readily be obtained. If there is a withdrawal of labour in London Underground, travellers will have to walk/ take buses or drive on overcrowded roads. If there is

industrial action in prisons “control and good order within prisons can be lost; and prisoners can end up being denied humane treatment through being locked in their cells” (Straw, 1998). If there is industrial action in any of the emergency services life or limb may be put at risk.

Another reason for the high profile is that because the government is the employer directly or indirectly in the public sector, ministers (as noted in sub-section 2.1) are answerable to parliament and thus there are often many facts on the record. This facilitates media reporting. Moreover, most public sector organisations are large organisations; eg one million people work in the NHS and almost half a million work in the civil service and thus are more likely to attract media attention than small organisations. Finally some public sector disputes may perhaps be viewed as having political overtones where they are directed against government policy.

2.3 Third party intervention

This paper will look at various forms of third party intervention. There are a range of bodies, some of which are funded by government, but operate at a day to day level independently of it and contribute to the prevention and resolution of disputes. Foremost among these is the Advisory, Conciliation and Arbitration Service (Acas) which was placed on a statutory basis by the Employment Protection Act, 1975. Acas is directed by a Council made up of a part-time chair and eleven members drawn from employer, employee and independent backgrounds. (See the latest Acas annual report for a full description of the work of Acas). Acas provides conciliation, mediation, arbitration and advisory services throughout Britain.

Other third party bodies, however, operate only in respect of a specific function, eg arbitration within a statutory framework provided by the Central Arbitration Committee, partnership arrangements provided by the Involvement and Participation Association; or in respect of a specific function and area eg the Police Arbitration Tribunal, the Review Bodies (see sub-section 5.1).

Hunter (1977) argues that a third party can act as a catalyst speeding the process of settlement, thus saving costs to the parties. He also argues that third party dispute resolution mechanisms should be virtually free to those who use them because the state has an interest in industrial peace. Hunter does not, however, undertake a full cost-benefit analysis. He says:

The task would be a formidable one, partly because of the difficulty of evaluating the output finally lost because of industrial action (including secondary effects) and partly for technical reasons such as the need to estimate the real resource costs of supplementary benefit payments, possible multiplier effects of expenditure and the implications for government tax revenue (Hunter, 1977:241).

3. Historical background

3.1 Early developments

Regularised employment in the public sector can be traced back to the mid-nineteenth century and, in particular, to the social reforms which led to local government systems for towns and counties and to a growth in central government. Not only did the craft unions organise their trades people working in the Royal Ordnance factories, Royal Dockyards and the Stationery Office but, more specifically, public sector unions were formed. For instance the National Union of Elementary Teachers was founded in 1870, partly in response to grievances over the payment by results system for teachers introduced in 1862 (Clegg *et al*, 1964:3). The three constituent unions (COHSE, NALGO, NUPE) which created Unison in 1993, currently the largest public sector union, can trace their origins back to the turn of the century. For instance NALGO (the National and Local Government Officers Association) was formed in 1905 by a merger of the Municipal Officers' Association and the Liverpool Municipal Officers' Guild (Ironsides and Seifert, 2000).

A major breakthrough for public sector employment relations came following the Whitley Committee of 1917, which recommended the establishment of collective bargaining and joint consultation throughout British industry. To give a lead the government adopted a Whitley system for its own employees, the National Whitley Council for the civil service, and established the Burnham Committee, based on Whitley principles, to deal with school-teachers' terms and conditions (Corby and White, 1999). By 1933 collective bargaining was the acknowledged practice of the great majority of local authorities, though "the framework of Whitley machinery and national terms and conditions was only finally completed after the second world war" (White and Hutchinson, 1996: 206).

This period also saw the development of state provided third party intervention. Industrial relations arbitration can be traced back to the Cotton Arbitration Act of 1800, The Arbitration Act 1824, The Arbitration (Masters and Workmen) Act 1872, and The Conciliation Act 1896. The latter gave the government statutory powers to inquire into disputes, and to initiate conciliation or arbitration but was little used. In contrast, the Industrial Court, established in 1919 as a result of a recommendation in the Whitley report, was much used, perhaps because the parties had grown used to arbitration during the 1st World War (Rideout, 2002).

3.2 Post World War Two – 1979

Between 1945-50 the Labour government took into public ownership a number of industries, including coal, steel and the railways and the nationalisation acts placed management under a legal obligation to recognise and consult with trade unions. It also established the National Health Service (NHS), simultaneously introducing a system of NHS Whitley Councils.

At the same time as providing negotiating forums in the public sector, successive governments sought to be a model employer. For instance they provided *de facto* job security, pensions, sick pay, effective grievance machinery, procedures for promotion, a central role for the unions in the management of change and an emphasis on pay comparability with the private sector, which in the civil service led to elaborate pay determination mechanisms known as the Priestley system. Furthermore, there were third party devices to resolve disputes, ie conciliation and arbitration, often with a right of unilateral access (Hepple, 1982). For instance there was unilateral access to arbitration in British Gas, British Waterways, the Post Office, local government, the water industry, the civil service and the police service. These last three had bespoke arbitral bodies (Beaumont, 1992).

During the 1960s employment in the public sector grew with for instance the creation of new universities and polytechnics, the raising of the school leaving age, the expansion of the NHS and the development of the services provided by central and local government. This led to a growth in employment costs which were largely under-written by government (Winchester, 1983). Perhaps as a result, during the 1960s and early 1970s public sector industrial relations were essentially quiescent. For instance the Donovan Commission (Royal Commission, 1968) had little to say about the public

sector, which it saw as a haven of peaceful industrial relations, coal mining apart. Nevertheless, the period from the second world war to the late 1960s should not be viewed through rose coloured spectacles as Colling (1997) warns. Moreover, the 'good employer' model did not stop public sector employers from keeping pay levels low for many of its employees (Thornley, 1994).

There was, however, an all-party consensus that the state should be a 'good' employer and this was buttressed by a favourable economic situation. From the mid-1960s to the end of the 1970s, however, there was a series of economic crises, exacerbated by the marked rise in oil prices from 1973. This led to a rise in inflation, which peaked at 26 per cent in 1975 (Winchester and Bach, 1995). In an attempt to control this soaring inflation successive governments introduced incomes policies. Thus in 1964 the Labour government made a prices and incomes policy central to its economic strategy and new governments, elected in 1970 and 1974, first abandoned their predecessors' incomes policies and then introduced their own measures of wage restraint when faced with economic difficulties. Also, in 1976, in response to intervention by the International Monetary Fund, the Treasury introduced cash limits into the public services, with the result that public expenditure was no longer demand led.

These government policies were increasingly opposed by the public sector unions, primarily because the government chose to set an example for all employers by strictly adhering to the prescribed pay limits for its own workforce. Thus unlike the private sector, there was little, if any, collusion between the employer and the unions to avoid the limits. Accordingly from the early 1970s "trade unions and their increasingly restive members responded through industrial action, and in the process abandoned their traditionally moderate image" (Winchester and Bach, 1995: 309). Indeed industrial action began to spread rapidly through the public sector as civil servants, local government workers, firefighters, health workers, teachers and coal miners began to exert their industrial power. This culminated in the so-called Winter of Discontent 1978-79, a series of mainly public sector strikes, essentially resolved through the establishment of a special pay body, the Clegg Commission.

The Clegg Commission, was not the only example of third party intervention to resolve disputes. The Conciliation and Arbitration Service, soon renamed the Advisory, Conciliation and Arbitration Service (Acas), was established in 1974 and the Central Arbitration Committee (CAC) was established to supersede the Industrial Court in 1976. The CAC took over the latter's jurisdiction in respect of the Fair Wages Resolution and its statutory extensions. In addition it acquired new powers to consider claims that collectively agreed standards should be extended¹ and that recognition orders had not been met. Furthermore, it could amend collective agreements which discriminated between men and women and consider complaints by trade unions in respect of disclosure of information for collective bargaining.

3.3 1979-1997

During the period 1979-1997 when the Conservative party was in government, it rejected the political consensus shared by its predecessors, whatever their political complexion, in respect of employment relations generally and public sector employment relations in particular. Instead it based its policy initiatives on the ideas of leading right wing intellectuals who in turn based their philosophies on the work of Hayek and Friedman. They held that the market was the most efficient way of allocating goods and services and that collective bargaining by trade unions interfered with the functioning of the labour market (Wedderburn, 1989). Accordingly, the government's legal enactments restricted and regulated incrementally the scope for lawful industrial action in terms of its protected purposes and scope and the procedures which must precede it. "As well as thereby extending the remedies available to employers faced by industrial action it ... also made available to union members and, latterly, the wider public, mechanisms for encouraging challenges to the organisation of such campaigns" (Deakin and Morris, 1995:761). Though Acas remained unscathed, the CAC was shorn of all its powers except the hearing of disclosure of information complaints. As to macro-economics, the government's pursuit of so-called monetarism led to levels of unemployment in the mid-1980s of 10 per cent or more compared with 2-5 per cent in the 1970s and this weakened the bargaining position of trade unions (Burchill, 1997).

Turning to the public sector, the government involved the private sector in the provision of public sector services through compulsory competitive tendering/market testing in local government and in the civil service and then, from the early 1990s, through the Private Finance Initiative under which the private sector is both a provider of services and of capital. The Conservative government also introduced proxies for market mechanisms in the civil service (by the creation of executive agencies);

¹ Schedule 11 of the Employment Protection Act, 1975.

in the NHS (by the creation of an internal market through a purchaser/provider split) and in education (by local management of schools and the incorporation of further education colleges and polytechnics/new universities). In addition, it privatised nationalised industries including telecommunications, steel, coal, electricity, gas, water, railways, bus services, British Airways and docks.

This summary, however, necessarily ignores sub-sectoral differences. For instance the government imposed considerable employment changes on civil servants, but relatively few changes in the police service. It also ignores the fact that at times pragmatic considerations predominated over ideological ones. An example is the creation of a pay review body for nurses and paramedical staff in 1983 and for school-teachers a decade later, rather than leaving the pay of these groups to be determined purely by the parties.

Focusing on public sector disputes, as can be seen from table 1, apart from the years 1979, 1987 and 1990, the largest annual dispute, as measured by working days lost in a stoppage, was in the public sector. The figures in table 1, however, are not adjusted according to relative size of organisation/sub-sector and there was a general downward trend in the incidence of stoppages during the period covered by the table (1979-1996). Bearing in mind these caveats, it should be noted that between 1975 and 1979, the incidence of days lost through strikes was higher in the private sector than the public sector. The 1980s saw a reversal of this pattern.

One reason for the protracted nature of public sector disputes in the period 1979-1997 was that Conservative governments sought to assert managerial prerogative. To this end, for instance, the first Thatcher administration prosecuted the 13 week strike at British Steel Corporation in 1980 "to its bitter end to achieve, as one minister told me with grim relish at the time 'a demonstration effect'" (Young, 1990:195). In the civil service dispute in the following year, the government was prepared to endure a 20 week strike although the cost in lost revenue collection far outweighed the amount of the pay increase sought by the civil service unions. Indeed Acas recorded its concern at its delayed involvement in the steel dispute (Goodman, 2000) and it was not invited to conciliate in the civil service dispute.

The government also blocked the use of arbitration in the civil service in 1981, even though at that time there was theoretically unilateral access, and rejected it where there was joint access, for instance in the NHS strike of 1983 and in the ambulance dispute of 1989/90. Furthermore a government report in 1981, which examined 17 public sector arbitration agreements, recommended re-negotiation so that there would no longer be unilateral access to arbitration, traditionally more prevalent in the public than the private sector (Beaumont, 1992). It argued that arbitration favoured the union side, potentially undermined cash limits and encouraged irresponsibility among the parties. This change from unilateral to joint access was introduced in respect of school-teachers in England and Wales and civil servants and was then overtaken by privatisation of the utilities².

This is not to say that there was no third party intervention during the period 1979-1997. "Acas was heavily involved through a (rare) Committee of Inquiry in the major water dispute in 1983, and also appointed an independent panel (chaired by Sir John Wood) in an attempt to mediate in the 1985/86 teachers' dispute" (Goodman, 2000:48). There was also Acas conciliation in the NHS at district level, and in local disputes in the civil service, for instance in 1984 at the DHSS computer centre in Newcastle upon Tyne (Lowry, 1990).

Nevertheless, these were exceptions and the stance of the Conservative governments was one of resistance to third party intervention and of resistance to pluralism. According to Young (1990:358) the banning of union membership at Government Communications Headquarters (GCHQ) epitomised the stance of the state as employer. "It expressed an attitude, announced a determination, and enforced a priority which previous governments shrank from."

² Against this trend, the right of unilateral access to arbitration was accorded to House of Commons staff in 1986, although binding awards are subject to the overriding authority of the House and compliance with the House of Commons Administration Act 1978 (Fredman and Morris, 1989).

Table 1: The largest annual dispute (working days lost) 1979-1996 inclusive

Year	Group	Working days lost		Cause	Remarks
		Number (Millions)	% of total ³		
1979	Engineering workers	16.0	54%	Pay	
1980	Steel workers	8.8	74%	Pay	
1981	Civil servants	1.1	25%	Pay comparability	
1982	Railway worker	1.2	21%	Pay	Three large national stoppages. Also dispute in NHS May-Dec.
1983	Water workers	0.8	21%	Pay	
1984)	Mineworkers	22.4	83%	Pit closures	This dispute, which began on 12/3/84 and ended on 4/3/85, resulted in an overall total loss of 26.4 mn working days,
1985)		4.0	63%		
1986	School-teachers	0.3	19%	Pay	Industrial action by teachers began in 1985. In Scotland the dispute was for an independent pay review and in E & W it was for an improved pay offer.
1987	Workers in telecommunications	1.5	41%	Pay	The second largest dispute was in the civil service over pay
1988	Postal workers	1.0	28%	Employment of casuals	
1989	Council workers	2.0	49%	Pay	NALGO members
1990	Engineering workers	0.3	16%	35 hour week campaign	Five separate disputes
1991	Council workers	0.1	13%	redundancies	
1992	Council workers	0.8	15%	redundancies	
1993	Civil servants	0.2	25%	market testing, privatisation, cuts in service	
1994)	College	0.1	22%	Introduction of new employment contracts	
1995)	Lecturers	0.4	9%		
1996	Postal workers	0.8	62%	Pay increases allied to productivity	Various areas of the UK

Source: Employment Gazette 1981-1994; Labour Market Trends 1995-1997⁴.

³ Working days lost in all industries and services

⁴ For a technical note about the definition of a stoppage and working days lost see Labour Market Trends, 2001, June 313-314.

4. Current position

4.1 Employment and union membership

The public sector now accounts for more than 40 per cent of gross domestic product (Richardson, 2002) and almost a fifth of all employment. Total UK workforce jobs in 2001 were 29,424,000 of which 5,163,000 (18 per cent) were in the public sector defined as including central and local government and public non-financial corporations such as NHS trusts, British Broadcasting Corporation and the Post Office. The universities and further education colleges, however, are deemed for statistical purposes to be in the private sector.

In 1981 the public sector workforce was nearly 30 per cent of the total workforce but 20 years later it had declined by some 10 percentage points (Hardwidge, 2002; Audit Commission 2002). Yet the number of people providing public services has increased because many are employed in the private sector.

The age profile of the public sector workforce differs from that of the private sector with the former having an older workforce: 16 per cent of the public sector workforce were under 30, compared with 31 per cent in the private sector in 2001. Indeed over 27 per cent of public sector staff were aged over 50. 80 per cent of all public sector jobs were in education, local government and the NHS with 376,000 jobs in the social services alone. Essentially because of privatisation and contracting out, the ratio of manual workers to non-manual workers in the public sector has declined in the last 20 years (Hardwidge, 2002; Audit Commission, 2002).

As noted in sub-section 2.2, union density is significantly higher in the public sector than the private sector. Whereas in 2001 in the public sector three out of five employees in the UK were in a union, in the private sector it was less than one in five (Brook, 2002). Similarly 73 per cent of UK public sector employees were covered by a collective agreement, compared to 22 per cent in the private sector.

4.2 The law and industrial action

Any consideration of public sector disputes must be placed in the context of the law on industrial action. At an international level, there is no reference to the right to strike in the relevant Conventions of the International Labour Organisation (ILO): Freedom of Association and the Right to Organise (number 87) and the Right to Organise and Collective Bargaining (number 98). In practice, however, the right to strike has been derived by the supervisory bodies from the right to organise. This is because the ILO "has consistently affirmed that this is one of the essential and legitimate means by which workers and their organisations may promote and defend their economic and social interests..." (Deakin and Morris, 1995:753-4).

Dealing with the public sector, the right to strike is limited. First, "the armed forces and the police" can be exempt from Convention 98 (article 5). Second, Convention 151 on Labour Relations (Public Service) says:

The extent to which the guarantees provided for in this Convention shall apply to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature shall be determined by national laws or regulations.

The same restrictions on scope are also applied "to the armed forces and the police" (article 1). Third, the ILO Committee of Experts (1983:66) has said:

If strikes are restricted or prohibited in the public services or in essential services, appropriate guarantees must be afforded to protect workers who are thus denied one of the essential means of defending their occupational interests. Restrictions should be offset by adequate impartial and speedy conciliation and arbitration procedures, in which the parties concerned can take part at every stage and in which the awards should in all cases be binding on both parties. Such awards, once rendered, should be rapidly and fully implemented.

