As regards costs, an employment tribunal does not normally make an award but may do so, for example, where in its opinion a party to any proceedings has acted frivolously or vexatiously, as where an employer or employee refuses to take any part in the proceedings, or has acted abusively or disruptively – so the parties must behave!

The only situation in which a tribunal *has a duty to make a costs order* is when in an unfair dismissal complaint the employee claimant has expressed a wish to be reinstated or re-engaged and has told the employer this at least seven days before the hearing and yet the hearing has had to be postponed because the employer has failed, without special reason, to adduce reasonable evidence as to the availability of the job from which the employee was dismissed or of comparable or suitable employment where he can be re-engaged. Under the 2004 regulations a tribunal can now also make a *preparation time order* where either the claimant or the defendant makes a payment in respect of the preparation time of the other. Such an order may be made where the party who receives payment was not legally represented at the hearing or where the proceedings were determined without a hearing. An hourly rate of £26 per hour is applied from 1 April 2006 and goes up by £1 an hour every year. A maximum of £10,000 can be awarded. The provision may help, for example, small employers who may face claims from employees who are backed by trade unions and the employer deals with his or her own defence. These payments do not depend upon who succeeds at a hearing.

Also under the 2004 regulations a tribunal may make a *wasted costs order* against a person representating either party where the representative's unreasonable or negligent act or omission has affected the conduct of the proceedings. These orders can be applied to lawyers and other representatives such as trade unions, employers' associations and law centres.

The decision is made by a majority and is given orally at the hearing or, if necessary, reserved and given at a later date. In any case it is recorded in a document which is signed by the chairman and contains reasons for the decision. The parties each receive a copy. It should also be noted that where an employee has died tribunal proceedings may be started or continued by his personal representatives.

An employment tribunal can review and change its decision afterwards where, for example, new evidence has become available which could not have been known of or foreseen at the original hearing.

The Employment Appeal Tribunal (EAT)

Appeal from an employment tribunal lies only on questions of law. The determination of the facts by an employment tribunal cannot be challenged on appeal and it is, therefore, most important that the facts are properly presented to the tribunal at the hearing. In this connection an EAT decision serves as a warning to employers who fail to turn up at tribunal hearings. The EAT has ruled that evidence that was not placed before an employment tribunal because the employer decided not to attend the hearing could not be raised on appeal (see *Taylor* v *John Webster Buildings Civil Engineering* [1999] ICR 561). Under s 9 of the Trade Union and Labour Relations (Consolidation) Act 1992 it will also hear an appeal from the ACAS Certification Officer by a trade union aggrieved by his refusal to issue it with a certificate that it is independent. The major legislative privileges are given to those trade unions which are independent of the employer and not, for example, to employer-dominated staff associations. The Certification Officer adjudicates upon the matter of independence under s 6 of the Trade Union and Labour Relations (Consolidation) Act 1992.

The Employment Appeal Tribunal is a superior court of record with an official seal. Although the central office of the tribunal is in London, it may sit at any time and in any place in Great Britain. It may also sit in one or more divisions.

Appeals are usually heard by a judge of the High Court or a circuit judge or a recorder and either two or four appointed members who do not belong to the judiciary but have special knowledge or experience of industrial relations, either as representatives of employers or workers. The reason why the judge will usually sit with either two or four appointed members is so that in either case there are an equal number of persons whose experience is as representatives of employers and of workers. The decision need not be unanimous but may be by a majority. Each member of the court, including the judge, has a vote so that the judge could be outvoted, but this is extremely rare. Exceptionally, if the parties to the proceedings consent, a case may be heard by a judge and one or three appointed members. Legal aid for advice and representation is available to individuals for appeals from employment tribunals (see Access to Justice Act 1999, Sch 2).

Appeals to the Employment Appeal Tribunal are commenced by serving on the tribunal within 42 days of the date on which the document recording the decision or order appealed against was sent to the person appealing, a notice of appeal. The appropriate form is set out in the Employment Appeal Tribunal Rules.

The hearing will normally take place in public but the tribunal may sit in private to hear evidence where, for example, it relates to national security or could cause substantial injury to an organisation appearing before it, as where a company's trade secrets might be revealed. The EAT usually consists of a High Court judge and two lay members. A practice has developed under which circuit judges or recorders sit in the EAT regularly. For cases of major importance the EAT may be composed of a presiding judge with four lay members maintaining the balance between employer representatives and those of workers. There may be one or three lay members if the parties consent.

The Employment Appeal Tribunal may review and change any order made by it on a similar basis to the provisions already mentioned in regard to employment tribunals. Appeal lies on any question of law, decision, or order of the Employment Appeal Tribunal, either with leave of the Tribunal or of the Court of Appeal to the Court of Appeal. Legal aid would be available on such appeal according to the usual rules. There may then be a further appeal to the House of Lords (becomes Supreme Court) under the usual rules.

Section 28 of the Employment Tribunals Act 1996 provides that EAT proceedings in an appeal against the decision of an employment tribunal consisting of a chairman sitting alone are to be heard by a judge sitting alone, unless he or she directs otherwise.

Reporting restrictions

Sections 11, 12, 31 and 32 of the Employment Tribunals Act 1996 (ETA) allow employment tribunals and the EAT to make restricted reporting orders in cases involving sexual misconduct (e.g. sexual harassment) and disability cases. These orders prevent those who make or are affected by such allegations from being identified in media reports of the case. Persons have in the past been put off bringing such cases before tribunals because of the publicity which they attracted.

Contractual breach

Section 3 of the ETA 1996 and SI 1994/1623 (made under previous legislation) give the employment tribunals power to hear and determine claims for damages for breach of the contract of employment, in addition to their usual jurisdiction for breach of employment rights. It is now possible to claim unfair dismissal and damages for wrongful dismissal, i.e. dismissal without due notice, before the same tribunal. Formerly, the wrongful dismissal aspect of the claim would have had to be carried on in a county court or the High Court. These courts are still available for those who wish to pursue a claim for wrongful dismissal in

them. The employment tribunal limit on damages is £25,000 and the claim must be brought, if a tribunal is used, within three months from the date the employment ceased. The main disadvantage of bringing wrongful dismissal claims in employment tribunals is that legal aid is not available, whereas it may be in the ordinary civil courts. Furthermore, the limitation of claims in the ordinary courts is six years and not the shorter period of three months allowed for tribunal claims.

Claims for statutory unfair dismissal must be brought before an employment tribunal. As noted above, contractual claims for wrongful dismissal can also be brought before an employment tribunal but the damages are capped at £25,000, even when the claimant's loss is known to be greater.

What is the position where a tribunal hears a case for wrongful dismissal and while accepting that the claimant's loss is greater, makes an award of £25,000 being governed by its cap? Can the claimant proceed with a claim in the county court or the High Court for the balance between the capped award and the actual loss?

The Court of Appeal dealt with this situation in *Fraser* v *HLMAD Ltd* [2006] IRLR 687. F was dismissed by the administrative receivers of HLMAD Ltd, which was insolvent. F claimed unfair dismissal and wrongful dismissal before a tribunal. In his claim initiating proceedings in the tribunal he stated that he reserved the right to pursue a claim in the High Court for damages in excess of the £25,000 cap.

Later, F commenced an action for the alleged wrongful dismissal in the High Court but did not withdraw the wrongful dismissal claim from the tribunal, which went on to make an award for unfair dismissal and £25,000 for the wrongful dismissal. HLMAD Ltd, through its administrative receivers, asked the High Court to strike out F's claim for wrongful dismissal, which it did. F appealed to the Court of Appeal, which agreed with the High Court and affirmed the striking out.

The civil procedure rule of merger applied. The effect of a judgment for the claimant absorbs any claim which was the subject of that action into the judgment so that the claimant's rights are then confined to enforcing the judgment. The claim for the excess over £25,000 was not a separate cause of action and could not be split into two causes of action, one for damages up to £25,000 and another for the balance. A claimant who expected to recover more than £25,000 should bring the claim in the ordinary courts. Merger of the claim in this case was not prevented by the express statement made in the tribunal claim form that F reserved his right to bring High Court proceedings for the excess over £25,000.