At a national level, the law on industrial action is highly technical and complex and there is no statutory definition of industrial action, which covers strikes and lock-outs and lesser forms of action such as bans on compulsory or voluntary overtime, go-slows and work-to-rule. At a collective level whether

industrial action attracts legal liability depends on the interaction between common law and statute. In relation to the individual worker industrial action almost invariably involves a breach of the contract of employment and there is only limited protection against dismissal.

This paper does not attempt to summarise the law and readers are referred to the relevant employment legislation booklets published by the Department of Trade and Industry⁵. Suffice it to say that a three stage inquiry is necessary: first, does the industrial action involve the commission of a tort for which there would be liability at common law; second, if there is liability at common law, is there statutory immunity for acts done in contemplation or furtherance of a trade dispute; third, is the immunity conferred by statute lost? Immunity may be lost for a number of reasons, for instance because a union took industrial action without a valid ballot or without giving the employer due notice or because the union took unlawful secondary action. Once liability has been established, the “most common and effective remedy available to employers is an interim injunction to restrain industrial action from commencing or continuing... Employers also have the option of bringing civil proceedings for damages, although this is far less common” (IDS, 1999a:5).

The common law and the statutory provisions apply equally to those workers in the public and private sectors but of particular salience in the public sector is whether a dispute qualifies as a trade dispute, rather than a dispute against government policy. A court will not look at the union’s motive but at the subject matter, see for instance the London Borough of Wandsworth v National Association of Schoolmasters/Union of Women Teachers (1993). In that case the Court of Appeal held that the union’s instruction to its members to boycott tests and assessments associated with the national curriculum dispute between the union and the Secretary of State was a trade dispute. It accepted that the dispute was about working time and excessive workload. As the Court of Appeal held in *University College London Hospital NHS Trust v Unison* (1999:34):

A union can have a policy of opposing a particular course of action root and branch which is seeking to achieve a political objective. At the same time it could have a more limited objective, namely to alleviate the adverse consequences which it anticipates could flow from the more general policy. That more limited objective can be the reason for taking strike action. That more limited policy can comply with the requirements of s.244 [the list of items which qualify as a trade dispute].

In addition to the common law and statutory restrictions applying to workers whether they are in the public or private sectors, there are some restrictions applying to certain groups. First striking or taking industrial action constitutes a criminal offence for members of the armed forces and police officers and cadets, who additionally cannot be represented by a trade union. Police officers up to the rank of chief inspector may join the Police Federations, which are not trade unions at law. Second, postal workers can be prosecuted under the Regulation of Investigatory Powers Act 2000 for intentionally intercepting a communication in the course of its transmission, as can private sector telecommunications workers⁶. It is strongly arguable, though that striking postal workers are not intercepting a communication in the course of its transmission if they are not at work.

Other special cases, albeit in respect of civil not criminal law, are prison officers and those employed at GCHQ. The Criminal Justice & Public Order Act (CJPOA) 1994, section 127 created a statutory tort of inducing a prison officer to withhold his services or commit a breach of discipline. The duty was owed to the Secretary of State who could seek an injunction or damages. These provisions, however, were superseded by the Industrial Relations Procedure Agreement 2001 between HM Prison Service and the Prison Officers’ Association, a legally enforceable agreement which outlaws disruption in public sector prisons and provides the Secretary of State with the same remedies as were provided under the CJPOA.

Inducing disruption at GCHQ is also outlawed, but by a legally binding collective agreement concluded in 1997, not statute. The GCHQ agreement, though, limits the unions’ financial liabilities for breach to an aggregate of £10,000 per union in respect of any or all breaches “arising out of, or incidental to a single dispute or a connected series of disputes”.

Wood (1992: 267) considers that there is a conflict between industrial action law and the traditional industrial relations methods of resolving disputes through conciliation, mediation and arbitration. He says:

⁵ PL869 Industrial Action and the Law: Employee’s Version; PL870 Industrial Action and the Law: Employer’s Version.

⁶ The only other private sector workers for whom it is a criminal offence to strike are merchant seamen/women, when at sea.

Legal control is concerned, properly, with ensuring that the rules regulating industrial action are not broken. This is a different matter from settling a dispute. It is concerned with the manner in which the dispute is pursued, not in the discovery of the terms upon which it can be settled.

4.3 Strikes

There are problems in separating out public sector strikes from private sector strikes because the Office of National Statistics (ONS), which defines a strike as a stoppage of work arising from a labour dispute, categorises strikes by standard industrial classification (SIC). In some industries eg “transport, storage and communications” there is a mixture of the public and private sector eg those employed by London Underground and by the train operating companies; those employed by the Post Office (Consignia) and those employed by British Telecommunications plc.

According to an ONS spokesperson: “We do not publish figures by public/private split, and as the number of working days/stoppages have decreased over time, to do so would put at risk the confidentiality agreement we have with employers”⁷.

Looking at the strike figures as a whole, (ie not split between public and private sectors) the principal cause for disputes 1991-2000 was pay, closely followed by redundancy. Also during the 1990s, the pattern of strikes changed. There was an increasing tendency for workers to stage a series of one day strikes related to the same issue but spread over several weeks or months or to wage selective action, rather than continuous all-out strike action. “Such disputes can be sustained by both parties for quite lengthy periods, often exacerbating the tensions involved and leading to further entrenchment of positions” (Acas, 1997:9).

Whilst ONS statistics cannot provide a public/private sector split in respect of strikes, WERS 1998 can. Using the employer responses, 8 per cent in the public sector said that there had been a strike in the last five years and 7 per cent said there had been some other form of industrial action. The comparable figures for the private sector were 1 per cent in both cases. (The difference was significant: chi squared <0.001).

⁷ Email to author: 24.6.2002.

5. Third party intervention in the determination of terms and conditions

Having looked at the background we now consider the mechanisms adopted for third party intervention in public sector disputes. This section looks at standing bodies where there is third party intervention in the determination of terms and conditions.

5.1 Pay Review Bodies: the mechanisms

The pay review bodies (PRBs) provide third party intervention in the pay determination process and are a “peculiarly British method for the determination of pay for public servants” (White, 2000:71). There are six pay review bodies, which together cover over a quarter of all UK public servants, as follows:

- *Armed forces*: 210,000 commissioned and non-commissioned officers and other ranks;
- *Senior salaries*: 3,000 senior civil servants, 119 senior officers in the armed forces, 1,700 judges, members of parliament, ministers, members of the Scottish Parliament, the Welsh Assembly, the Northern Ireland Assembly and the Greater London Authority;
- *Doctors and dentists*: 141,500 hospital doctors, public health doctors, general practitioners and dentists in England, Wales and Scotland;
- *Nurses, midwives and professions allied to medicine*: 416,000 whole time equivalent nurses, midwives and health visitors and 54,300 radiographers, physiotherapists, occupational therapists, chiropodists, dieticians, orthoptists, drama, art and music therapists in England, Wales and Scotland ;
- *School-teachers*: 482,220 school-teachers in England and Wales;
- *Prison Service*: 24,000 prison officers, 5,900 night patrol officers and prison auxiliaries and 1,100 governors in England and Wales plus the equivalent grades in the Northern Ireland Prison Service.

IDS, 2002

There are both similarities and differences between the PRBs. As to the similarities: though independent of government, all are established with a chair and committee of members appointed by the Prime Minister or the relevant Secretary of State and “the composition of the review bodies is in no way intended to reflect the various interests within the services they cover” (Fredman and Morris, 1989:184). All are supported by the government funded Office of Manpower Economics (OME) in three main ways. First, the OME provides accommodation for the PRBs. Second, it provides a secretariat. Third, it provides statistical support, carrying out pay surveys. If the PRBs want additional research which the OME has not the resources to undertake in-house, it sub-contracts and manages the research. For instance it managed the research undertaken by MORI when it conducted a survey of hospital consultants’ workload and responsibilities for the Review Body on Doctors’ and Dentists’ Remuneration (1999).

Another similarity relates to the fact that all the PRBs essentially adopt the same ways of working. They all visit their various ‘constituencies’, for instance schools, hospitals and military establishments and they all take evidence from interested parties separately, both written evidence and oral evidence given in camera. The interested parties reflect the complexities inherent in public service employment: the bodies representing staff, the employers, the government department concerned. Then, taking account of the evidence received, the statistical research from the OME and any specially commissioned research, the PRBs publish their recommendations to government in a report, which also indicates the thinking behind the recommendations and summarises the main evidence received. The government can accept/reject/stage the PRBs’ recommendations, but in practice rejection is extremely rare. “The recommendations may not suit everybody but they are always set within parameters close to the expectations of the parties” (Burchill 2000a:151). (For further details see White, 2000).

There are, though, significant differences between the PRBs. Perhaps the most important distinction refers to whether the pay review body for the group in question operates alongside collective bargaining. Those in the Armed Forces are not represented by a trade union and cannot strike (see sub-section 4.2 above) and there is no collective bargaining. Similarly there is no collective bargaining for those covered by the Senior Salaries Review Body (SSRB) (formerly known as the Top Salaries Review Body).

The position of senior civil servants, however, is different from the other groups covered by the SSRB in that their unions are recognised for consultation. Senior civil servants are on individual contracts and their pay is delegated to departments within a framework laid down by the Cabinet Office. The role of the SSRB is “firstly, to monitor the operation of the pay system to help ensure its general fairness, effectiveness and cohesion, and, secondly, to recommend increases to the maximums and minimums of the pay ranges” (IDS, 2002:109). The relevant trade unions for senior civil servants (most are in the Association of First Division Civil Servants (FDA)) can represent senior civil servants individually, make representations to the SSRB and take part in joint consultation with Cabinet Office, departments and agencies.

In contrast, two other pay review bodies, the Doctors’ and Dentists’ Review Body (DDRB) and the PRB for nurses, midwives, health visitors and professions allied to medicine, which together cover over half of the employees in the NHS, co-exist with a considerable amount of collective bargaining and autonomy of the parties. Thus the contract for consultants (ultimately rejected by doctors) was negotiated in 2002 outside the pay review body. Similarly the new pay structure for non-medical staff in the NHS, *Agenda for Change*, was negotiated by the parties outside the PRB, as was a long term pay deal effective from April 2003; see appendix B.5. Moreover, while some conditions are within the remit of the PRB for nurses and paramedicals, such as standby, on-call and London allowances, there is collective bargaining about other conditions, such as overtime premia, holiday entitlement and car mileage allowances and trust-level bargaining over certain terms and conditions. In addition, there has been unilateral imposition by government; eg cost of living supplements for nurses introduced in 2001 (IDS, 2002).

The two newest PRBs, for school-teachers (STRB) and for prison officers (PSRB), are underpinned by statute, unlike the other PRBs, and there is provision for parliamentary oversight⁸. The remit of the STRB is extensive and leaves only a little opportunity for workplace bargaining (Fredman and Morris, 1992). It covers teachers’ statutory conditions of employment, which are defined as remuneration and “such other conditions of employment as relate to their professional duties and working time”⁹. The PSRB, however, is likely to co-exist with a considerable amount of collective bargaining as its terms of reference are to provide independent advice on remuneration only, although it may be asked by government to consider other specific issues.

5.2 Pay Review Bodies: their effectiveness

The government is the direct or indirect employer of the groups covered by the PRBs and part of the rationale for PRBs is that they are at arm’s length from government. Although government has the final say, there is an independent, third party element in the pay determination process which can be seen to be fair and the PRBs’ reports have the legitimacy that inevitably pertains to recommendations by independents. Indeed when the PRBs’ independence has been undermined, the process has come under strain. During the period 1980-1990 PRB awards were regularly reduced, deferred or staged by government and the “DDRB particularly warned the government that continual failure to honour its recommendations would lead to long term problems” (White, 2000:83). More recently PRB awards have been honoured in full by government, with the exception of prison officers and the judiciary, whose awards were staged in 2002 (IDS, 2003).

Have the PRBs prevented conflict between the parties? The answer is “yes”¹⁰. Moreover, governments have seen the PRBs as dispute prevention mechanisms. For instance PRBs for nurses and school-teachers were established in 1983 and 1991 respectively after there had been significant industrial action on the basis that industrial action would not be taken in future. Although the unions concerned were not required to sign up to a no-strike agreement (White, 2000), there is probably an

⁸ The relevant Secretary of State, when setting terms and conditions must issue a statutory instrument, which may be annulled by resolution of either House.

⁹ School Teachers’ Pay and Conditions Act, 1991 section 1(2).

¹⁰ There was some limited industrial action in the NHS in 1995 after the PRB for nurses and paramedicals recommended local bargaining to top up the national award.

implicit understanding that the PRB process and industrial action are not compatible. Perhaps though, the testament to the PRB system's 'success' is the extension of its coverage in the last decade: school-teachers, prison officers and members of the devolved bodies; see sub-section 5.1. It should be noted, however, that the PRB for non-medical NHS staff is currently being sidelined. Not only have negotiations taken place outside it (see sub-section 5.1 above) but in 2003 a long-term pay deal of 10 per cent over three years was concluded (see appendix B.5).

5.3 *The police*

The PRBs are not the only standing bodies which incorporate an independent third party element in the determination of terms and conditions of service. The Police Negotiating Board (PNB), which covers over 160,000 police officers in the UK, is chaired by an independent person appointed by the Prime Minister and negotiates on pay and designated conditions of service for police officers. Like the PRBs, it is serviced by the OME, which provides accommodation and a secretariat as well as carrying out pay research or managing sub-contracted research. Furthermore, just as PRB reports are recommendations to the relevant minister, the agreements of the PNB are in the form of recommendations to the Home Secretary¹¹, the Northern Ireland Secretary and Scottish ministers. Moreover, as with PRBs for school-teachers and prison officers, the government has an explicit ability to insert issues into the agenda of the PNB. In addition, it can set timetables and deadlines for the PNB and agreements reached by the PNB are in the form of recommendations to ministers.

The PNB operates UK-wide and covers all ranks, but it has separate, standing committees for chief officers, superintendent and federated ranks who comprise 95 per cent of all police officers. The full Board has quarterly meetings with fixed dates and despite reductions in size in 1998 and 2001, it still has a large membership (22 staff side members, 22 official side members). These meetings are so large because they represent diverse interests and there is a large amount of intra-organisational bargaining. The staff side comprises the three Police Federations for the three UK countries, the three parallel Superintendents' Associations and two associations representing chief officers. The official side has three main elements: police authorities who are the nominal employers, chief officers who are the senior operational managers; and civil servants representing the Home Office and its equivalents in Scotland and Northern Ireland (Clark, 2001). See appendix B.6 for full details.

In this context detailed negotiations and discussions are normally conducted outside of the main Board and its standing committees, for example through working parties, sub-committees, correspondence, or face to face discussions between the principal negotiators in the presence of the independent chair and secretariat (Hunter, 2000; Clark, 2002)

Detailed negotiations normally centre on allowances and the main conditions of service. In practice there is rarely much negotiation about the annual pay increase as this is determined by a formula, currently based on the median of total pay movements in the OME's regular survey of non-manual pay settlements outside the public services.

If there is a failure to agree, the constitution provides for conciliation and compulsory arbitration. These are dealt with in sections 6 and 8.

5.4 *Firefighters*

In 1999-2000 there was an inquiry into the machinery for determining firefighters' conditions of service (Burchill, 2000b) which led to changes, including the appointment of an independent chair of the National Joint Council (NJC) for Local Authority Fire Brigades.

The NJC¹², which covers some 67,000 firefighters in the UK, operates on a day to day basis through a sub-committee of eight people on each side chaired by an independent. The full NJC, however, also chaired by an independent, comprises 23 people on the employers' side and 22 on the employees' side. Compared to the PNB, however, there are not the complexities of representation. For instance, the Fire Brigades Union (FBU) is UK wide, compared to three country based Police Federations. On

¹¹ The only time a PNB recommendation was rejected by the Home Secretary was in 1989 and the rejection was signalled well in advance.

¹² This paper describes the position in the summer of 2003. A working group, representative of the fire service stakeholders is to propose revisions to the constitution of the NJC by 30.11.03.

the official side, there are no departmental civil servants or chief officers but only representatives of 59 local government fire authorities. Moreover, the NJC has the power to conclude agreements. (Unlike the PNB they are not in the form of recommendations to the Secretary of State.) This is not to say that the government does not have a legitimate interest; it provides some 85 per cent of the budget of the fire services. One employer side member of both the PNB and the NJC for firefighters said: "If [the government] have a formal position, as in the police, they are actually put on the spot. Although I have tended to take the view that they are better off out of it, I sometimes wonder if they were part of the process and you put them on the spot, would that actually make life easier?"

The NJC meets quarterly and if there is a failure to agree, the matter is referred to Acas for conciliation. If conciliation fails to produce a settlement, either side may request arbitration, ie there is unilateral access. Conciliation and arbitration are dealt with in sections 6 and 8.

Firefighters' negotiations from 1978-2001 inclusive centred on conditions of service as there was an agreed formula for determining annual pay increases: the upper quartile of male manual earnings as determined by the annual New Earnings Survey. After a dispute (2002-2003) it was agreed to dispense with that formula. Instead a staged and long term pay agreement was concluded to run from 2002 to 2004 inclusive, with increases for 2003 and 2004 tied to what is called modernisation (for instance alternative duty systems) and with a new pay formula to be used for 2005 and 2006.