Appeals in health and safety matters

Where a health and safety inspector has served an improvement notice requiring improvements to be made in the procedures of a business, or a prohibition notice under which activity must cease, appeal is to an employment tribunal and from that tribunal to a Divisional Court of Queen's Bench and not the EAT.

Alternative dispute resolution

The work of tribunals has increased greatly and, in line with the movement in the ordinary courts towards more ADR, the *Report of the Tribunal System Taskforce*, issued in 2002, recommended a greater emphasis on the resolution of disputes by the Advisory, Conciliation and Arbitration Service (ACAS), following experiments through pilot schemes.

It is also relevant to mention here that s 32(2) of the Employment Act 2002 states that a claimant cannot put a claim before a tribunal if he or she has not followed paras 6 or 9 of Sch 2 to the 2002 Act. These provisions are designed to reduce tribunal applications by requiring would-be claimants to raise a grievance internally before going to a tribunal. Problems have emerged with this legislation, which receives further treatment in Chapter 19.

Administrative inquiries

As we have seen in some areas of administrative action, e.g. planning, there is in general no right of appeal from the initial decision of the government or a local authority to an independent tribunal. The relevant Acts of Parliament normally provide for an opportunity to put a case against the decision at a public inquiry conducted before an inspector who is normally a Ministry official. The inspector makes a report to the Ministry concerned and the decision is made by the Minister himself or a senior civil servant on his behalf.

Advantages of tribunals

As a method of deciding disputes tribunals and administrative inquiries have advantages. For example, the tribunals and inquiries generally specialise in a particular field, and can thus acquire a detailed knowledge of disputes in that field. The procedure of tribunals is simple and informal, and it is often suggested that this puts those appearing before them at ease so that they are better able to present their case. Certainly such justice is cheaper and there are in general no court fees and costs, though if the assistance of a lawyer is required he will have to be paid and there is no legal aid in this field except in the Employment Appeal Tribunal.

However, appellants who are not represented by lawyers may take full advantage of the rights of appeal given, though sometimes this results in references to tribunals which are frivolous by nature. Generally speaking, administrative tribunals and inquiries give quick decisions, and appellants are not subjected to the delays which are sometimes met with in ordinary courts of law. Tribunals and inquiries are usually local by nature; they are, therefore, able to acquaint themselves with local conditions, and can carry out inspections of property and sites where this would assist them in their decision.

The Tribunals and Inquiries Acts

Criticism of administrative tribunals led to the setting up of a Committee on Administrative Tribunals and Inquiries under the chairmanship of Sir Oliver Franks which reported in 1957. The main areas of disquiet were that tribunals did not give reasons for their decisions and furthermore that those decisions were not subject to appeal to the High Court on a point of law.

The majority of the proposals of the Franks Committee were accepted by Parliament and enacted in the Tribunals and Inquiries Act 1958. This Act, together with certain changes and additions in subsequent legislation was re-enacted as the Tribunals and Inquiries Act 1971. This was later consolidated into the Tribunals and Inquiries Act 1992.

The implementation of Franks led to the following main changes:

(*a*) A Council on Tribunals now gives advice to the Lord Chancellor on the working of tribunals and reports to Parliament from time to time on its work.
(*b*) The chairmen of the various tribunals are selected by the Ministers in whose fields they work from a panel of persons appointed by the Lord Chancellor. The chairmen are usually lawyers.
(*c*) A tribunal must normally allow a party who wants it to have a lawyer to represent him.
(*d*) All material facts are disclosed to all parties before a tribunal hearing and the hearing is in public unless, e.g., public security is involved.
(*e*) Reasons for decisions are given if requested.
(*f*) Appeals lie from most tribunals to the Divisional Court of Queen's Bench.

Unfortunately, governments have often set up new tribunals without proper consultation with the Council on Tribunals to see whether an existing tribunal might take on the work. This has resulted in a proliferation of tribunals with a bewildering multiplicity of separate jurisdictions. That apart, the implementation of most of the Franks' Committee recommendations means that there are no longer any major reasons for dissatisfaction with the powers and duties of tribunals.

There are those who have argued for appeal to a special Administrative Division of the High Court and, as we shall see as the chapter proceeds, control of administrative tribunals by means of judicial review is exclusively within the jurisdiction of the High Court and claims are heard by an Administrative Court within the Queen's Bench Division.

Reform

The former Lord Chancellor's Department that now has the title of Department of Constitutional Affairs is poised for a huge expansion to involve the takeover of tribunals in England and Wales which are now scattered among several departments as is revealed by the above materials. The proposals contained in the Leggatt Report of 2001 bring under the Department the tribunals now split between such departments as Employment, Social Security and the Inland Revenue (see *Tribunals for Users: Report of Sir Andrew Leggatt* published in August 2001). The Report is the culmination of a 10-month review of the tribunal system, the first since the Franks Committee reported 44 years before. Ministers are looking to 2006/07 for unification of the tribunals service.

Inquiries Act 2005

This Act is included for the sake of completeness but is not concerned with the solving of disputes between the citizen and the state as the above material is. The Act replaces the little used Tribunals of Inquiry (Evidence) Act 1921, which applied where both Houses of Parliament had resolved that it was expedient that a tribunal be established for inquiring into a matter of urgent public importance. The 2005 Act now covers these situations and the power to establish an inquiry is vested in ministers of the various departments of state that are relevant to the problem.

The Act provides a useful framework for the conduct of future public inquiries but it does contain provisions that are potentially inimical to the conduct of an independent and free inquiry, in that it reserves to the relevant minister the power to stop the inquiry or publish only a limited report.

The inquiry is undertaken by a chairman alone or with other members of an inquiry panel appointed by the relevant Minister in writing.

Legal aid

Legal aid in tribunals has been reviewed from time to time but it was felt appropriate to recommend that it should be available only for proceedings in the Lands Tribunal and the Employment Appeal Tribunal. In fact, advocacy before the Lands Tribunal is no longer the the subject of legal aid, having been excluded by Sch 2 of the Access to Justice Act 1999. Legal aid is still available for proceedings before the Employment Appeal Tribunal. Many still regard the present position as unreasonable.

In particular, it is felt that legal aid is appropriate in cases heard before, e.g. the Social Security Commissioners. In addition, there is no reason why legal aid should not be extended to some of the domestic tribunals, e.g. in respect of hearings before the Professional Standards Committees of the Institute of Chartered Accountants in England and Wales (see below). Extension of legal aid to these proceedings is unlikely for the present at least.

Domestic tribunals

Another area in which persons or groups of persons or other public agencies exercise judicial or quasi-judicial functions over others is to be found in the system of domestic tribunals. These are, in general, disciplinary committees concerned with the regulation of certain professions and trades, some having been set up by statute and others merely by contract between members and the association concerned. Examples of tribunals regulating professions are what might be referred to broadly as the disciplinary committees of the General Medical Council, Architects' Registration Council, The Law Society, the Professional Standards Committees of the ICAEW, and the Inns of Court. As regards the regulation of the investment industry and the City of London, there is the Financial Services Authority operating under the Financial Services and Markets Act 2000 and the Panel on Take-overs and Mergers, together with recognised investment exchanges, e.g. The London Stock Exchange.

Because domestic tribunals are not *public* authorities but *private associations based on contract,* the courts cannot control the decisions which these tribunals make by the process of judicial review leading to the issue of a mandatory order, a prohibiting order or a quashing order (*Law* v *National Greyhound Racing Club Ltd* [1983] 3 All ER 300).

At one time members were bound by the rules of these tribunals no matter how unreasonably or unfairly they might operate. For example, if the rules allowed expulsion there was no remedy against this even though a person so expelled might be unable to work if he was not a member of the association.