There are separate, detailed provisions for the resolution of local disputes at fire brigade level¹³. Essentially if a matter is unresolved locally, a national disputes committee is convened. This comprises three members from each side and an independent chair. In addition there is provision for mediation locally in respect of disputes over alternative duty systems.

5.5 Comparisons and evaluation

Like the PRBs, the third party role for police officers and firefighters is not ad hoc but continues over several years. For instance the present chair of the PNB and the Police Advisory Board England and Wales, Professor Jon Clark, was appointed for four years from February 2000. His predecessor chaired the PNB for 14 years. The chair of the NJC for firefighters at the time of writing (June 2003), Professor Frank Burchill, was appointed on an open-ended basis from 2001. Also both the PRB reports and the PNB agreements are in the form of recommendations to ministers.

The system for the determination of the pay of police officers and firefighters can be differentiated from the review body system, however, in two main ways. First the parties are autonomous: they meet with each other and make joint agreements which are voluntary and mutual, with the independent chair helping to promote voluntary agreement in various ways, according to an interviewee. Second, unlike the PRBs the focus has been on allowances and the main conditions of service, see above. In addition for both police officers and firefighters, but for only one of the six PRB groups, there is unilateral access to arbitration. For police officers, however, unlike firefighters, arbitration is compulsory. (See section 8.)

Perhaps the ultimate consideration is whether the mechanisms adopted have prevented disputes for those groups where industrial action is not outlawed. As noted in sub-section 5.2, the PRBs have essentially prevented strikes and there was no national strike in the fire services between 1978 and 2002, when the indexation agreement for pay uplifts prevailed, though there was some industrial action at local level.

¹³ This procedure too is being reviewed at the time of writing.

6. Conciliation

6.1 What is conciliation?

Whereas the third party mechanisms described in the previous section are aimed at dispute prevention and are standing mechanisms, conciliation is aimed at dispute resolution and is provided ad hoc. Over the last 100 years, the term 'conciliation' has undergone a shift in meaning. In the 1890s, according to the Webbs, there was no clear distinction drawn between collective bargaining, conciliation and arbitration all of which could produce "constructive reconciliation" between representatives of employers and workers (Fox, 1985: 132). Today the term 'conciliation' is a process whereby a neutral third party assists the parties to the dispute to reach a settlement. Its essential characteristics are that a settlement can only be reached if both parties accept it and that the process is private. What a party says in the conciliation process is never revealed by the third party, unless all parties agree.

Collective conciliation is conciliation where the dispute is between a trade union(s) and the employer. In Great Britain virtually all collective conciliation is provided by conciliation officers employed by Acas. For police officers, however, conciliation may be, and normally is, provided by the independent chair of the PNB. Moreover, the Central Arbitration Committee can provide what virtually amounts to conciliation in certain areas. See section 8.

Collective conciliation can be distinguished from mediation, where the third party makes *formal* recommendations as a basis of settlement which the parties are free to accept or reject, and from arbitration, where the parties undertake in advance to accept an award of a third party. (See sections 7 and 8 below.) Common to both conciliation and mediation, however, is the preservation of the autonomy of the parties by assisting dispute resolution but not imposing a solution. In fact, Acas is the only organisation, "probably internationally" according to an interviewee, that draws a distinction between conciliation and mediation in industrial relations disputes; what Acas calls 'conciliation' is usually called 'mediation' elsewhere.

Collective conciliation is also to be distinguished from individual conciliation whereby an attempt is made to resolve a complaint of an individual that his/her statutory employment right(s) have been infringed and the individual maintains the right to have the complaint heard by an employment tribunal if conciliation is not successful. In practice, too, there is a difference. Individual conciliation is largely carried out by telephone. Collective conciliation is largely carried out face-to-face on Acas premises.

Collective conciliation is "in effect *assisted bargaining*". Conciliators, who only have the power of reason and persuasion, act as an intermediary and keep the parties communicating by:

... clarifying issues, establishing common ground, identifying barriers to progress, eroding unrealistic expectations, pointing to the costs and disadvantages if the dispute is not settled, developing possible solutions and creating confidence that an acceptable solution will be found (Goodman, 2000:38).

An interviewee said that his union sought conciliation

...when there is a lack of trust or breakdown of relations. There is an intent or desire to settle on both sides but there is a problem over who backs down or who is seen to move. More often than not it is a way out for both sides without losing face. They can go off and signal that they are prepared to do a deal, but not have to do it face to face.

According to Acas (2001:22)

... there is an element of mystery about what goes on behind the scenes but, fundamentally, Acas helps the parties find common ground. Employers and unions often start in separate rooms, with a senior Acas conciliator moving from one to the other, gaining trust and developing a shared agenda.

The style of the conciliation officer varies from what Goodman (2000:39) calls a catalyst to the more proactive creative force. In fact conciliation processes vary. There are a whole range of techniques which the conciliation officer uses including acting as a message bearer/shuttle, bringing the parties face to face, having separate meetings with each side, playing devil's advocate or taking risks by

proposing solutions. It should be pointed out, however, that although the literature talks about a conciliator, ie singular, in national public sector disputes there tends to be more than one conciliator involved, with the most senior conciliator taking the lead.

Dix (2000) carried out a study of the style of the Acas conciliator in individual conciliation cases, but there is perhaps a read-across to collective disputes. She provides a model of conciliation styles based on three dimensions:

- reactive/proactive – a continuum describing the extent to which the conciliators are active and persistent in initiating and responding to contact with the parties;
- message bearer/seeking to influence;
- passive/forceful.

Molloy et al (2002), in a small qualitative study of collective conciliation based on 18 interviews with users, depicted styles adopted by conciliation officers as a spectrum. At one end there were conciliation officers whose style was depicted as the “go between”. At the other end of the spectrum there were conciliation officers whose style was depicted as “proactive”. The latter not only relayed messages but also teased out areas of possible agreement and looked for ways in which the parties could resolve the dispute.

There is some debate about whether conciliators should know the industry or not. If they do not, then they can ask naive questions and provide a fresh mind. If they do, then they are more likely to understand the politics of the organisation and the background to the dispute. An example of the latter is the independent chair of the Police Negotiating Board. He has, for example, assisted the parties in achieving a conciliated settlement on the reintroduction of the chief superintendent rank in 2000 and on the Police Pay and Conditions Agreement in 2002 (Clark, 2001; Clark, 2002). According to an interviewee, in the fire services the employer side national secretary and the union side national secretary, together with the independent chair, have sometimes acted as conciliators locally. The employer side national secretary, accompanied by the independent chair, has seen the local management side and the union side national secretary, accompanied by the independent chair, has seen the local union side and then the three conciliators confer. The same interviewee also said that the Employers’ Organisation for local government had conciliated in local government disputes in Jersey and Guernsey.

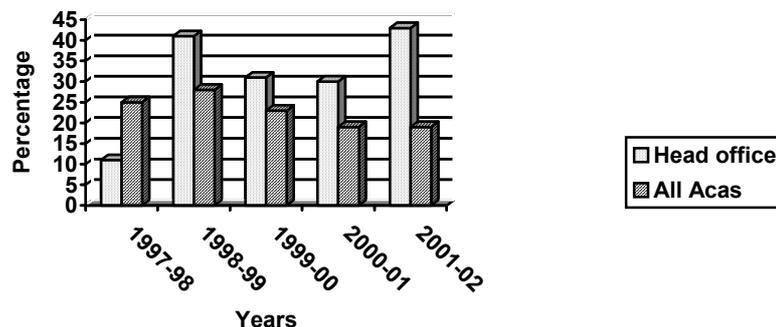
As an employer side national secretary said, however, having acted as a conciliator in the industry where he negotiates and having been on the receiving end of Acas conciliation, “it’s as broad as it’s long” and there are advantages and disadvantages with the “fresh mind” approach. Acas often seeks to square the circle by conciliators informally specialising in certain industries.

6.2 The extent of collective conciliation in the public sector

When looking at the dimensions of collective conciliation, Acas statistics based on the five years from 1 April 1997 have been used. This is because one year alone might give a misleading impression as there might be a ‘blip’. Another reason for looking at those five years is that on 1 May 1997, there was a change in the political complexion of the government, when New Labour took power. This is almost coterminous with the Acas financial year which commences on 1 April.

Acas carries out most of its collective conciliation through its regional offices, with head office handling disputes with a national dimension. Although the majority of collective conciliation cases arise out of disputes in the private sector rather than the public sector, public sector collective conciliation cases were more likely than private sector conciliation cases to have a national dimension. As can be seen from figure 1, the percentage of public sector cases handled by Acas Head Office was greater than the percentage for Acas as a whole during the four years from 1 April 1998. The most marked difference was in the year 2001/2002: 43 per cent of all cases in head office were public sector (16 out of a total of 37), but the comparable figure for Acas as a whole was 19 per cent (289 out of a total of 1504). Taking the five years from 1 April 1997 together, almost a third of all head office cases (167) were public sector cases. In Acas as a whole there were 7631 collective conciliation cases in the five years from 1 April 1997 of which less than a quarter (23%, N = 1757) were public sector cases.

Figure 1 Collective conciliation - public sector cases as a percentage of all



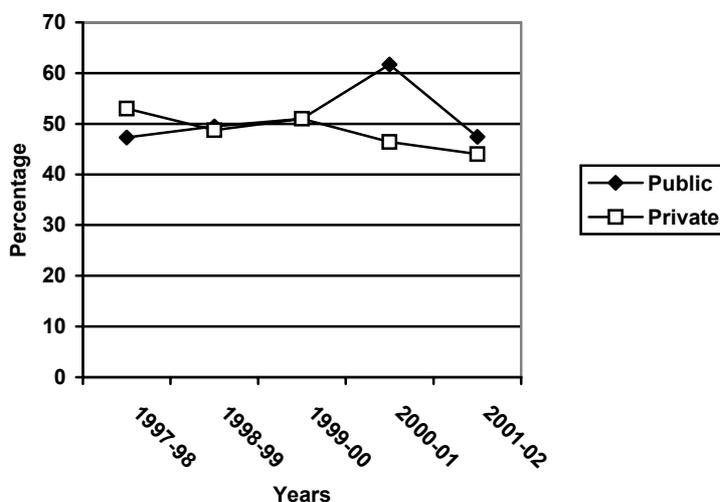
cases

Source: Acas statistics 1997-2002

As soon as Acas knows that a dispute is about to start, an Acas conciliator starts to ‘run alongside’ (to use Acas jargon). In other words, the Acas official makes informal contacts with both sides to brief him/herself about the background and to consider if Acas assistance is appropriate. Indeed the Acas conciliator may invite both sides to come in to brief him/her, as occurred in July 2002 in the case of the local government dispute. He/she will then use “professional judgement about the timing and the attitudes of the parties to decide if and when to intervene and propose conciliation” (Acas, 1996:31). Mostly conciliation takes place after a request from the parties but sometime cases arise out of an Acas initiative. Premature intervention where the parties are determined to have a showdown is unlikely to be useful (Acas, 1979).

During the five years from 1 April 1997 roughly half of all collective conciliation cases were primarily concerned with pay, including the general pay claim, and conditions of employment¹⁴. When one splits the cases between the public and private sectors and looks at the five years from 1 April 1997, there is little difference except in 2000-2001. In that year, 62 per cent of public sector disputes (N = 43) were primarily caused by pay, including the general pay claim, and conditions of employment. The equivalent figure for the private sector was 46 per cent (N = 268). See figure 2.

Figure 2 Pay & conditions as cause of dispute



¹⁴ There are six other categories: recognition; changes in working practices; other trade union matters; redundancy; dismissal and discipline; other.

Source: Acas statistics 1997-2002

Of course, assigning a single cause is sometimes misleading. For instance in 1999 there was a dispute in the Meat Hygiene Service, a civil service executive agency, over the annual pay review. During the course of conciliation, however, other issues emerged: civil service privilege leave, job evaluation, the working relationship between the parties, HM Treasury requirement to introduce an element of performance related pay into the pay system and anomalies arising from the fact that, when the Service was set up in 1995, although most employees came from local authorities, a few came from the civil service. See Acas (2000) for more details.

6.3 The Civil Service

In the civil service, according to a union interviewee, there is less transparency about the pay remit than in the private sector. In the civil service “they normally fudge, sometimes helpfully. It is quite Sir Humphreyish”. In the private sector “you operate more clearly in the context of the commercial realities for that company”.

Although Acas has provided conciliation where there have been disputes in non-departmental public bodies, such as the South Bank arts complex and the British Library, it has rarely provided conciliation in the mainstream civil service. For instance, Acas was not involved in conciliating in the long running dispute in job-centres. The dispute, which lasted from September 2001 until April 2002, centred on staff safety and union demands for the provision of screens (Labour Research, 2002). The union, the Public and Commercial Services Union (PCS), wrote to the chief executive of Acas a few times, but according to a union interviewee, ministers refused conciliation. Similarly Acas was not involved in a dispute in 2001-02 over terms and conditions in the Department of Food and Rural Affairs (DEFRA). A union official was of the view that the job-centre dispute would have been particularly appropriate for conciliation as it was not about money so there was “no fourth party sitting in the wings”, ie the Treasury.

An interviewee suggested a number of reasons for the refusal to seek conciliation from Acas. First, he said, there was a widespread misconception about conciliation among senior managers in the civil service. They equated conciliation with arbitration and handing over a matter to a third party to decide. There was “a vicious circle of ignorance, never using it, never having been through it and so there is no trust in the process”. Second, the civil service saw Acas as an arm of government “where there is a junior minister responsible for Acas sitting in judgement on senior ministers on a matter of policy”. Third, the interviewee thought that there was a “psychological difficulty” for civil service managers as they would normally be on higher grades than the Acas conciliators and would not want “HEOs and SEOs [junior staff] coming along and telling you what to do”. Fourth often the employees involved in a civil service dispute are members of PCS, as are Acas employees, so managers (perhaps wrongly as Acas conciliators have a reputation for neutrality) felt that there could be a conflict of interest.

The same interviewee suggested a number of ways round this problem. He suggested that perhaps Acas could be an arm of Parliament, like the National Audit Office, rather than government. He also suggested using independents to conciliate. Interestingly Professor Jon Clark, as mentioned in sub-section 5.3, provides conciliation for police officers (as well as chairing the Police Negotiating Board) and many mediators such as Professor Frank Burchill operate mediation like conciliation; see section 7 below.

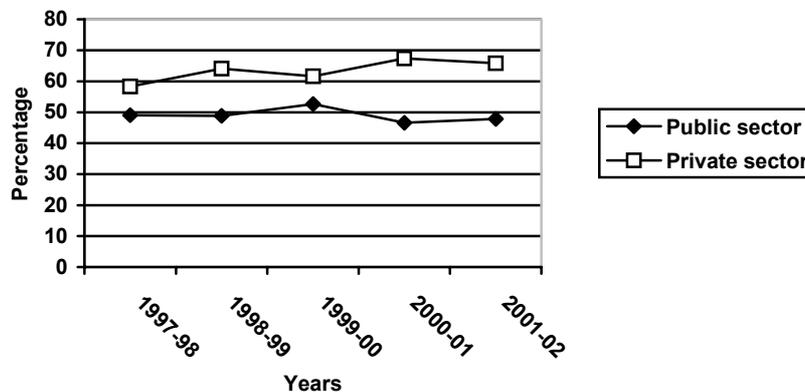
6.4 Outcomes

The job of the conciliator is to help employers and unions to settle their differences by agreement, if possible in a lasting way. The qualitative study by Molloy *et al* (2002) explored how collective conciliation assisted the parties. It provides an example from a local authority where a trade union was in dispute over plans to contract out certain services because staff were concerned that this might affect the quality of service provided. The conciliator suggested to the union that requesting involvement in the tendering process might provide a route out of the dispute and this suggestion was then accepted by the employer.

Acas statistics also give information about the outcome. Acas defines the most positive outcome as one where “the issue in dispute was resolved through conciliation under Acas auspices. This includes the situation where in conciliation a union withdrew its claim, or management its own proposal(s).”

Interestingly, using this definition and looking at the figures for the five years from 1 April 1997, private sector cases surpassed public sector cases. For instance in 2001-2002, 65.8 per cent of private sector cases (N = 800) resulted in a positive outcome, as defined above. The equivalent figure for the public sector was 47.8 per cent (N = 138). See figure 3.

Figure 3 Positive outcome from conciliation



Source: Acas statistics 1997-2002

Looking at the period 1 April 1997 to 31 March 2002, there is little difference between the public and private sectors in progress towards an outcome. This is defined as “although no final settlement was reached in conciliation, it was clear that a deadlock was broken through conciliation, and a settlement was rapidly reached in direct negotiations”. For instance, in 2001-2002, the figures were 9.3 per cent for the public sector and 7.7 per cent for the private sector. In 1999-2000 the figures were 6.3 per cent for the public sector and 6.9 per cent for the private sector.

Some regard conciliation merely as a staging post to arbitration and not an intervention in its own right. According to one interviewee from the Employers’ Organisation for local government:

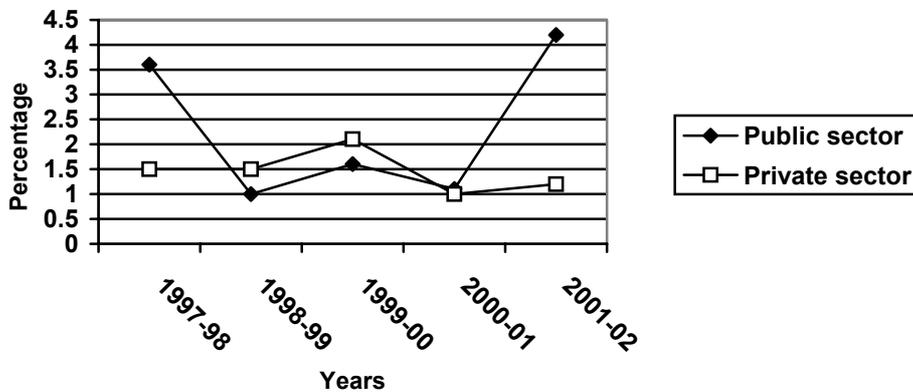
We all think we are such good negotiators on both sides, that there is no way that anyone could explore any avenue that we have not explored before...Rather than seeking conciliation, what we tend to do is to seek arbitration and conciliation is something that Acas says, “well hang on. What about conciliation?”.

In fact, however, Acas conciliation often proves effective. For instance in August 2002, after a day of industrial action, Acas brokered a conciliated settlement in respect of a national local government dispute in England and Wales. This involved a two year pay deal with a percentage weighting for the lowest paid and an independent inquiry to report in September 2003 into the pay of local government staff (Maguire, 2002a).

Acas statistics, however, are somewhat confusing both for those seeking to complete statistical returns and for those seeking to analyse the results as to whether conciliation is merely a staging post to arbitration. Acas has one classification which it defines as “following movement by one side or the other during conciliation, the matter was referred with the agreement of the parties to arbitration”. Judged on this measure and examining the five years from 1 April 1997, very few cases either in the public sector or the private sector were referred to arbitration. The proportion of public sector cases varied from 1 per cent to 3 per cent a year and the proportion of private sector cases varied from 2 per cent to 3 per cent a year.

Acas, however, has another classification defined as “with the agreement of all parties, the issue in dispute was referred for possible resolution to mediation, Committee of Enquiry, joint working party etc or to arbitration if there was conciliation over the terms of reference or the arbitration procedure”. Judged on this measure the public sector exceeded the private sector in only two of the five years from 1 April 1997, as figure 4 illustrates. The most marked difference was in 2000-2001: 4.2 per cent of public sector (N = 12) conciliated cases compared to 1.2 per cent of private sector (N =14) conciliated cases resulted in agreement to proceed to mediation, joint working party etc or to arbitration.

Figure 4 Outcome of conciliation – reference to mediation, joint working party, etc, arbitration



Source: Acas statistics 1997-2002

6.5 User satisfaction

Acas carries out an annual customer survey of collective conciliation and this paper looks at the responses to the April 2002 survey. Of these 38 respondents were classified as coming from the public sector and 123 from the private sector. Public sector respondents, therefore, comprised 23.6 per cent, not greatly different from the percentage of public sector cases in all Acas conciliation cases (19 per cent).

Conciliation was less likely to be written into the procedure in the public sector, compared to the private sector (18.4 per cent compared to 26.8 per cent). When asked about the attitude towards Acas conciliation, in both the public and private sector there was little difference. In both sectors just over 71 per cent of respondents either strongly agreed or tended to agree that Acas helped speed up the resolution process. When asked, however, whether Acas conciliation helped to bring the sides closer together, respondents in the private sector were more likely to agree or tend to agree than respondents in the public sector (66 per cent and 58 per cent respectively).

Respondents were also asked to rate the quality of the final agreement in terms of acceptability, practicability and a lasting resolution of the dispute. In some cases conciliation did not result in a final agreement (see sub-section 6.4). Where a final agreement was not reached, respondents often said that the questions were "not applicable" in their case, so these responses were excluded. The vast majority of respondents who felt that these questions were applicable said that the agreement was good or very good in terms of acceptability, practicability and lasting resolution of the dispute. Respondents involved in disputes in the public sector, however, were less likely than those in the private sector to state that the agreement was good or very good in terms of acceptability, (71 per cent, N = 21, compared to 80 per cent, N = 84 respectively), and practicability (73 per cent, N = 22, compared to 84 per cent, N = 87, respectively). There was, though, very little difference between the two sectors in terms of the lasting resolution of the case (64 per cent compared to 68 per cent, respectively)¹⁵.

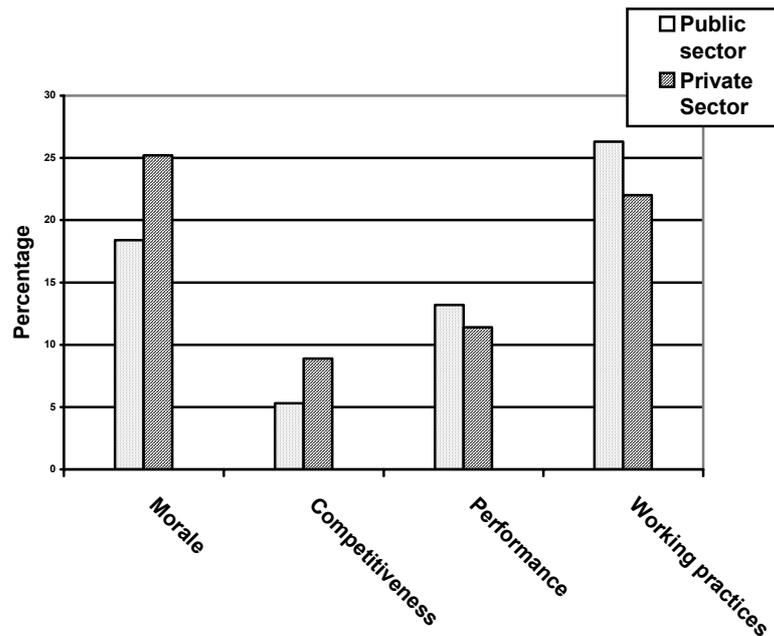
Following Acas involvement in the dispute were there improvements in terms of employee morale, competitiveness, performance and working practices? As figure 5 shows, public sector respondents were more likely than private sector respondents to answer in the affirmative in respect of performance

¹⁵ The figures quoted above should be treated with caution as the sample is small, particularly in respect of public sector findings and so the difference may not be statistically significant.

and working practices, but less likely to answer in the affirmative in respect of morale and competitiveness. The latter, however, is not a salient factor in many areas of the public sector.

The overwhelming majority of customers were content with Acas: 9 out of 10 respondents in the public and private sectors said that they were very likely or quite likely to use Acas in the future and over four out of five respondents, whether in the public or private sectors said that they were very satisfied or quite satisfied overall with the service received from Acas. This demonstrates a high level of satisfaction, irrespective of sector.

Figure 5 Improvements after Acas conciliation



Source: Acas customer survey 2002

The study by Molloy *et al* (2002:35) also found a high degree of satisfaction with Acas conciliation officers, irrespective of sector. “They were generally perceived to carry out a difficult job well, with patience, intelligence and tact, and in so doing, to provide a very important and valued form of assistance.” The most satisfied service users tended to be those who had experienced more proactive styles of conciliation, as they were felt to be particularly helpful in assisting the parties to rethink or alter their position; (see sub-section 6.1). Furthermore, Molloy *et al* (2002) found that Acas involvement was seen to bestow credibility upon any settlement in which they were involved and also trade unions felt it signalled to members that any settlement had only been achieved after a struggle.

7. Mediation

7.1 *What is mediation?*

Mediation is a half-way house between conciliation and arbitration. As with conciliation, the parties are free to accept or reject any recommendations. Thus mediation tends to be used when the parties feel that they do not want to put the final decision in the hands of an arbitrator. Yet as with arbitration, the mediator is given terms of reference agreed by the parties and makes a formal report. In the USA and South Africa the term “advisory arbitration” is used.

The Acas conciliator is never the Acas mediator or arbitrator. Acas conciliators are Acas employees and thus civil servants. Acas mediators and arbitrators are not employed by Acas. They are appointed by Acas from its panel and receive a fee for their work on an ad hoc basis. In fact most are academics. This emphasises the separation of conciliation from mediation/arbitration and the fact that anything said to a conciliator is not transmitted to the mediator/arbitrator, who gets the matter ‘cold’. This was confirmed by one person who has been a mediator/arbitrator “for over a quarter of a century, operating within the Acas framework”. He stated that he has “never been approached by, or attempted to approach a conciliator”.

Mediation is a very flexible mechanism and the process adopted varies. Often the process is similar to conciliation and the mediator, like the conciliator, shuttles between the parties, who stay in separate rooms and are normally only brought together when they are ready to reach an agreement. Then the mediator makes his/her recommendation(s) on the understanding that the parties will almost certainly accept them. Sometimes, however, the mediation process may be similar to arbitration in that a hearing is held and both parties state their case and cross-question each other, with the mediator also posing questions. Different mediators have different styles but the process tends to be more at the arbitration end of the spectrum where there is a board of mediation or where the two sides are numerous. (One mediator recalls a mediation case where there were 40 people on the union side).

One Acas mediator who sees mediation as similar to conciliation, said:

I don't sit and listen to the case. There is no point bothering with all the arguments. If the arguments had resolved anything, they would have resolved the dispute... I consider mediation to be a fixing process and what I am assuming is that the parties are looking for an external voice to give them what they are looking for... I recommend all that they have agreed. Otherwise it is just my view of what they ought to agree.

Just as the mediation process varies, so does the actual term used to describe the process and mediation is sometimes called an ‘inquiry’, ‘review’, or ‘working party’. For instance, a review was used in a fire service authority with the independent person appointed by Acas from its list of mediators/arbitrators aided by two technical assessors (both national level negotiators with one drawn from the employer side and one drawn from the trade union side). Yet Acas classified it as mediation for the purpose of its statistics as the independent person made recommendations which were not binding. Similarly it classified as mediation a working party in respect of a dispute between the Royal Fleet Auxiliary and the National Union of Rail, Maritime and Transport Workers (RMT), which involved the independent person appointed by Acas from its list of mediators/arbitrators in chairing a working party which met five times in 2000 and according to management turned “largely negative feelings into positive results”, a view essentially echoed by the union. (For further details see Acas, 2001:26-27.)

In a similar vein, London Underground Limited’s procedural agreement eschews the term mediation, although in fact providing for it. It says that the parties can proceed “on jointly agreed terms of reference, but any proposal that may result being non binding on the parties”.

7.2 *The extent of mediation*

Acas will only make arrangements for mediation if there is an indication from both parties that they will seriously consider the recommendations. Looking at Acas statistics for the five years commencing 1

April 1997, in 1999-2000 there was only one case of mediation, a private sector case. The largest annual number of mediations occurred in 2000-2001 when there were eight cases, of which three were public sector.

Why is mediation so little used? Apart from Royal Mail¹⁶ and London Underground (see appendix B.4), mediation is a virtually unacknowledged mechanism in procedures. Also one experienced arbitrator who also mediates considers that “people generally don’t know what mediation is”. This view was echoed by an Acas official who said that “even practitioners in the field, you know HR managers and union officials, don’t understand it”. The distinction between mediation and arbitration was fine, he said, and “when you’re in a high profile public sector dispute and someone independent [the mediator] comes out and puts a particular figure down... the pressure to accept will mount”. Furthermore, he said:

I suppose at the end of the day, the customers are happy with either using the conciliator where the conciliator doesn’t make formal recommendations, can only make suggestions, or they’ll jump to somebody to tell them what to do and maybe there is not a big market for the bit in between... People probably quite like conciliation and if that doesn’t resolve it, let’s just have the decision and finish it.

It should be noted, however, that Royal Mail is likely to make more use of mediation (and arbitration) than hitherto. An independent review chaired by Lord Sawyer found a poor industrial relations climate. It recommended that a small expert group should become involved either as mediators or arbitrators in disputes about the implementation of the *Way Forward*, a wide-ranging agreement covering pay, conditions and working practices (Sawyer *et al*, 2001). Indeed a mediation was held in April/May 2002. There were three days of hearings covering a range of issues including delivery specification and mail centre working practices, as well as the annual pay review.

¹⁶ There is a Post Office Arbitration and Mediation Tribunal, a standing body comprising a chair and two side members. There is unilateral access to mediation and joint access to arbitration.

8. Arbitration

8.1 Defining arbitration

Arbitration is a process whereby an employer and trade union in dispute agree to hand over to an independent person (or group of persons) the responsibility for telling them how the difference should be settled (Lowry, 1990:60). It is important to emphasise that this paper only looks at arbitration where the parties are the trade union and the employer. It does not deal with the Acas unfair dismissal arbitration scheme where an individual's claim of unfair dismissal can be resolved by arbitration as an alternative to resolution by an employment tribunal.

Acas is the main provider of voluntary arbitration, ie where the award of the arbitrator is morally, but not legally, binding. It appoints the arbitrator(s) from its panel, either a single arbitrator or less commonly a three person board. It also administers the process, for instance obtaining from the parties jointly agreed terms of reference, arranging the exchange of statements of case and the venue for the hearing and issuing the arbitration award to the parties. Furthermore, Acas arranges arbitration in respect of the prison service and GCHQ where in both cases there is a legally binding no disruption agreement. (See appendix B.)

In addition to its role in providing ad hoc arbitration, Acas oversees some standing arbitral bodies. These are to be found only in the public sector - the Police Arbitration Tribunal, the Post Office Arbitration and Mediation Tribunal and the Civil Service Arbitration Tribunal. The arguments for and against a standing arbitral body are similar to the arguments for and against a conciliator who knows the industry or service well, ie the advantage of knowledge of the intricacies and politics involved versus the outsider bringing a fresh mind. It should be pointed out that although Acas is the main provider of voluntary arbitration, and therefore the focus of this section, some arbitrations are arranged privately.

8.2 The CAC

The Central Arbitration Committee (CAC) can carry out voluntary arbitration, though it has not done so for over a decade. The CAC, though, provides arbitration as part of a statutory process in three areas: the statutory union recognition procedure, disclosure of information for collective bargaining purposes and European Works Councils. In these three areas its awards are legally enforceable, unlike Acas arbitration awards. Also, whereas Acas arbitration hearings are private and its awards are confidential to the parties, the CAC holds public hearings and its awards are posted on its web-site.

Rideout (1982) terms arbitration within a framework of statutory rules "regulated arbitration" which he distinguishes from voluntary or "equitable arbitration". Regulated arbitration, however, can be distinguished from adjudication in the courts. "The purpose of arbitration is to resolve a problem; the purpose of adjudication is to determine rights" (Rideout, 2002:7). There are also procedural differences. Unlike a judge, the arbitrator employs an inquisitorial method, is not bound by precedent, and unlike a court or employment tribunal there is no swearing of oaths, formal cross-examination, or right of appeal, judicial review apart. Moreover, the CAC when carrying out regulated arbitration, seeks to help the parties to resolve issues informally. For instance under the trade union recognition provisions, (Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act) the CAC is required to "assist" the parties to negotiate an agreement on particular issues, such as the identification of the bargaining unit under paragraph 18. (In practice the CAC case manager normally liaises with an Acas conciliator whose help is sought where appropriate). Looking at complaints to the CAC by trade unions in respect of disclosure of information for collective bargaining during the period 1976-1997, conciliation featured significantly. Only 22 per cent of complaints (65 cases) required a formal arbitration award. The majority were withdrawn or settled (Gospel and Lockwood, 1999). In practice an informal meeting is held with the parties, perhaps with an Acas conciliator present.

It should be noted that the European Works Council legislation does not bear on the public sector, nor in practice have the recognition provisions done so and there are only a handful of disclosure of information cases a year. For instance in 2001-2002 the CAC received 8 complaints. The total since

the inception of the legislation in 1977 to 31 March 2002 was 497 (Central Arbitration Committee, 2001; Central Arbitration Committee, 2002). The highpoint was in 1978 when 62 cases were received (Gospel and Lockwood, 1999). Nevertheless, statistics suggest that public sector cases form a significant proportion. In the period 6 June 2000 to 31 March 2002 there were 17 disclosure of information complaints of which 10 were public sector¹⁷.

8.3. Types of arbitration

“Regulated” and “equitable” arbitration apart, there are other classifications of arbitration. One classification is whether the arbitration is voluntary or compulsory. Compulsory arbitration, however, is defined in different ways. According to Mumford (1996), compulsory arbitration has three elements: strikes and lock-outs are illegal, parties can be compelled to arbitration without their consent and awards are enforceable by law. Lowry (1990), however, defines compulsory arbitration as taking place when both sides have agreed as a final stage in their procedure agreement that an unresolved issue must be referred to arbitration for settlement. Indeed, the third element of Mumford’s definition (awards enforceable by law) applies only to statutory or “regulated” arbitration, which can be distinguished from compulsory arbitration. As to no-strikes, often compulsory arbitration is linked to a no-strike provision, as is the case for the police and prison officers and employees at GCHQ, but a no-strike provision is not a *sine qua non* of compulsory arbitration.

Another classification is whether access to arbitration is unilateral (at the wish of one party) or joint (dependent on the agreement of both parties). As noted in sub-section 3.3, when Margaret Thatcher was prime minister, several public sector procedures were changed, with joint access to arbitration replacing unilateral access. Unilateral access, however, is still to be found in the public sector in respect of the national negotiating arrangements for local authorities and for the fire services. (According to an interviewee, in 2002 the local authority employer side secretary informally proposed the removal of the unilateral right to arbitration, but the staff side secretary rejected the proposal.) Furthermore, unilateral access is a feature of the arbitration provisions at GCHQ and for police and prison officers where industrial action is outlawed. In the private sector, unilateral access to arbitration is common in logistics companies which supply supermarkets, as well as some greenfield manufacturing establishments. An interviewee said: “There is no right or wrong as to unilateral/joint access. It depends on the context”.