The breakthrough came in the decision of the Court of Appeal in *Lee* v *Showmen's Guild of Great Britain* [1952] 1 All ER 1175 which brought domestic tribunals under the control of the courts. Mr Lee ran a roundabout. He occupied the same pitch each year at Bradford Summer Fair. Another Guild member, Mr Shaw, claimed the pitch and a committee of the Guild found that Mr Shaw was entitled to have it and that Mr Lee was guilty of unfair competition. It fined Mr Lee £100. He then brought an action claiming a declaration that the committee's decision was invalid. The Court of Appeal upheld Mr Lee's claim in the main because it was at last accepted that the contract associations could not by that contract rule out the jurisdiction of the court because no contract intended to bind the parties to it could oust that jurisdiction (see further Chapter 16).

Since that time the courts have intervened to see that the rules of these associations are correctly interpreted and that the principles of natural justice are observed. They have

developed a jurisdiction to redress wrongful expulsion; wrongful refusal to admit to membership; refusal to admit women and restrictive activities in terms of what members can do. Thus, in *Pharmaceutical Society of Great Britain* v *Dickson* [1968] 2 All ER 686 the House of Lords decided that the Society could not by its rules restrict chemists in terms of what they sold in their shops.

In *R* v *Panel on Take-overs, ex parte Datafin plc* [1987] 1 All ER 564, the Court of Appeal decided that having regard to the *public* consequences of non-compliance with the code, e.g. that a bid by one company for another could be declared invalid if the procedures of the code were infringed, application for judicial review of Panel decisions would be available in an appropriate case. This represents a considerable extension of the law to allow judicial review of domestic bodies where their decisions have effect upon the non-member public. However, it is doubtful whether the *Datafin* decision could be extended to purely domestic tribunals, e.g. the disciplinary bodies of the various professions whose proceedings affect only their members and not to any significant effect the public who are not members.

The *Datafin* decision was distinguished in *R (On the application of Sunspell Ltd)* v *Association of British Travel Agents* [2000] All ER (D) 1368. The High Court ruled that unlike the Panel the government did not seek to regulate the travel industry through ABTA. The power that ABTA possessed arose entirely from the truly voluntary submission of its members to its authority. It was not a public or governmental body in its nature.

A person aggrieved by the decision of a domestic tribunal can, however, ask the court for the remedy of a *declaration* of his rights or an *injunction*. These have proved quite powerful remedies as a means of controlling purely domestic tribunals.

Judicial control over inferior courts and tribunals

We must now consider what *control* the ordinary courts of law have over administrative action as expressed in the decisions of tribunals and inquiries and what *methods* are used to exercise that control.

Control by the judiciary is exercised as follows:

(*a*) by statutory rights of appeal from the tribunal;

(*b*) by application of the doctrine of *ultra vires*;

(*c*) by the use of the principal administrative law remedies, i.e. injunctions, declarations, and the prerogative orders of *certiorari*, prohibition, and *mandamus*, through an application under the Civil Procedure Rules for judicial review. The application to the court may additionally include a claim for damages. Claims are dealt with by the Administrative Court in London or Cardiff (where the matter relates to a public authority in Wales).

These methods of control will now be considered in more detail. However, before proceeding further it should be noted that by reason of a Practice Note issued by the Lord Chief Justice (see [2000] 4 All ER 1071), an order for *mandamus* is now known as a mandatory order, an order for prohibition is known as a prohibiting order and an order of *certiorari* is known as a quashing order.

Statutory right of appeal

Where, as in the case of the Lands Tribunal, the Act of Parliament setting up or controlling the tribunal gives a right of appeal to the ordinary courts of law, the courts are entitled to re-hear the whole case and are not limited to a consideration of the reasons given by the tribunal for

its decision. The court can consider the whole matter afresh, and can substitute a new decision for that of the tribunal.

It should be noted that the existence of a right of statutory appeal does not necessarily prevent a successful application for judicial review. Thus, in *R* v *Wiltshire CC, ex parte Lazard Bros Ltd* [1998] CLY 95 the local authority resolved to make an order under the Wildlife and Countryside Act 1981 designating a road through a village as a by-way open to all traffic. Lazard Bros, who were owners of a farm in the village, successfully applied to the High Court for an order quashing the resolution. The court said that the fact that there was a statutory remedy of public inquiry and statutory appeal thereafter did not negate the court's jurisdiction to entertain an application for judicial review.

Ultra vires

No public authority may lawfully make a decision and take action on it unless it is authorised by law to do so or the act is construed as being reasonably incidental to its authorised activities. An act which does not conform with the above is treated by the courts as void under the doctrine of *ultra vires* (beyond the powers of).

The doctrine applies to bodies and individuals such as Ministers exercising judicial, quasi-judicial, legislative or administrative functions, including local authorities, tribunals, government departments and other public authorities, though Parliament's legislative powers are unlimited (see Chapter 1).

Typically, the *ultra vires* method of control is used where the decision taken is unauthorised by the powers given to the authority. However, even when the authority acts within its powers, the court can review the decision if it is unreasonable to a high degree (*Associated Provincial Picture Houses Ltd* v *Wednesbury Corp* [1947] 2 All ER 680). Subsequent case law has moved away from the 'reasonableness' test in favour of saying that the decision is disproportionate to the result to be achieved (see p 85).

Attorney-General v *Fulham Corporation*, 1921 – The *ultra vires* method of control (**6**)

Prerogative orders and judicial review

Where no right of appeal is given, it may be possible to challenge the decision of an inferior court or public tribunal by having recourse to the supervisory jurisdiction of the High Court. The procedure is available in civil and criminal matters.

This jurisdiction is exercised exclusively by the High Court by means of the orders known as *mandatory orders, prohibiting orders* and *quashing orders*. These orders, which are not available as of right but at the discretion of the court, were formerly prerogative writs, which a subject might obtain by petitioning the Crown.

The Sovereign has no such power today, the control being exercised by the Administrative Court as part of the Queen's Bench Division, the former writs being now called orders (Supreme Court Act 1981, s 29: becomes Senior Courts Act 1981).

A person cannot normally invoke the supervisory jurisdiction of the High Court if other more appropriate procedures for appeal exist.

Order 53 of the Rules of the Supreme Court (becomes Senior Court Rules) which is attached as a schedule to the Civil Procedure Rules 1998 Part 50, introduces a comprehensive system of judicial review. A statutory basis for this procedure also appears in s 31 of the Supreme Court Act 1981 (becomes Senior Courts Act 1981). It allows an application to cover

under one umbrella, as it were, all the remedies of *mandatory orders, prohibiting orders* and *quashing orders*, and also declaration and injunction. There is no need to apply for one of these remedies individually. Any combination of them is available under the one claim for judicial review. Damages may also be claimed on an application for judicial review (1981 Act, s 31(4)). No application for judicial review may be made without leave. Application is made for this to a single judge in what was called the Crown Office, but which is now called the Administrative Court. This is to eliminate frivolous claims. As regards the title of the action, proceedings are taken in the name of the Crown as in criminal proceedings. Thus, there is the citation as, e.g., *R* v *Barchester County Council, ex parte Bloggs* (since July 2000 the citation is e.g. *R (On the application of Bloggs)* v *Barchester County Council)*. If permission to apply for judicial review is obtained from the single judge, the application is made in a criminal cause or matter to the Divisional Court of Queen's Bench and in a civil cause or matter to a single judge of the High Court. These applications are not governed by the track allocation procedures under the Civil Procedure Rules 1998 (see further Chapter 5).

There have been difficulties in the past as to whether a person had the necessary *locus standi*, i.e. interest, to bring an action for one of the administrative remedies. *Locus standi* is dealt with in Order 53 and s 31(3) of the 1981 Act which lay down a simple test which is that the applicant must have 'a sufficient interest in the matter to which the application relates'. The test is, of course, rather vague, but Lord Denning, in discussing the remedy of judicial review in *The Discipline of Law*, states:

> The court will not listen to a busybody who is interfering in things which do not concern him, but it will listen to an ordinary citizen who comes asking that the law should be declared and enforced, even though he is only one of a hundred, or one of a thousand, or one of a million who are affected by it. As a result, therefore, of the new procedure, it can I hope be said that we have in England an *actio popularis* by which an ordinary citizen can enforce the law for the benefit of all – as against public authorities in respect of their statutory duties.