In practice, moreover, whatever the procedure states, the right of unilateral access to arbitration is tempered by the power of the parties. For instance the fire service employers were of the view that the 2002-03 fire service dispute could not be resolved by their exercise of the right of unilateral access because the union involved, the Fire Brigades Union, would not accede to arbitration. As an employer side member said: “We could huff and puff, but what’s the point?” Similarly a local authority employer side representative said that if the staff side had exercised their unilateral right of access in respect of the 2002 dispute, the large local authority employers would have pulled out of the National Joint Council.

A final classification is whether the form of arbitration is conventional or pendulum. In conventional arbitration, the arbitrator has complete discretion, within the agreed terms of reference, to determine the nature of the award. In pendulum arbitration, the arbitrator is confined to awarding either the union’s final claim or the employer’s final offer. The rationale for pendulum arbitration is that it counters the perceived tendency of conventional arbitrators to split the difference. Also pendulum arbitration encourages the parties to negotiate seriously for fear of losing entirely at arbitration. It thus overcomes the “chilling” effect of conventional arbitration, ie the reluctance to bargain realistically and the “narcotic” effect, ie the habit forming tendency to resort to arbitration. On the other hand pendulum arbitration, because it limits the arbitrator’s discretion, can be inflexible. (See Kessler (1987) for a fuller discussion.)

Lewis (1990) points out that pendulum arbitration has been used in the United States of America in a number of local jurisdictions to resolve industrial disputes in respect of public sector workers such as prison guards, firefighters, and teachers who are legally prohibited from striking. In Britain, however, pendulum arbitration is rare in the public sector. It is only used in respect of prison officers. If there is a failure to agree locally, the dispute proceeds automatically to Acas conciliation. If the dispute

¹⁷ CAC annual reports before 6 June 2000 do not enable a public/private sector breakdown to be calculated.

remains unresolved, there is a unilateral right of access to pendulum arbitration, subject to the approval of the general secretary of the Prison Officers' Association or the deputy director general of the Prison Service. Pendulum arbitration is slightly more common in the private sector, particularly in foreign owned/green-field sites, and is sometimes linked with unilateral access.

8.4 Arbitration in practice

"Arbitration is not a means of determining social justice. It is a means of resolving disputes" according to the first Acas chair, Jim Mortimer (1982:61), who argues that power is an important ingredient of arbitration. Similarly Burchill (1997) quotes the old adage that the role of the arbitrator is to find out who the lion is and make sure that the lion gets the lion's share. He says: "In other words, it is not the role of the arbitrator to bring to the decision their own views of fairness and justice, but to recognise the politics of the relationship, and to try to reach a decision which allows the parties to move on from the dispute" (Burchill, 1997:129).

This chimes with some interviews conducted for this paper. For instance, a public sector national union official said:

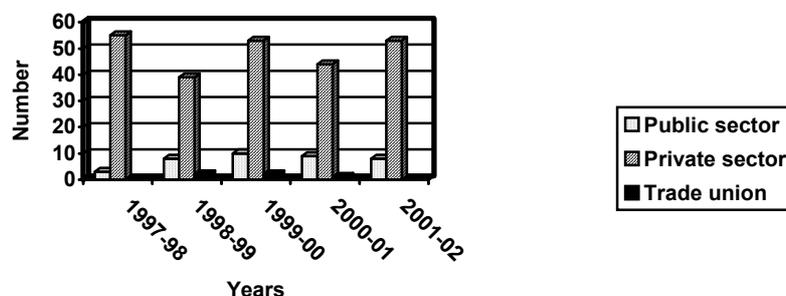
The ability to get something out of arbitration will partly depend on your ability to demonstrate to the arbitrator that you actually feel very strongly about it. If you feel very strongly about it, the best way is to get members to take industrial action... If then you get taken by the employers to arbitration, at least you can say members are not prepared to put up with it and feel very strongly about it. My experience has been that arbitrators will usually recognise that... and seek ways of addressing that. But if it's seen as well, nobody is really bothered about this issue, but haven't got the wherewithal to reach an agreement themselves, then we get an award that we are not particularly happy with.

In contrast, another arbitrator who was interviewed considered that power and its demonstration were only part of the equation. "Fairness, reasonableness under the circumstances, good industrial relations and convincing evidence and argument in support of a claim", he said, "were probably more important".

8.5 Arbitration statistics

Looking at the five years from 1 April 1997, Acas arranged some 50 arbitration hearings a year, the majority being private sector cases. The largest number in a single year (1999-2000) was 65, of which two were cases heard by the Police Arbitration Tribunal and eight were other public sector cases. See figure 6. This compares with some 1500 conciliation cases a year. In fact, though Acas is often called the "arbitration service" in the press, this misrepresents the emphasis of Acas's work.

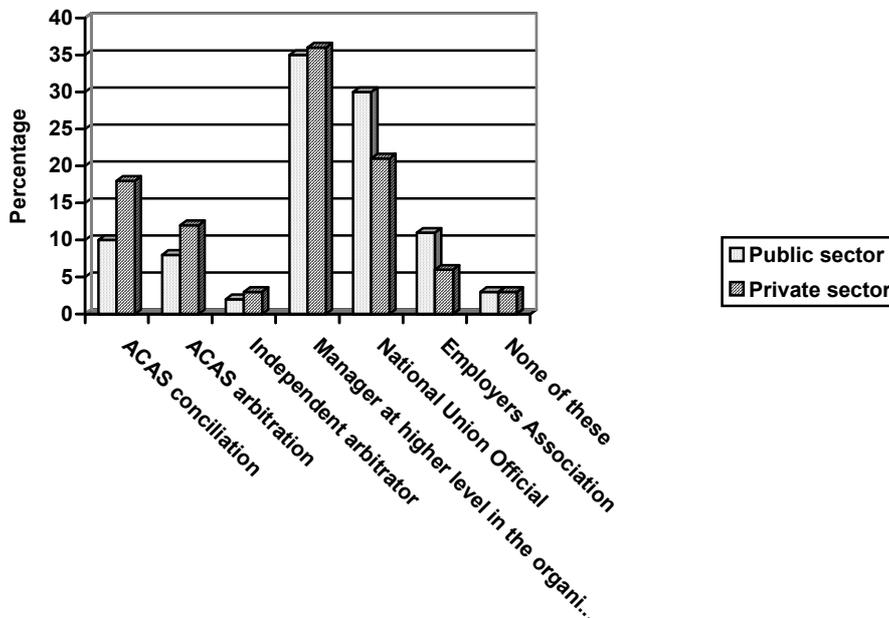
Figure 6 Acas arbitration cases (number per year)



Source: Acas statistics 1997-2002

These Acas statistics are supported by an analysis of statistics from WERS 1998; see figure 7. Not only was the number of workplace disputes in the private sector referred to arbitration (and conciliation) greater than in the public sector, in percentage terms also the number was greater.

Figure 7 Referral of workplace disputes to outside bodies (WERS)



Source: Data from Workplace Employee Relations Survey 1998

Interestingly, though, the WERS data suggests that in the public and private sectors, the number of disputes referred to arbitration (52 and 67 respectively) was only slightly less than the number referred to conciliation (64 for the public sector and 98 for the private sector). Acas statistics show a significantly greater difference. For instance in the year from 1 April 1998 there were eight public sector disputes referred to arbitration and 39 private sector disputes. In the same year 412 public sector disputes were referred to conciliation and 1037 private sector disputes.

In addition to Acas arbitration, arbitration is sometimes arranged privately by the parties. According to Acas statistics, the number of private arbitrations is roughly about half the number of Acas arbitrations: for instance in the 12 months from 1 October 2000 there were 27 private arbitrations. Of these 13 were in the public sector, a somewhat higher figure than the 8 to 10 public sector Acas arbitrations (see figure 6).

Focusing solely on arbitration arranged by Acas, the overwhelming majority of public sector cases concerned pay, ie the annual pay increase or other pay and conditions. For instance in the year from 1 April 2001, 90 per cent of public sector cases concerned pay, compared to 52 per cent of private sector cases. (The other categories were dismissal and discipline, grading and scope).

Contrary to popular misconception, mediators/arbitrators do not compromise or split the difference. An employer interviewee said:

My experience of arbitration is that arbitrators tend to find largely in favour of one party and throw a few crumbs of comfort to the loser. Those who are less experienced in arbitration have the view that arbitrators split the difference, but those who have been through the process a few times know the reality.

An analysis of the statistics provides support for this view. Acas classifies the result in five ways: in favour of the employer, in favour of the union, compromise, unquantifiable, no award issued. Looking at the year 2001-2002 only one out of 10 (10 per cent) public sector cases and four out of 56 (7 per

cent) private sector cases resulted in a compromise. The comparable figures for 2000-2001 were two out of 12 (17 per cent) and nine out of 49 (18 per cent).

Turning to discrete areas of the public sector, in the civil service although in theory there is a standing body, the Civil Service Arbitration Tribunal (CSAT), it has been dormant for almost two decades. This contrasts with the period before 1981, when the CSAT was much used and there was unilateral access. It also contrasts with the Police Arbitration Tribunal which since the mid-1980s has typically decided one or two cases a year.

At GCHQ new rights of unilateral access to arbitration agreed as from 1997 have only been used once (in 2002). An interviewee said: "with the ability to have arbitration, that acts as a very strong pressure on both sides to reach agreement rather than taking a gamble and leaving it to an arbitrator". The Prison Service arbitration agreement, however, unlike the GCHQ one, looks like being used often. See appendix B for further details.

Although Acas has carried out user satisfaction surveys for collective conciliation and advisory projects which can be analysed separately for the public and private sectors, there is no comparable survey in respect of arbitration for trade disputes. Indeed the most recent survey resulted from the work of Brown (1992) over 10 years ago. She surveyed all parties involved in references to Acas arbitration in 1988 and found a high degree of user satisfaction. For instance 86.1 per cent of respondents answered "yes" to the question: "Would you use Acas arbitration again if a similar dispute arose in the future?". There was no breakdown, however, by public/private sector. A public sector national employer side secretary, though, in an interview for this paper expressed satisfaction with Acas arbitration and said:

Our experience is that Acas is very responsive.. and we get a first class service. We don't use them much but we use them a bit. Let me give you an example. I rang them up and said we have got this local dispute. It has completely fallen apart. Management want to introduce something come what may, unless I can sort out arbitration in two weeks. And we've done it. They pulled all the stops out and we were ringing each other up at strange times of the day.

It should be noted that according to Brown's study, customer satisfaction with Acas arbitration was significantly higher than with adjudication by an Employment Tribunal. See, for instance, Dickens *et al*, (1985).

8.6 Arbitration and the parties' autonomy

Arbitration, by its very nature, undermines the autonomy of the parties as the arbitrator is the decision maker. Indeed, Sir Lawrence Hunter, the former independent chair of the Police Negotiating Board, said: "As chairman, I have always had some regret – and some sense of personal failure – when issues end up at arbitration, for it means passing responsibility to a third party when the parties themselves could have reached their own agreement" (Hunter, 2000: 21).

Do parties share this view and consider that the use of arbitration represents a failure? The short answer is a qualified "no". As one arbitrator put it: "There are some issues where the gulf between the sides is genuinely and legitimately so great that a negotiated settlement is not possible". A national employer representative said that he thought that arbitration was a failure "if you use it too often. And it is a failure if you do it on issues that are too big." This chimes in with textbook comments about arbitration, ie that employers will use it where the cost of losing is bearable; (see for instance Gennard and Judge, 1999:142). Another interviewee said that he did not think "success" or "failure" were appropriate terms and a further interviewee said that although compulsory arbitration could have a chilling effect on negotiations, ad hoc arbitration did not. The latter was a useful mechanism: "The parties are so far apart. They want to get on with their lives and get the issue done and dusted."

9. New approaches

9.1 Advisory projects

Acas is not only concerned with dispute resolution through conciliation, mediation and arbitration, it also devotes resources to dispute prevention through what it used to call advisory mediation, but now calls advisory projects. Essentially an advisory project is where managers and union/employee representatives, or groups of employees work together in a joint problem-solving mode assisted by an Acas official. Furthermore, while the terms of reference for mediation or arbitration are relatively narrow in scope and are focussed on resolving a defined conflict, the terms of reference for advisory projects are more open ended and are aimed at relationship building (Kessler and Purcell, 1995).

Acas delivers its advisory project work through two main methods: joint workshops and joint working parties (JWPs).

Joint workshops provide a non-negotiating forum for parties to explore problems and causes and identify appropriate courses of corrective action, including an agreed agenda for taking matters forward. JWPs are also non-negotiating bodies, typically chaired by Acas staff, through which employer and employee representatives work together, adopting a structured problem-solving approach – problems are defined, information is gathered and considered, options are evaluated, and solutions are agreed and implemented (Acas, 1997:43,44).

Dispute resolution – collective conciliation, mediation, and arbitration – is posited on institutionalised industrial relations carried out by unions and employers. In contrast, advisory projects can be undertaken in workplaces where there are institutionalised industrial relations and in workplaces where there are not (Purcell, 2000). The latter are predominantly in the private sector (Cully *et al*, 1999:93).

Acas (undated:8), in a pack for prospective users of its advisory projects, says:

Acas advisors don't simply try to persuade management and employee representatives to behave in a more accommodating and friendly fashion. If joint working is to work effectively, those involved in the process have to be assisted to replace their confrontational approach with tools and techniques which are more suitable for creating and sustaining co-operative relationships.

In a similar vein, an interviewee said:

Acas have in their advisory process over many years developed a range of interventions. Those interventions have varied from what one might call helping people to pull back from the abyss... to helping people to move forward in quite an engaged way. Because Acas has the standing which it does and because Acas is not associated with a brand, this has created a scenario where Acas have been able to be active... Acas has simply been the person with the toolkit who has come along and helped us to move forward.

Thus although 'jointness', staff involvement and good practice are common strands, the projects themselves vary and Acas annual reports give examples in both the public and private sectors. Looking at public sector examples, some have been an outcome of conciliation. For instance in 1997 Acas facilitated two JWPs set up as part of the resolution of a long running, national dispute between Royal Mail and the Communication Workers Union. One concerned delivery issues and one concerned new ways of working. Similarly Acas helped to set up a JWP following a dispute between London Underground and the Associated Society of Locomotive Engineers and Firemen (ASLEF) and the National Union of Rail, Maritime and Transport Workers (RMT). The JWP focussed on the morale of train staff and output issues (Acas, 1998).

An example of a somewhat different advisory project, which did not evolve from a dispute, concerned the Hampshire Fire Authority in 1998. This involved management and three unions: the Fire Brigades Union (FBU), Unison and the GMB. It started with an industrial relations audit and resulted in a report proposing a partnership agreement, guidelines for communications and arrangements for staff appraisal (Acas, 1999). In a similar vein wide-ranging initiatives resulted from an advisory project at South Devon Healthcare NHS trust. These initiatives included as a "Who's Who" for new staff; a leadership development programme for managers and a new appraisal system for all staff (Acas,

2001). Acas also acted as facilitators for a joint review of industrial relations in the Glasgow and Edinburgh areas of Royal Mail in autumn 2000, with particular attention paid to the conduct code and leadership behaviours. Outcomes included a joint management/union training programme and a new code of practice signed by the Glasgow area operations manager and the CWU branch secretary for the conduct of industrial relations. Yet another public sector example comes from the Home Office where Acas assisted in the revision of disciplinary procedures in 2001-2002.

Statistics broken down by sector and sub-sector were not provided but anecdotal evidence suggests that the majority of advisory projects are in small firms in the private sector. Looking solely at the public sector, NHS trusts are the sub-sector where there has been the heaviest use of advisory projects.

9.2 Customer survey of advisory projects

Kessler and Purcell (1995) who carried out research from 1990-1993 found that just under half the managers said that they had benefited "a lot" from Acas advisory projects. More recently, in May 2002, Acas carried out a customer survey of its advisory projects, of which over 500 are completed each year. For the purposes of this paper the survey results were broken down into responses from the private sector of which there were 107 (66 per cent) and responses from the public sector, of which there were 35 (22 per cent). Some key differences between the two sectors were in respect of the initiation of the project and the main goal of the project. Almost 3 in 4 of public sector managers said that they had first suggested contacting Acas, as opposed to a trade union/employee representative, a joint approach or an approach by Acas, compared to just over 2 in every 5 for private sector managers. As to the main goal that participants hoped that the project might achieve, in the public sector the main goal most often hoped for was "improved communication between management and employee representatives" (40 per cent). In the private sector the main goal most often hoped for was "greater trust between management and employees" (32 per cent).

Respondents signified a high degree of satisfaction and there was very little difference between the public and private sectors. For instance 94 per cent of respondents from the public sector and 90 per cent of respondents from the private sector were of the view that their main goal had been achieved either fully, to a large extent or to some extent. Similarly overall most respondents said that there had been some improvements in the level of trust between management and respondents since the Acas advisory project had been conducted. The breakdown was exactly the same for both public and private sector respondents at 69 per cent. Furthermore, 91 per cent of public sector respondents and 92 per cent of private sector respondents were either very satisfied or quite satisfied with the Acas exercise.