However, it should not be assumed that judicial review is available to redress any decision which might be regarded in a broad sense as 'unfair'. The House of Lords made it clear in *Puhlhofer* v *Hillingdon LBC* [1986] 1 All ER 467 – an attempt to challenge a decision not to house the applicant – that persons seeking judicial review must base their case on one of the accepted principles of review, e.g. *ultra vires* or procedural irregularity.

As we have seen, decisions taken at a trial on indictment in the Crown Court are not subject to judicial review (see *R* v *Harrow Crown Court, ex parte Perkins* [1998] Current Law 96).

R v *Brighton Justices, ex parte Robinson*, 1973 – Judicial review not generally available where appropriate procedures for appeal exist (**7**)

IRC v *National Federation of Self-Employed and Small Businesses Ltd*, 1981 – Judicial review: the need for *locus standi* (**8**)

Grounds on which a quashing order lies

The only grounds on which such an order lies are as follows:

(a) Want or excess of jurisdiction. This exists where the inferior court or body has adjudicated on a matter which it had no power to decide, i.e. where it is acting beyond its powers (*ultra vires*).

A quashing order is not the only remedy which may be used to control *ultra vires* acts. Note, for example, the use of an injunction in the *ultra vires* situation seen in *A-G* v *Fulham Corporation*, 1921 (Case **6**).

(b) Denial of natural justice. The principle is that, although a tribunal should not be required to conform to judicial standards, but should be free to work out its own procedures, nevertheless it must observe the rules of natural justice, i.e. there must be no bias and both sides should be heard.

(i) *Bias*. This may be pecuniary bias but other forms of bias are relevant as where, for example, the chairman of magistrates states that he always prefers the evidence for the prosecution given by the police. It was held in *Seer Technologies Ltd* v *Abbas* (2000) *The Times*, 16 March that it was inconceivable that any legitimate objection could be taken against a judge purely on grounds of religion, ethnic or national origin, gender, age or sexual orientation. This is obviously right, since it would allow the issue of bias to be brought in many cases particularly as women and black lawyers begin to be appointed to the judiciary. A defendant cannot be allowed to say, e.g., 'The judge was biased. He is black and I am white', or 'The judge is a woman and I am a man'. The situation would, of course, be different if actual bias could be shown as where a female or black judge was shown to have a pecuniary interest in the outcome of a case.

The Court of Appeal ruled in *Kjell Tore Skjevesland* v *Geveran Trading Co Ltd* [2003] 1 All ER 1 that the requirement that judges be free from bias may not always apply to advocates. The petitioner was not entitled to a retrial of bankruptcy proceedings on the ground that his barrister had been acquainted with the wife of the debtor for six years.

However, the House of Lords did find procedural bias in *Lawal* v *Northern Spirit Ltd* [2004] 1 All ER 187, where a barrister who had previously sat as a part-time judge in the Employment Appeal Tribunal appeared for the employer on appeal by the claimant to the EAT in a situation where one of the lay members of the EAT had previously sat with the barrister when he was taking appeals as a part-time judge. L contended that this could have been instrumental in the loss of his claim for racial discrimination. The House of Lords agreed that there was procedural bias.

(ii) *The right to be heard*. There is no inherent right to an oral hearing; written evidence may be acceptable. However, the right to be heard (*audi alteram partem*) implies that notice of the hearing or other method of stating one's case must be given together with notice of the case which is to be met (see *R* v *Wear Valley DC, ex parte Binks* (1985) and *R* v *Board of Governors of London Oratory School, ex parte R* (1988) at p 687). In addition, though the law is not entirely free from doubt, it is the better view that a reasonable opportunity to cross-examine witnesses is part of the *audi alteram partem* principle. Thus, in *Nicholson* v *Secretary of State for Energy* (1977) 76 LGR 693, the right of cross-examination at a public inquiry into the siting of an opencast mine was upheld on the basis that the denial of that right was a breach of natural justice.

Legal representation is also part of the *audi alteram partem* principle. Public tribunals under the Tribunals and Inquiries Act 1992 will normally allow a party who wants it to have a lawyer to represent him. As regards a domestic tribunal, the Court of Appeal in *Enderby Town Football Club Ltd* v *The Football Association Ltd* [1971] 1 All ER 215 laid down the following broad principles:

(1) If the rules of the organisation say nothing about it, the matter is basically within the discretion of the tribunal.
(2) If the case involves difficult points of law, it is better for the parties to use the ordinary courts and get a declaratory judgment setting out their rights. If, however, a tribunal is used, legal representation should be allowed and the court will intervene on the grounds of public policy to see that it is.
(3) A rule forbidding legal representation altogether is probably invalid. A tribunal should always be given a discretion.

However, it seems that in *disciplinary cases* where it is necessary to reach decisions quickly, it might well be appropriate to refuse legal representation. Thus, in *Maynard* v *Osmond* [1977] 1 All ER 64, the Court of Appeal held that natural justice did not require that a police constable should have legal representation at a hearing before the chief constable on a disciplinary matter involving an allegation that a sergeant had falsely stated that PC Maynard had been asleep while on duty. Furthermore, the House of Lords decided in *R* v *Board of Visitors of the Maze Prison, ex parte Hone and McCarten* [1988] 1 All ER 321 that a prisoner charged with a disciplinary offence is not entitled, as of right, to legal representation at the disciplinary hearing.

Whether a decision is judicial, quasi-judicial or administrative, or disciplinary, the rules of natural justice need not necessarily be applied if national security is involved.

(c) Effect of failure to comply with rules. In recent times the courts have made it clear that anything done by a tribunal in breach of natural justice (or *ultra vires*) is void. If action has been taken on the decision of a tribunal which is void that action is also void. If the decision was merely voidable action taken on it prior to the court quashing it would be valid.

(d) Error of law on the face of the record. A quashing order lies to quash a decision the record of which discloses an error of law. According to Lord Denning in *R* v *Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 All ER 122, the record consists of 'the document which initiates the proceedings, the pleadings (if any), and the adjudication, but not the evidence or the reasons unless the tribunal chooses to incorporate them'. As we have seen, the Tribunals and Inquiries Act 1992 requires reasoned decisions in cases coming before tribunals and inquiries so that there should now normally be a record giving reasons which will assist the High Court in exercising its supervisory jurisdiction. In addition, if a reasoned decision is required by the 1992 Act a mandatory order lies to compel the tribunal or inquiry to give one.

However, the above provisions do not apply to magistrates' courts. If an order of a magistrates' court does not contain reasons for the making of the order, then, provided the magistrates have stayed within their jurisdiction and observed the rules of natural justice, a quashing order does not lie on the order under this heading.

R v *London County Council, ex parte Entertainments Protection Association Ltd*, 1931 – Quashing orders and *ultra vires* (**9**)

Dimes v *Grand Junction Canal*, 1852 – Monetary bias (**10**)

R v *Bingham Justices, ex parte Jowitt*, 1974 – Other bias (**11**)

R v *Secretary of State for Home Department, ex parte Hosenball*, 1977 – Natural justice and national security (**12**)

Ridge v *Baldwin*, 1963 – Effect of failure to comply with rules of natural justice and *ultra vires* (**13**)

A prohibiting order lies to prevent an inferior tribunal from exceeding its jurisdiction, or infringing the rules of natural justice. It is governed by similar principles to a quashing order, except that it does not lie once a final decision has been given (a quashing order is then the appropriate order). The object of a prohibiting order is to prevent an inferior tribunal from hearing and deciding a matter which is beyond its jurisdiction. A prohibiting order and a quashing order are available against the Crown and public authorities but not against private persons or bodies, e.g. the big industrial conglomerates and trade unions.

Applications for quashing and prohibiting orders are often brought together, e.g. to quash a decision already made by a tribunal, and to prevent it from continuing to exceed or abuse its jurisdiction.

A prohibiting order may be issued to any person or body (not necessarily an inferior court, since it might be issued to a local authority). It commands him or them to carry out some public duty. Once again, it is not available against private persons or bodies.