9.3 Partnership agreements

Partnership is now a buzzword but it is very amoeba-like and hard to pin down. It is both procedural, with partnership agreements and partnership forums, and it is attitudinal, both sides co-operating with each other. It is based on the premise that employees through their representatives can have more influence by taking part constructively in the process of managing change, than remaining aloof and oppositional.

It is beyond the scope of this paper to debate the pros and cons of partnership for management and trade unions or to discuss whether partnership inhibits the growth of union organisation at the workplace (Kelly, 1996). Suffice it to say that the concept of workplace partnership in the UK essentially stems from an Acas Occasional Paper by Adams (1993). Adams was a key player in the formation of one of the first and best known partnership deals at Blue Circle. He saw partnership as a pluralist relationship based on shared interests, a joint commitment to the success of the organisation, a mutual respect by management and unions and the genuine sharing of information and consultation. Adams was of the view that it was often difficult for management and labour to move from an adversarial relationship to a co-operative one without third party assistance. He said: "most organisations find it helpful to enlist the aid of neutral third parties to help them manage the risks, acquire the skills, and successfully make the change to partnership" (Adams, 1993: 25).

In fact Acas advisory projects are designed to develop good ways of doing things in the workplace and co-operative relationships. Accordingly, they aim to produce what is in effect partnership, whether or

not the partnership label is attached. One interviewee thought that it was advantageous for Acas that it was “able to be active without necessarily saying ‘we are going to give you partnership’”. Moreover, there are organisations which provide third party assistance to management and unions specifically to create partnerships. Foremost among these is the Involvement and Participation Association (IPA). Its director is on the Acas Council at the time of writing (June 2003) and often works closely with Acas. More recently the TUC formed the Partnership Institute. Nevertheless, some partnership deals have been concluded without third party help and interviewees referred to partnership agreements in local authorities and the civil service where third parties were not involved.

According to an interviewee, the “large majority of work” was in the private sector, particularly manufacturing and private sector organisations which had come from the public sector, such as utilities. Looking solely at the public sector, however, both Acas and the IPA have had considerable involvement in the NHS.

In most of the public services, industrial relations are embedded in the Whitley structure which has a long history (see section 3) and Whitleyism, like partnership, emphasises co-operation between management and unions to further the efficiency of the service. An interviewee, however, was of the view that partnership was different from Whitleyism in that partnership is actually “focussed on activity” at all levels. While Whitleyism provided for dialogue between “senior figures in the trade union and senior figures in the employer” for the vast majority of people in the organisation, “Whitley could be a republic in Latin America or some strange practice in Burma. It just didn’t cross their radar screen.”

Is there any difference between partnerships in the public sector and the private sector? According to the director of the IPA there is. Comparing unionised organisations in the two sectors, he was of the view that in the public sector it would almost always start with an agreement, whereas in the private sector sometimes there were not any agreements at all and, if there were, they would be more loosely written. He said:

The effort and energy [in the public sector] would go into crafting the agreement. In some respects the agreement would be written in the language of gate-keeping as opposed to the language of enabling. This agreement would then be handed down from the top and there would be much more a sense of engagement and participation at the top than at the bottom.

9.4 Other initiatives

Advisory projects and partnership agreements apart, other new third party dispute prevention and resolution processes in the public sector are being developed. While it is beyond the scope of this paper to provide a comprehensive examination, a few recent initiatives are noted. One initiative concerns all employees of the probation service, other than those on chief officer grades. Under an agreement concluded in 2000 a person selected from Acas’s list of mediators/arbitrators is invited as an advisor to attend appeal hearings against any formal disciplinary findings. The agreement says:

The primary role of the independent advisor should be that of custodian of best practice, although they may also provide advice on other matters as appropriate. The appeal panel will be expected to note and consider carefully the advice provided by the independent advisor. The final decision, however, will be taken by the appeal panel.

A similar initiative might be adopted at Royal Mail. An independent report considered that one of the main causes of strikes were discipline and dismissal cases. It recommended:

A specialised arbitration panel, with a Royal Mail and a CWU nominee and an independent chair (perhaps supplied by Acas), should be made available to provide a rapid but fair ruling on the fairness of the disciplinary action in the exceptional cases which have the potential to become industrial relations flashpoints (Sawyer, *et al*, 2001: 64).

In a further initiative, Acas has a facilitating and mediating role in locally generated disputes of sufficient gravity in the context of relationship building at HM Prison, Brixton. Other initiatives concern the use of mediation for grievances relating to harassment and bullying. For instance the Employment Service uses a mediation service run by the Centre for Dispute Resolution (CEDR) as part of its formal procedure for dealing with harassment complaints (IDS, 1999b).

10. Conclusions

This paper now returns to the two research questions which are addressed in turn.

10.1 Research question one

What are the mechanisms provided by third parties to prevent and resolve collective disputes in the public sector and how do they work in theory and practice?

To sum up, there is a considerable variety in the way that third party intervention is provided in respect of public sector disputes, both as preventative and resolving devices. First, the paper examined the third party mechanisms used in the process of determining terms and conditions in the public sector. At the time of writing these comprise the six pay review bodies and the negotiating forums for police officers and firefighters which are chaired by an independent. Although there are variations between these bodies, there are similarities. For instance all the conclusions of these bodies, except those for the fire services, are in the form of recommendations to government. All the PRBs, except the armed forces review body and the SSRB, co-exist with some collective bargaining.

The paper next examined collective dispute resolution mechanisms. Foremost among these is conciliation provided by Acas. Roughly half of all public sector disputes in the five years from 1 April 1997 concerned pay, including the general pay claim and conditions of service. In the same time period, in roughly half of all public sector cases “the issue in dispute was resolved through conciliation under Acas auspices. This includes the situation where in conciliation a union withdrew its claim, or management its own proposal(s)”. Furthermore, the overwhelming majority of public sector respondents were very satisfied or quite satisfied with the service they received from Acas. Interestingly, though, conciliation was seldom used in the civil service, even where the union requested it.

Another collective dispute resolution mechanism is mediation. Although a flexible mechanism, it was little used in the five years from 1 April 1997 in the public sector. For instance in one year (1999-2000) there were no public sector cases.

Arbitration, however, was used somewhat more, though there were at the most 10 public sector cases per year in the five years from 1 April 1997. Moreover, these global figures disguise variations between frequent users, such as in respect of police officers and more recently the POA, and GCHQ, where the union used its right of unilateral access to arbitration for the first time in 2002 since the signing of the agreement five years previously. Arbitration is a process whereby an employer and trade union in dispute hand over to an independent person (or group of persons) the responsibility for deciding the issue. In theory, then, it undermines the autonomy of the parties. None of the public sector employers and union officials interviewed, however, considered that the use of arbitration represented a failure, provided it was not used too often. The overwhelming view was that it got the parties off the hook and enabled them to move on.

Finally the paper examined new ways adopted by third parties of preventing disputes, including the use of advisory projects by Acas and partnership arrangements by the Involvement and Participation Association. Although statistics are not available, anecdotal evidence suggests that NHS trusts comprise the sub-sector of the public sector where such arrangements have been used most.

There was general customer satisfaction with advisory projects. For instance 91 per cent of public sector respondents to an Acas survey said that they were either very satisfied or quite satisfied with the Acas advisory project. Other initiatives aimed at dispute prevention or resolution included the use of mediation for grievances, particularly bullying.

Whatever mechanism was adopted there was evidence that an impartial outsider often plays a key role in aiding the parties to reach agreement, whether using the traditional Acas approaches of collective conciliation, mediation and arbitration or new approaches often encapsulated in partnership agreements.

10.2 Research question two

What, if any, differences are there between the public and private sectors in respect of disputes and third party intervention to prevent and resolve them?

The conclusion of this paper is that there are only a few, but nevertheless significant differences between public sector and private sector disputes and third party mechanisms. Indeed there are many similarities. Looking at collective conciliation, there is little difference in respect of the cause of dispute and in responses to the Acas user satisfaction survey. 9 out of 10 respondents in the public and private sectors said that they were very likely or quite likely to use Acas services in the future and over four out of five respondents, whether in the public or private sectors, said that they were very satisfied or quite satisfied overall with the service received from Acas. Turning to mediation, this device was little used, whether in the public or private sectors. Slightly more use was made of arbitration and there were public/private sector similarities in outcome: in only a minority of cases was the arbitration result a compromise. Also interviewees, both an Acas official and some independents who acted as arbitrators, were of the view that any difference in the behaviour of the parties did not rest on the sector in which they were located. Employers and trade unions at national level were generally more sophisticated whereas employers and trade unions locally, whether or not in workplaces that were part of a larger organisation and irrespective of sector, tended to be less so.

As to the differences: first as noted in sub-section 2.2 public sector disputes are more likely to receive media attention than private sector disputes, because most public sector organisations are large and thus newsworthy and provide essential services for which there is no alternative provider. Second, the fundamental relationship between capital and labour is not present in the public sector in the same way as it is in the private sector and the government, as direct or indirect employer, is subject to different constraints from private sector employers, the most important being accountability to parliament and ultimately to the electorate. One result is that there are certain third party mechanisms which are only found in public sector employment relations, such as the review bodies or independent chairs of negotiating bodies.

Third, public sector disputes are proportionately more likely than private sector disputes to have a national dimension. For instance public sector collective conciliation cases are more likely than private sector conciliation cases to be handled by head office. (Acas Head Office only deals with disputes which have a national dimension). See figure 2 for details. Fourth, Acas statistics in the five years from 1 April 1997 suggest that private sector cases were more likely than public sector cases to lead to a positive outcome from conciliation. See figure 3 for details.

Fifth, and this is the most important difference, the government predominates in public sector pay determination, whether or not it is legally the employer, because it is wholly or partly the paymaster and because it is both economic manager and employer. Therefore, the government's concern is not just the cost of the payroll for a particular group of public sector workers but the potential ripple effect a pay deal may have on public sector pay more generally and thus on the economy. This concern is heightened when the public services have a high political salience. The government does not have the same role in private sector negotiations. It may take an interest in some private sector negotiations, and even express a view privately, but it does not predominate.

The government's predominance in public sector pay negotiations is manifested both overtly and covertly. Dealing first with government's overt predominance, the agreements reached by the Police Negotiating Board are recommendations to the Secretary of State. In the NHS the outcomes of changes to pay and conditions require the approval of the Secretary of State. Where the review bodies' remit runs, the government has three bites at the cherry. It appoints members of the review body. The department gives evidence to the review body and, most importantly, the pay review body is in the form of recommendations to the relevant minister, who ultimately decides whether to accept/reject/stage the recommendations. As to arbitration, decisions in respect of the civil service, GCHQ and HM Prison Service may be overturned by a minister on grounds of "public interest". The government has no equivalent locus in private sector arbitration decisions.

Where departmental civil servants take part in the negotiating process in a public sector organisation, as in the police or the NHS, there is what has been termed intra-organisational bargaining and government influence is institutionalised and overt. Where it does not, as in the firefighters and local

authorities, departmental civil servants are nevertheless involved, albeit covertly, and “the employers see themselves as being under considerable pressure from central government” (Burchill, 2000b:11). As one employer side secretary said: “in theory I’m the employer’s negotiator, but in practice I’m the go-between”.

Covert predominance may at times be traced to the Treasury rather than the lead department, whether or not pay is determined nationally or locally. For instance when the NHS unions were holding talks with the Department of Health over the new national pay system for non-medical staff in the NHS (*Agenda for Change*), they were not prepared to proceed in summer 2002 until they were assured that there would be the money necessary to finance any agreement (Scott, 2002). In the civil service, where pay is determined at department/agency level and not nationally, before any department/agency negotiates with its unions over civil servants’ pay, it has to clear its so-called pay remit with the Treasury (Talbot, 1997). Other parts of government, apart from the lead department, who may have a legitimate interest in public sector disputes are situated at 10 Downing Street: the Delivery Unit and the Office of Public Services Reform.

In addition, ministers may have a predominant and covert influence. For instance, according to an interviewee, ministers in private influenced London Underground employers in respect of the 2002 pay negotiations. Another interviewee recalled the dispute in local authorities in 1989 when white collar staff took industrial action. He said: “Thatcher called in the employers’ chair and said that she did not want a dispute that summer and that they had to settle and they did”. Furthermore, Margaret Thatcher when prime minister personally interfered in disputes in British Steel 1980, the civil service 1981 and coal mining 1984-85 as documented, for instance, by Young (1990).

The firefighters’ dispute 2002-2003 is an example of the government’s predominance both overtly and covertly. For instance, in early July, according to newspaper reports, the employers’ side in the firefighters NJC received an “instruction... from very high up” in the Office of the Deputy Prime Minister, that they could not table a planned offer of a 16 per cent pay increase (Maguire, 2002b:12; Adams, 2002:5). On 22 November 2002 when the employers and the union had reached a pay deal the government publicly vetoed it because in its view the extra pay was not linked sufficiently closely to changes in working practices (Millar et al, 2002).

As an Acas official said tactfully: “in the public sector there are more dimensions”.

10.3 Final comment

After New Labour came to power in 1997, it declared its intention to modernise the public services: schools, hospitals, local and central government and the criminal justice system with the aim of delivering high quality and efficient public services and providing joined up government (Cabinet Office 1999). Allied with this, the government increased public expenditure substantially from 2001 (Bach, 2002). Modernisation has taken different forms in different sub-sectors. In terms of public sector pay, modernisation has been translated into addressing recruitment and retention problems, tackling pay discrimination on grounds of gender and altering pay systems to support new working practices. Moreover, New Labour has eschewed an explicit public sector pay policy, although it has sometimes expressed concern about the knock-on effects of a pay deal for one group on other public sector groups (as with the firefighters in 2002-03). The government’s diversity of approach is not confined to public sector pay however; it extends to pay determination. As illustrated in appendix A, in no two groups in the public sector are the employment relations arrangements and the third party mechanisms exactly the same and the government has proceeded pragmatically on a case by case basis, rather than adopting a more uniform approach. Whether the latter would be more preferable is open to debate.

Appendix A: Key groups in the public sector

Organisation	Group	Industrial action illegal?	Determination of remuneration	Determination of other terms & conditions	Access to arbitration	Arbitral body
Armed forces	Armed forces (UK-210,000)	Criminal offence	Pay Review Body	Pay Review Body & Queen's regulations	None	None
Civil service	Non-industrial civil servants below grade 5 (E, W and Scot-490,000)	No	Collective bargaining decentralised to dept/agency level	Collective bargaining decentralised to dept/agency level	Joint	Civil Service Arbitration Tribunal
Education Authorities	School-teachers (E & W- 482,2200)	No	Pay Review Body with statutory underpinning	Pay Review Body except for certain local matters	Joint	Ad Hoc Arranged by Acas
Fire Authorities	Firefighters (UK-67,000)	No	Pay formula 1978-2002 Pay agreement 2002- 04 Pay formula 2005-06	Collective bargaining*	Unilateral	Ad Hoc Arranged by Acas
Government Communications Headquarters	GCHQ staff (UK-4,500)	Legally binding 'no disruption' agreement	Collective bargaining	Collective bargaining	Unilateral	Ad Hoc Arranged by Acas
HM Prison Service	Prison officers (E & W-30,000)	Legally binding 'no disruption' agreement + statutory reserve powers	Pay Review Body with statutory underpinning	Collective bargaining for non-PRB matters	Unilateral	Ad Hoc Arranged by Acas
Local government	Former manual & white collar staff (E & W-1,270,000)	No	Collective bargaining	Collective bargaining	Unilateral	Ad hoc Arranged by Acas
London Underground	Employees except those in senior management (London-16,000)	No	Collective bargaining	Collective bargaining	Joint	Ad Hoc Arranged by Acas
National Health Service	Nurses & some paramedics (E,W & Scot- 470,000)	No	Pay Review Body	Collective bargaining except stand-by, on-call & London allowances	Joint	Ad Hoc Arranged by Acas
Police authorities	Police officers (E, W Scot-144,000)	Criminal offence	Pay formula & Police Negotiating Board ^{††}	Police Negotiating Board	Unilateral	Police Arbitration Tribunal
Royal Mail	Employees below the senior salary structure (UK-175,000)	No **	Collective bargaining	Collective bargaining	Joint	Post Office Arbitration & Mediation Tribunal [†]

* An official side and staff side meet together under an independent chair. In respect of police officers, any agreements are in the form of recommendations to the Secretary of State.

** See sub-section 4.2 for a discussion of the Regulation of Investigatory Powers Act 2000

† There is unilateral access to mediation by the Post Office Arbitration and Mediation Tribunal and joint access to arbitration.

Appendix B: Arrangements in selected areas of the public sector

B.1 Fire Service

Background

Fire brigades in the UK employ some 67,000 people. Of these 59,000 are uniformed personnel, whose industrial relations arrangements are described below.

Firefighters are deployed in 59 fire authorities and, Northern Ireland apart, although these fire authorities are under local government control, they obtain around 85 per cent of their funding from central government. The Fire Brigades Union (FBU) is the recognised union for firefighters whose terms and conditions stem from the machinery set out in the so-called Grey Book. Negotiations are carried out through the National Joint Council (NJC) for Local Authority Fire Brigades, established in 1948 but amended in 2000 after an independent inquiry by Burchill (2000b). Under the Burchill provisions the NJC comprises 45 members: 22 on the employees' side and 23 on the employers' side, (with the Employers' Organisation for local government taking the lead and providing the employers' side secretary). There is also an independent chair. Day to day negotiations, however, are carried out by a sub-committee with a maximum of eight on each side, chaired also by the same independent chair. From 1978-2001, the annual pay increase was determined by a voluntarily agreed formula based on the upper quartile of male manual earnings as indicated by the annual New Earnings Survey.

Disputes between representatives of employees and of employers, if unresolved at brigade level, are referred to the Disputes Committee of the NJC. Since 1997 that has comprised three representatives of each side, the two joint secretaries and an independent chair, who is a different person from the NJC chair. Where the Disputes Committee fail to resolve the matter, it is referred to the full NJC.

The new provisions

In 2002-2003 there was a major dispute between the FBU and the employers. After the report by an Independent Review of the Fire Service (2002) chaired by Sir George Bain, 15 days of strikes which cost the government £100 million (Hansard, 2003) and the government laying before parliament a bill to impose terms and conditions, agreement was reached on 12 June 2003 (Turner, 2003). This agreement establishes new pay arrangements. A pay increase of 4 per cent was backdated to 7.11.02. The pay increases for 2003 and 2004, however, (7 per cent on average and 4.2 per cent) are linked to so-called modernisation, for instance alternative duty systems. In 2005 and 2006 there will be a new pay formula: movements in pay of the "Associate Professional And Technical" occupational classification in the New Earnings Survey.

The 2003 agreement also provides for a review by the NJC of the disputes procedure. In addition, a working group "representative of fire service stakeholders" is to propose revisions to the constitution of the NJC by 30.11.03.

Third party intervention

At present both the NJC and the Disputes Committee have independent chairs. Informally, the independent chair of the Disputes Committee, together with the national secretaries of the two sides may conciliate; see sub-section 6.1. Formally, though, if the NJC fails to reach agreement, either in respect of negotiations on terms and conditions or a matter referred to it by the Disputes Committee, the matter is automatically referred to Acas for conciliation. Where conciliation fails to produce a settlement, either side can request arbitration through Acas. If there is any doubt whether a matter is arbitrable then the matter will be decided by an arbitrator.

The 2003 agreement provides for mediation over alternative duty systems. It makes it clear that "the determination of the number of personnel on duty at each location at different times of day is a matter for the fire authority". Nevertheless, it says that the fire authority will discuss proposed alternative duty systems with the union. If there is no agreement the difference can be referred to a technical advisory panel chaired by an independent expert appointed by the two sides of the NJC. The panel will seek to broker an agreement but, if that is not possible, will make recommendations.

Comment

Industrial relations in the fire service are currently under some strain as a result of the dispute. Moreover, the agreement is a framework that will necessitate further negotiations and those surrounding new patterns of fire cover for each brigade based on new risk management plans may well be contentious. Also the agreement specifies that the pay increases in 2003 and 2004 are subject to verification by the Audit Commission (England and Wales), Accounts Commission (Scotland) and Government (Northern Ireland) that the intended benefits of modernisation are being delivered locally and this too may prove contentious.

B.2 GCHQ

Background

From 1984 to 1997 union membership was banned at Government Communications Headquarters (GCHQ), the electronic intelligence gathering centre whose headquarters are at Cheltenham. GCHQ staff, however, could join the non-independent Government Communications Staff Federation (GCSF). After the 1997 election when new Labour returned to power, it restored union rights to the five civil service unions. These unions, together with GCSF, termed the “union parties”, concluded a legally binding “collective agreement to ensure staff relations are conducted peacefully and without disruption to operations at GCHQ”. There were then two mergers: first GCSF merged with the largest civil service union and second, this merged union then merged with another civil service union. As a result most GCHQ employees, of whom there are some 4,500¹⁸, now belong to the Government Communications Group (GCG) of the Public and Commercial Services Union (PCS)

The main provisions

The agreement which, as noted above, is legally binding, is based on a “joint partnership approach to solving industrial relations issues, respecting the interests of all parties involved”. All consultation and negotiation are with a view to achieving agreement and a joint consultative structure operates, with issues resolved between local GCG representatives and line managers at the lowest practicable level. In order to facilitate the full provision of information the union representatives of GCG, and at GCHQ’s discretion representatives of other union parties, are security vetted and, if suitable, granted security clearance.

The union parties agree that they will not induce or authorise any form of industrial action by GCHQ staff if such industrial action would have the effect of disrupting the operations of GCHQ. In the event of a dispute about whether industrial action would have the effect of disrupting the operations of GCHQ, the question will be decided by the Secretary of State for Foreign and Commonwealth Affairs whose decision, for which a contemporaneous reasoned explanation will be given, will be final. In the event of disruptive industrial action and without prejudice to the ability of GCHQ to seek injunctive relief, damages “shall not exceed an aggregate of £10,000 by the said union party arising out of, or incidental to a single dispute or connected series of disputes”.

Third party intervention

If the processes of consultation and negotiation fail to resolve a matter, which is not an individual issue, then GCHQ and the union may agree to refer it jointly to conciliation, or either shall be entitled unilaterally to refer the matter to arbitration. If there is a dispute between the parties as to whether a matter is capable of and suitable for arbitration under the agreement, the arbitrator will make a decision. Meanwhile, GCHQ will not impose any disputed change whilst the matter is under arbitration.

Arbitration is arranged by Acas and the arbitrator is someone acceptable to both sides, who may first act as a conciliator if the parties agree that such a course is desirable. If arbitration proceeds, the arbitrator’s award will be sent simultaneously to the parties, the Secretary of State for Foreign and Commonwealth Affairs and the Minister for the Civil Service. The Secretary of State, with the concurrence of the Minister for the Civil Service, has the power to overrule the arbitrator’s award “for overwhelming reasons of national security or public interest”. If that power is exercised a

¹⁸ Precise details are not revealed for national security reasons.

contemporaneous reasoned explanation will be given and the arbitrator's award will not be implemented. (See Corby (2000) for a full discussion.)

Comment

In the case of GCHQ, unilateral access to compulsory arbitration has been a spur to joint agreement rather than a mechanism that has been used. Indeed in the five years since the conclusion of the agreement (1997-2002), there was only one reference to arbitration. Furthermore one full time union official interviewed in 2002 for this research, and two other interviewees, a GCHQ human resources manager and the GCG secretary interviewed for other research in 2001 carried out by this author, said that taking the civil service as a whole, partnership was at its closest at GCHQ.

B.3 HM Prison Service

Background

There are some 30,000 prison officers and related grades employed in England and Wales by HM Prison Service and their recognised union is the Prison Officers' Association (POA). In 1994, the Criminal Justice and Public Order Act (CJ&POA) (section 127) created a duty owed to the Secretary of State that no-one shall induce a prison officer to withhold his services or commit a breach of discipline. Nevertheless, although industrial action is outlawed, it has taken place and, for instance, the Secretary of State obtained an injunction in 1999 to bar the POA from calling meetings in working time to protest at a below inflation pay offer.

The CJ&POA was superseded in 2001 when the Secretary of State announced a three strand approach to prison service industrial relations: a pay review body, a legally enforceable collective agreement and an announcement that s.127 of the CJ &POA would be repealed and replaced with a reserve statutory power (Corby, 2002).

The main provisions

The collective agreement which, as noted above, is legally binding, is based on a "joint partnership approach to solving industrial relations issues". It applies to all collective matters of policy and procedures which have an impact on staff represented by the POA, excluding pay and pay related issues which are dealt with by the PRB, individual grievance or disciplinary matters and nationally agreed matters which are dealt with through the Prison Service Whitley Council procedures. In other words, essentially the agreement applies to collective matters relating to the establishment.

The agreement contains a status quo clause to be applied "except in cases of clear operational emergency as sanctioned by the director general or deputy director general" of the Prison Service. Moreover, under the agreement the POA binds itself not to authorise, induce or support any industrial action which would disrupt operations. If there were a dispute about whether such action would be disruptive, the question would be decided by the Secretary of State who would then provide the parties with a written and reasoned explanation. In the event of a breach of the agreement, the Secretary of State can take action in court against the POA, including seeking injunctive relief.

Third party intervention

Before 2001, if there was a failure to agree locally the matter was referred to area level, then national level, with a manager hearing the matter at each stage. The new agreement provides that if there is a failure to agree locally then the matter is referred to Acas for conciliation. If no agreement is reached following conciliation, either party may unilaterally refer the matter to arbitration, after obtaining the approval of either the deputy director general of the Prison Service or the general secretary of the POA. Arbitration, which is by a single arbitrator, is arranged by Acas and is of the pendulum variety. The Secretary of State has the power to overrule the award of the arbitrator for reasons of national security or public interest. "To exercise that power the Secretary of State shall give a reasoned explanation to the House of Commons (when Parliament is in session) or to the Prime Minister, when Parliament is not in session) and shall publish that reasoned explanation."

As noted above, there is also third party intervention in pay determination through the Prison Service Review Body, which covers prison officers, related grades and some governors. This is the most recently established Review Body – its first report was issued in 2002.

Comment

The legally binding no-disruption agreement was modelled on that applying at GCHQ. There are, though some differences of which perhaps the most important is that the POA has unlimited liability in respect of a breach, while the unions who are party to the GCHQ agreement are limited to £10,000 per union per dispute or connected series of disputes.

Another difference relates to practice. The arbitration provisions of the GCHQ agreement have seldom been used. In the first year of the Prison Service agreement, four cases were referred to arbitration, including one case where the arbitrator had to decide whether the matter was in scope. Moreover, some observers are of the view that currently there is little partnership between the POA and Prison Service management, with industrial relations tensions exacerbated by the continuing increase in the prisoner population without corresponding increases in prison staffing or prisoner accommodation (Corby, 2002).

B.4 London Underground

Background

London Underground employs over 16,000 people and recognises four rail unions: the Associated Society of Locomotive Engineers and Firemen (ASLEF), the British Transport Officers' Guild (BTOG), the National Union of Rail, Maritime and Transport Workers (RMT), the Transport and Salaried Staffs' Association (TSSA). Two non-rail unions, Amicus and the Transport and General Workers Union (TGWU), are moving into the private sector with the so-called infracos at the time of writing.

In 1996 a long term agreement was concluded for drivers under which they traded a phased move from 38.5 to 35 hours a week for pay rises of up to two percentage points per year below those applying to other staff in 1996, 1997 and 1998. In 2000 trade unions representing other staff, still working up to 40 hours a week in some cases, secured a commitment to 37.5 hours to be implemented by 2001 but with no pay deductions.

Main provisions

There is machinery for collective bargaining at three levels. There is a company council, five functional councils and local level committees for non-managerial grades based on over 20 areas/depots. The company council deals with pay and conditions only. In the event of a failure to agree at local level, the issue is referred to the appropriate functional council. If there is still failure to agree "and it is a matter of principle" the issue can be referred to an ad hoc meeting with the director concerned together with full-time trade union officials.

Third party intervention

Up to 2000 London Underground had a wages board with an independent chair and two independent panel members one nominated by the trade unions and one nominated by the employer. This was ended under a new agreement whereby there is no independent locus in the negotiating machinery. In the event of a failure to conclude an agreement at the company council, or in the event of a failure to agree after a director's meeting, the parties can proceed as follows:

- "on jointly agreed terms of reference with any proposals that may result binding on the parties", ie joint access to arbitration;
- "on jointly agreed terms of reference, but any proposals that may result being non-binding on the parties", ie joint access to mediation;
- "if terms of reference cannot be jointly agreed seek assistance to resolve the situation", ie Acas conciliation.

Mediation was used in August 2001 in respect of the 2001 pay negotiations which covered all employees except senior managers and which was complicated by issues of differentials. Essentially, ASLEF and the RMT who represent drivers of passenger trains sought parity with Transplant or 'engineering' drivers who are involved in the transportation of freight for infrastructure repair and renewal and tend to work at nights when the passenger network is closed. It had previously been agreed that these Transplant drivers would move to a 37 hour week in 2001 and a 35 hour week in

2002. Under the public/private partnership they, unlike all other drivers, signallers and station staff, move to the private sector. The mediator recommended that London Underground “should take careful account” of the demand for parity “with the objective of setting a timetable for identifying anomalies and dealing with these where they exist”. As a result, a working party was set up which reached an agreement on a range of changes to drivers’ working arrangements and a phased bridging of the pay gap between passenger and Transplant drivers.

Comment

Employment relations at London Underground are currently under some strain for a number of reasons. These include trade unions’ fears that safety may be jeopardised in the event of changes to funding as a result of the Public/Private Partnership, which resulted in industrial action in July 2002. Also, pay rates for drivers (but not other staff) in some train operating companies have moved ahead of rates at London Underground. Against this background and after unsuccessful conciliation at Acas, management unilaterally imposed the pay settlement for April 2002¹⁹. In response the unions took strike action. This ended when the Mayor of London, Ken Livingstone, promised that when he took over London Underground in 2003, there would be a mediation inquiry with any recommendations on a pay uplift backdated to April 2002.

B.5 The NHS

Background

The National Health Service (NHS), founded in 1948, employs some one million people in Great Britain and unlike the other organisations listed in this appendix, the workforce is predominantly female and made up of many, different occupational groups. The largest occupational group, roughly about half of all NHS employees, is nursing, midwifery and health visiting. Probably the most powerful group are medical and dental staff, but other occupational groups working in the NHS include radiographers, physiotherapists, speech therapists, clinical psychologists, hospital pharmacists, clinical scientists, ambulance staff, ancillary staff, maintenance staff and managers.

The main provisions

National negotiations of terms and conditions are conducted through the Whitley Councils and committees. There is a general Whitley Council for matters affecting all NHS staff and eight functional councils, some of which are further divided. For instance the Whitley Council for scientific and professional staff has separate committees for speech therapists, clinical psychologists, clinical scientists, hospital pharmacists and chaplains. For building trades and maintenance staff there is a management advisory panel which operates in the same way as a functional Whitley Council. This complex negotiating structure is mirrored in the plethora of unions and staff associations in the NHS of which there are some 15.

The national provisions cover all NHS employees except healthcare assistants, an occupational group introduced in 1990. NHS trusts can, however, establish their own pay arrangements, irrespective of the national provisions. A few (less than two dozen) NHS trusts have introduced wholly new pay systems. The majority have only tinkered at the edges, for instance changing the removal allowance or observing the pay points but changing the pay progression arrangements by making the obtaining of an increment dependent on satisfactory progress, not service.

Third party intervention

There are two pay review bodies: one for doctors and dentists and the other for nurses, midwives and health visitors and certain professions allied to medicine. In fact these PRBs operate alongside a considerable amount of collective bargaining. For instance the contract for hospital consultants was negotiated by the Department of Health and the British Medical Association (BMA) in 2001/2002 outside the pay review body (albeit that contract was rejected by the BMA’s members). Similarly, the grading structure for nurses and midwives, effective in 1988, was negotiated outside the PRB. Also, there has been some unilateral imposition by government, notably cost of living supplements (COLS) introduced from 1 April 2001. The COLS, which apply to qualified nurses and paramedics working in London and the south east of England, were neither part of the review body’s recommendations nor were there negotiations in the Whitley machinery.

¹⁹ Emails to author from London Underground HR department 29 and 30 August, 2002

Arbitration, to which there is only joint access, in practice is little used in the NHS. For instance the unions proposed arbitration in respect of the dispute in 1988 about nurses' and midwives' grading and in the ambulance dispute 1989/90, but the Department of Health refused.

As to dispute prevention at a local level, Acas has undertaken advisory projects and the Involvement and Participation Association has helped to foster partnership deals. This aspect of third party intervention has probably been used the most in the NHS out of the public sector as a whole.
Comment

Outside the PRBs, the unions and the Department of Health have negotiated a new pay system for non-medical staff in the NHS known as *Agenda for Change*. Based on a gender neutral job evaluation scheme and an overhaul of working time arrangements, the new pay system will have two national pay spines to replace the many existing pay scales: one for nurses, paramedicals and other health professionals and one for all other staff (Department of Health 2002). At the time of writing (June 2003) *Agenda for Change* is being tested in "early implementer" sites. Meanwhile, the pay review body for nurses and para-medicals is effectively being sidelined as the parties have agreed a long term pay agreement of 10 per cent over three years from April 2003. (For a full discussion see IDS 2003.)

B.6 The police

Background

The present arrangements for determining the pay and conditions of police officers (but not civilians employed by police authorities) dates back to the Report of the Committee of Inquiry (1978) chaired by Lord Edmund Davies. This report was based on the fact that industrial action by police officers is a criminal offence and its main recommendations were embodied in the Police Negotiating Board Act 1980 (subsequently consolidated in the Police Act 1996).

There were 130,000 police officers in England and Wales in March 2002 and police officers up to chief inspector level are represented by one of three Federations (for England and Wales, for Scotland and for Northern Ireland). These Federations, while in many respects acting as if they were trade unions, are not trade unions in law.
The main provisions

Negotiations on pay and designated conditions of service for police officers are conducted by the Police Negotiating Board (PNB), which has an independent chair. Covering all ranks in the UK, it meets quarterly and has separate, standing committees for chief officers, superintendents and federated ranks. The precise remit of the PNB's negotiations are set out in s.61(1) Police Act 1996 and are: hours of duty, leave, pay and allowances, pensions, the issue, use and return of police clothing, personal equipment and accoutrements.

The PNB has a large membership: 22 staff side members, 22 official side members and there is a large amount of intra-organisational bargaining. The staff side is composed of representatives of the three Police Federations of England & Wales, Scotland and Northern Ireland which caters for cadets, constables, sergeants, inspectors and chief inspectors; the three parallel Superintendents' Associations and the two associations representing chief officers, one for England, Wales and Northern Ireland, the other for Scotland. The official side comprises representatives of police authorities (the nominal employers, composed of elected councillors whose political complexion varies, magistrates and independents), chief officers, who are the senior operational managers and representatives of the Home Office and its equivalents in Scotland and Northern Ireland. Representatives of the Office of Manpower Economics (OME), see below, the independent deputy chair and advisers to the two sides also attend. Accordingly at a meeting there can be around 65 present but only three speak: the staff side secretary, the official side secretary and the independent chair. In practice, the Employers' Organisation for local government takes the lead on the employers' side, providing the official side secretary.

The PNB is very formal so detailed negotiations and discussions are normally conducted outside of the main Board and standing committee meetings, for example through working parties or dialogue between the side secretaries and side chairs in the presence of the independent chair and secretariat.

(Hunter 2000; Clark, 2002). Any agreement by the PNB is in the form of a recommendation to the Home Secretary and his equivalents in Scotland and Northern Ireland, who then make regulations. Since 2001 the Home Secretary also has had power (following consultation with the independent chair) to place matters on the PNB agenda and set deadlines in matters of serious national importance to the police service.

Detailed negotiations centre normally on allowances and the main conditions of service. In practice there is rarely much negotiation about the annual pay increase as this is determined by a formula. The formula, which came into operation following a recommendation of the Edmund-Davies Committee of Inquiry into the Police (1977-78), was initially based on movements in the index of average earnings. From 1995, however, it has been based on the median of total pay movements in the OME's regular survey of non-manual pay settlements outside the public services.

Third party intervention

As noted above an independent person chairs the PNB. Professor Jon Clark, appointed by the Prime Minister from 2000 to 2004, is the current chair and he also chairs the Police Advisory Board in England and Wales. His deputy formerly chaired Magnox Electric. According to the Edmund Davies Report an independent chair "would supply a genuinely neutral voice in the to-and-fro of negotiation, and could help very considerably in bringing the two sides to agreement" (para 89, cited in Clark, 2001). The chair is supported by the OME which provides a secretariat, research, including its regular survey of pay movement, and accommodation.

If there is failure to agree the independent chair conciliates. If there is still failure to agree, there is the right of unilateral reference to the Police Arbitration Tribunal (PAT). The PAT is a standing three person arbitral body which operates under the auspices of Acas. Decisions of the PAT (like PNB agreements) are in the form of recommendations to ministers.

Comment

The machinery described above has changed only a little in the last 20 years, despite two major revisions of police officers' terms and conditions. The first major revision occurred in 1994 following a review of police officer rank structure, remuneration and conditions of service by a committee chaired by Sir Patrick Sheehy (Clark, 2001). The second major revision occurred in 2001/2002 following the publication of a paper by the Home Office outlining desired "outcomes" in respect of the deployment and remuneration of police officers. This included greater pay flexibility, more targeted rewards, reform of overtime and duty rostering arrangements, the rationalisation of allowances and flexibility for officers to stay on after 30 years. A provisional agreement was reached in December 2001 only to be rejected by police officers. In the event a revised conciliated settlement was reached in May 2002 (Clark, 2002).

Between 1996-2001 there have typically been one or two PAT arbitrations a year.

Appendix C: Abbreviations

Acas	Advisory, Conciliation & Arbitration Service
ASLEF	Associated Society of Locomotive Engineers and Firemen
BMA	British Medical Association
CAC	Central Arbitration Committee
CEDR	Centre for Dispute Resolution
CJ&POA	Criminal Justice and Public Order Act
COHSE	Confederation of Health Service Employees
COLS	Cost of Living Supplement (NHS)
CSAT	Civil Service Arbitration Tribunal
DDRB	Doctors' and Dentists' Review Body
FBU	Fire Brigades Union
GCG	Government Communications Group
GCHQ	Government Communications Headquarters
GCSF	Government Communications Staff Federation
HEO	Higher Executive Officer
IDS	Incomes Data Services
ILO	International Labour Organisation
IPA	Involvement and Participation Association
JWP	Joint Working Party
NALGO	National and Local Government Officers Association
NCO	Non-commissioned Officer
NHS	National Health Service
NJC	National Joint Council
NUPE	National Union of Public Employees
OME	Office of Manpower Economics
ONS	Office of National Statistics
PAT	Police Arbitration Tribunal
PCS	Public and Commercial Services Union
PNB	Police Negotiating Board
POA	Prison Officers Association
POA&MT	Post Office Arbitration and Mediation Tribunal
PRB	Pay Review Body
PSRB	Prison Service Review Body
RMT	National Union of Rail, Maritime and Transport Workers
SEO	Senior Executive Officer
SIC	Standard Industrial Classification
SSRB	Senior Salaries Review Body
STRB	School-teachers' Review Body
TGWU	Transport and General Workers Union
WERS	Workplace Employee Relations Survey

Appendix D: References

Acas (undated) Towards better employment relations: using the Acas advisory service, London: Advisory, Conciliation and Arbitration Service.

Acas (1979) Annual Report 1978, London: Advisory, Conciliation and Arbitration Service.

Acas (1996) Annual Report 1995, London: Advisory, Conciliation and Arbitration Service.

Acas (1997) Annual Report 1996, London: Advisory, Conciliation and Arbitration Service.

Acas (1998)) Annual Report 1997, London: Advisory, Conciliation and Arbitration Service.

Acas (1999)) Annual Report 1998, London: Advisory, Conciliation and Arbitration Service.

Acas (2000) Annual Report 1999-2000, London: Advisory, Conciliation and Arbitration Service.

Acas (2001) Annual Report 2000-2001, London: Advisory, Conciliation and Arbitration Service.

Adams, C. (2002) 'Blair faces up to his biggest domestic test', Financial Times, 23 October, 5.

Adams, L. (1993) 'Time for a Change: forging labour-management partnerships', Occasional Paper 52, London: Advisory, Conciliation and Arbitration Service.

Audit Commission (2002) Recruitment and retention: a public service workforce for the twenty-first century, London: Audit Commission.

Bach, S. (2002) 'Public sector employment relations reforms under Labour: muddling though on modernization?', British Journal of Industrial Relations, 40, 2, 319-337.

Beaumont, P. B. (1992) Public Sector Industrial Relations, London: Routledge.

Brook, K. (2002) 'Trade union membership: an analysis of data from the autumn 2001 LFS', Labour Market Trends, July, 343-354.

Brown, A. (1992) 'Acas arbitration: a case of consumer satisfaction?', Industrial Relations Journal, 23, 3, 224-234.

Burchill, F. (1997) Labour Relations, 2nd edition, Basingstoke: Macmillan.

Burchill, F. (2000a) 'The pay review body system: a comment and a consequence', Historical Studies in Industrial Relations, 10, Autumn, 141-157.

Burchill, F. (2000b) Inquiry into the Machinery for determining firefighters' Conditions of Service, Cm 4699, London: Stationery Office.

Cabinet Office (1995) Competitiveness: forging ahead, Cm 2867, London: HMSO.

Cabinet Office (1999) Modernising government, Cm 4310, London: The Stationery Office.

Central Arbitration Committee (2001) Annual Report 2000-2001, London: Central Arbitration Committee.

Central Arbitration Committee (2002) Annual Report 2001-2002, London: Central Arbitration Committee.

Clark, J. (2001) First Annual Report of the Independent Chair of the Police Negotiating Board, 2000-2001, London: Office of Manpower Economics.

- Clark, J. (2002) Second Annual Report of the Independent Chair of the Police Negotiating Board, 2001-2002, London: Office of Manpower Economics.
- Clegg, H. A., Fox A., and Thompson, A. F. (1964) A History of British Trade Unions since 1889: vol I 1889-1910, Oxford: Clarendon Press.
- Colling, T. (1997) 'Managing human resources in the public sector' in Beardwell, I. and Holden, L. (eds) Human Resource Management: a contemporary perspective, 2nd edition, London: Pitman.
- Committee of Inquiry (1978) chaired by Lord Edmund-Davies Report, Cmnd 7283, London: HMSO.
- Corby, S. (2000) 'The GCHQ Union Ban 1984-1997: the unions' strategy and the outcome', Labour History Review, 65, 3, 317-332.
- Corby, S. (2002) 'On parole, Prison Service industrial relations', Industrial Relations Journal, 33, 4, 286-297.
- Corby, S. and White, G. (1999) Employee Relations in the Public Services: themes and issues, London: Routledge.
- Cully, M., Woodland, S., O'Reilly, A., and Dix, G. (1999) Britain at Work as depicted by the 1998 Workplace Employee Relations Survey, London: Routledge.
- Deakin, S. and Morris, G. Labour law, London: Butterworths.
- Department of Health (2002) A modernised NHS pay system, www.doh.gov.uk/agendaforchange, accessed 29 November 2002.
- Dickens, L., Jones, M., Weekes, B. and Hart, M. (1985) Dismissed: a study of unfair dismissal and the industrial tribunal system, Oxford: Blackwell.
- Dix, G. (2000) 'Operating with style: the work of the Acas conciliator in individual employment rights cases' in Towers, B. and Brown, W. (eds) Employment Relations in Britain: 25 years of the Advisory, Conciliation and Arbitration Service, Oxford: Blackwell.
- Enderby v Frenchay Health Authority (1993) Industrial Relations Law Reports, 591.
- Foster v British Gas (1990) Industrial Relations Law Reports, 353-363.
- Fox, A. (1985) History and Heritage: the social origins of the British industrial relations system, London: Allen & Unwin.
- Fredman, S. and Morris, G. (1989) The State as Employer: Labour Law in the Public Services, London: Mansell.
- Fredman, S. and Morris, G. (1992) 'School Teachers' Pay and Conditions Act 1991' Industrial Law Journal, 21, 1, 44-46.
- Gennard, J. and Judge, G. (1999) Employee Relations, 2nd edition, London: Institute of Personnel and Development.
- Goodman, J. (2000) 'Building bridges and settling differences: collective conciliation and arbitration under Acas' in Towers, B. and Brown, W. (eds) Employment Relations in Britain: 25 years of the Advisory, Conciliation and Arbitration Service, Oxford: Blackwell.
- Gospel, H. and Lockwood, G. (1999) 'Disclosure of Information for Collective Bargaining: The CAC approach revisited', Industrial Law Journal, 28, 3, 233-248.
- Hansard (2003) House of Commons Debate on Fire Services Bill, 8 May, col 859, www.publications.parliament.uk/pa/cm200203/cmhansrd/cm030508/debtext/30508-12.htm accessed 13.6.03.

- Hardwidge, C. 'Jobs in the Public Sector', *Economic Trends*, 583, June, 39-52.
- Hepple, B. A. (1982) 'Labour law and public employees' in Wedderburn, Lord and Murphy, W. T. (eds) *Labour Law and the Community*, London: Institute of Advanced Legal Studies.
- Hunter, L. (1977) 'Economic issues in conciliation and arbitration', *British journal of Industrial Relations*, 15, 2, 226-245.
- Hunter (2000) 'The real deal', *Police Review*, 10 March, 20-21.
- IDS (1999a) *Industrial Action*, *Employment Law Handbook*, London: Incomes Data Services.
- IDS (1999b) 'Harassment policies' *IDS Studies*, 662, January, London: Incomes Data Services.
- IDS (2002) *Pay in the public services: review of 2001, prospects for 2002*, London: Incomes Data Services.
- IDS (2003) *Pay in the public services: review of 2002, prospects for 2003*, London: Incomes Data Services.
- Independent Review of the Fire Service (2002) *The future of the fire service: reducing risk, saving lives*, report of a review chaired by Sir George Bain.
- International Labour Organisation (1983) *Freedom of Association and Collective Bargaining*, report of the Committee of Experts, 69th session, Geneva: International Labour Office.
- Ironside, M. and Seifert, R. (2000) *Facing up to Thatcherism: the history of NALGO 1979-93*, Oxford: Oxford University Press.
- IRS (2002) 'Don't nurse a grievance: resolving disputes at work', *IRS Employment Review*, 759, 9 September, 7-13.
- Kelly, J. (1996) 'Union militancy and social partnership' in Ackers, P., Smith, C., and Smith, P. *The New Workplace and Trade Unionism*, London, Routledge.
- Kessler, I. and Purcell, J. (1995) 'Joint problem solving: does it work? An evaluation of Acas in-depth advisory mediation', *Occasional Paper 55*, London: Advisory, Conciliation and Arbitration Service.
- Kessler, S. (1987) 'The swings and roundabouts of pendulum arbitration' *Personnel Management*, December, 38-42.
- Labour Research (1999) 'Prison officers in the dock' *Labour Research*, 88, 1 January, 9.
- Labour Research (2002) 'Jobcentre strike is over, as others set to begin', *Labour Research*, May, 4.
- Lewis, R. (1990) 'Strike free deals and pendulum arbitration', *British Journal of Industrial Relations*, 28, 1, 32-56.
- London Borough of Wandsworth v National Association of Schoolmasters/Women Teachers (1993) *Industrial Relations Law Reports*, 344-350.
- Lowry, P. (1990) *Employment Disputes and the Third Party*, Basingstoke: Macmillan.
- Maguire, K. (2002a) 'Pay inquiry set up after council deal', *Guardian*, 7 August, 6.
- Maguire, K. (2002b) 'Prescott office blocked offer to firefighters', *Guardian*, 10 September, 12.
- Millar, S., Watt, N. and Maguire, K. (2002) 'How 16 hours of frantic talks ended in high farce' *Guardian*, 23 November, 4-5.
- McCarthy, W. (1976) *Making Whitley Work*, London, HMSO.

- Molloy, D. Legard, R. and Lewis, J. (2002) *Acas collective conciliation: users' perspectives*, London: Advisory, Conciliation and Arbitration Service.
- Mortimer, J. (1982) 'Arbitration, the public interest and labour relations' in Wedderburn, Lord and Murphy, W. T. (eds) *Labour Law and the Community*, London: Institute of Advanced Legal Studies.
- Mumford, K. (1996) 'Arbitration and Acas in Britain: a historical perspective' *British Journal of Industrial Relations*, 34, 2, 287-305.
- Purcell, J. (2000) 'After collective bargaining? Acas in the age of human resource management' in Towers, B. and Brown, W. (eds) *Employment Relations in Britain: 25 years of the Advisory, Conciliation and Arbitration Service*, Oxford: Blackwell.
- Review Body on Doctor's and Dentists' Remuneration (1999) 28th Report, Cm 4243, London: Stationery Office.
- Richardson, R. (2002) 'Rethinking Whitehall' *Financial Times*, 17 June, 19.
- Rideout, R. (1982) 'Arbitration and the public interest: regulated arbitration' in Wedderburn, Lord and Murphy, W. T. (eds) *Labour Law and the Community*, London: Institute of Advanced Legal Studies.
- Rideout, R. (2002) 'What shall we do with the CAC?', *Industrial Law Journal*, 31, 1, 1-34.
- Royal Commission on Trade Unions and Employers' Association (1968) chaired by Lord Donovan, Report, Cmnd 3623, London: HMSO.
- Turner, D. (2003) 'Ministers slug their way to a victory of sorts over firefighters', *Financial Times*, 13 June, 4.
- Sawyer, T. Borkett, I. and Underhill, N. (2001) *Independent review of industrial relations between Royal Mail and the Communication Workers Union*, London: unpublished.
- Scott, G. (2002) 'Pay talks enter final stage after funding is confirmed', *Nursing Standard*, 16, 34, 8 May, 4.
- Straw, J. (1998) Letter from Home Secretary, Jack Straw, to the POA national chair, Mark Healy, 28 January, unpublished.
- Talbot, C. (1997) 'UK civil service personnel reforms: devolution, decentralisation and delusion', *Public Policy and Administration*, 12, 4, 14-34.
- Thornley, C. (1994) 'Nursing pay policy: chaos in context', paper presented to the Employment Research Unit annual conference, 'The contract state: the future of public management', Cardiff Business School, September.
- University College London Hospitals NHS Trust v Unison (1999) *Industrial Relations Law Reports*, 31-35.
- Watt, N. and Maguire, K. (2002) 'Blair faces union summer of discontent', *Guardian*, 5 July, 5.
- Wedderburn, Lord (1989) 'Freedom of association and philosophies of labour law', *Industrial Law Journal*, 18, 1, 1-38.
- White, G. (2000) 'The Pay Review Body System: its development and impact' *Historical Studies in Industrial Relations*, 9, Spring, 71-100.
- White, G. and Hutchinson, B. (1996) 'Local government' in Farnham, D. and Horton, S. (eds) *Managing People in the Public Services*, Basingstoke: Macmillan.

Winchester, D. (1983) 'The public sector' in Bain, G. S. (ed) *Industrial Relations in Britain*, Oxford: Blackwell.

Winchester, D. and Bach, S. (1995) 'The state: the public sector' in Edwards, P. (ed) *Industrial Relations: Theory and Practice in Britain*, Oxford: Blackwell.

Wood, J. (1992) 'Dispute Resolution – Conciliation, Mediation and Arbitration' in McCarthy, W. (ed) *Legal Intervention in Industrial Relations: Gains and Losses*, Oxford: Blackwell.

Young, H. (1990) *One of Us*, London: Pan.