- an employee is entitled to OAL or AAL in regard to a child when he or she has been notified that he or she has been matched with a child by an adoption agency and he or she has been employed for 26 continuous weeks ending with the matching week;
- OAL is for 26 weeks of leave commencing either on the date the child is placed with the adopter or a date that is no more than 14 days before the expected date of placement, i.e. when the child comes to live permanently with the adopter;
- AAL is for a further period of 26 weeks end on to the OAL. No further service qualification is required;
- OAL is paid for by statutory adoption pay at the lesser of £108.85 or 90 per cent of normal earnings for 39 weeks;
- the provisions for employer recovery are the same as for SMP and SPP.

Notice provisions

Notice to the employer of 21 days is required of the intention to take leave. The employer must respond within 28 days stating when the leave ends under the employee's entitlement. This fixes the return date. The employee must give eight weeks' notice to the employer to change the intended start date and this is also the notice period for early return from leave.

Additional adoption leave

Provision is now made for an additional period of adoption leave of 26 weeks. This cannot be taken by the person who has taken adoption leave. Once again, this leave is intended to be taken by the partner who has not taken adoption leave and can commence only when the person taking the adoption leave has returned to work before exhausting that leave.

Unpaid parental leave

The new ss 76–78 of the ERA 1996 apply. These sections together with the Regulations provide for collective agreements to be made with trade unions and workforce agreements to be made with employees in regard to parental leave. Nevertheless, employees retain their rights under what is called the statutory fallback scheme unless the collective or workforce scheme is more generous, in which case such schemes can replace the fallback scheme. This book considers only the fallback scheme as follows.

The fallback scheme

An employee who has been continuously employed for a period of not less than one year has a right to 13 weeks of parental leave in respect of each child born on or after 15 December 1999 and each child under 18 who is adopted by the employee on or after that date (but see below). Women who qualify for parental leave can take it immediately after taking maternity leave. A week means seven days' absence from work, even though the employee would not have been required to work on every one of the working days. Leave must be taken in seven-day blocks up to maximum of four weeks' leave in respect of an individual child during a particular year calculated from the first time the employee became entitled to take parental leave. This was affirmed as a correct interpretation of the law in *Rodway* v *New Southern Railways Ltd* [2005] IRLR 583, where Mr Rodway, a train guard conductor, asked for a day off to look after his two-year-old son while the mother was away for the day. He was refused the time off but took it anyway, as he could not get anyone else. His employer later put him through a disciplinary procedure but his claim for detriment because he was trying to use the parental leave provisions was turned down by the Court of Appeal. Leave of one day was not

within the leave provisions. Leave may be taken in blocks of one-day or multiples of one day where the child is disabled. The leave must be taken during the period of five years from the date of birth or adoption or until the child turns 18 years if disabled. As regards the adoption of older children, the leave period ends when they reach 18, even if five years from placement for adoption has not by then elapsed.

Notice

The employer must receive notice (not necessarily written notice) of 21 days specifying the dates on which leave is to begin and end. Where the leave is to be taken on birth, the notice must specify the EWC and the duration of leave to be taken and be given 21 days before the beginning of EWC. The same with adoption except that notice must be given 21 days before the expected week of placement.

Evidence

The employer is entitled to require evidence of the employee's legal responsibility for the child as well as evidence of the age of the child.

Postponement of leave

The employer may postpone a period of leave where he considers that the operation of the business would be affected in terms that it would be 'unduly disrupted'. He has only seven days to make his mind up about postponement which may be for a maximum period of six months. No postponement is allowed if leave is taken on the birth or adoption of a child.

The employment contract during leave

While on parental leave, employees remain bound by their obligation of good faith towards their employer and any express undertakings in the contract in regard to non-disclosure of confidential information and competition. The employer must continue to abide by the implied obligations of trust and confidence and offer the right to return to the same job but if that is not possible to another job which is suitable and appropriate in the circumstance. There is also protection in regard to salary, continuity of employment and pension rights on return.

Making a claim

The relevant provision is s 80 of the ERA 1996. It gives employees a right to complain to an employment tribunal within three months from the date when any of the rights under the parental leave arrangements are denied, in the sense that these have been unreasonably postponed or prevented. Any related dismissal is automatically unfair and there is no cap on the compensation that may be awarded.

Records

The Regulations do not require the keeping of records but it will be impossible for employers to avoid keeping them for accounting purposes to show that leave has been unpaid and that the rights are not being abused. Bearing in mind also that time off for domestic emergencies (also unpaid) exists (see below), employers must consider the need to set up systems and procedures to cope with the new rights and look at how they can run along with any existing contractual rights to be paid parental leave that employees already have within a particular organisation.

Time off for dependants

This is provided for by s 57A of the ERA 1996. It entitles every employee regardless of length of service to take a reasonable amount of time off work 'to take action that is necessary'

- to help when a dependant gives birth, falls ill or is assaulted;
- to make longer term arrangements for the care of a sick or injured dependant;
- as a result of a dependant's death;
- to cope when the arrangements for caring for a dependant break down unexpectedly; or
- to deal with an expected incident that involves a dependant child during school hours or on a school trip or in other situations when the school has responsibility for the child.

Dependants

This means a husband or wife or a child or parent of the employee whether they live with him or not or any member of the employee's household who is not employed by him or her and is not a tenant, lodger or boarder.

Amount of time off

There is no set limit. In every case the right is limited to the amount of time that is reasonable in the circumstances. Employment tribunals will be the ultimate arbitrators if a claim is brought by an employee.

Payment for time off

The employer is under no obligation to pay the employee for time taken off.

Notification

The right only applies if the employee 'as soon as is reasonably practicable' tells the employer why he or she is absent and unless the employee is already back at work for how long the absence is likely to last.

Enforcing the right

Section 57B of the ERA 1996 entitles an employee to complain to an employment tribunal that the employer has unreasonably refused to allow time off as required by s 57A. The period for application is three months of the employer's refusal and compensation may be an uncapped award such as is just and equitable.

Victimisation and dismissal

There is protection in terms of a tribunal complaint for any victimisation or dismissal resulting from the exercise or purported exercise of the right in a proper way and dismissal is automatically unfair. Selection for redundancy for the same reason will be automatically an unfair dismissal.

Qua v *John Ford Morrison Solicitors*, 2003 – Guidance on dependants' leave (**255a**)

Maternity allowance

Those who do not qualify for statutory maternity pay because e.g. their earnings are below the lower earnings limit (currently £84 per week) may be able to get maternity allowance. The provisions are broadly as follows:

Amount of benefit

A successful claimant will receive weekly the lesser of £108.85 or 90 per cent of average earnings.

Payment period

Maternity allowance is paid for up to 39 weeks. The earliest the period can start is the eleventh week before the EWC unless the child is born before this and the latest is the Sunday after the child is born.

Service requirement

In order to qualify for maternity allowance, the claimant must have worked as an employee and/or been self-employed for at least 26 weeks in the 66 weeks immediately before the EWC. The weeks do not need to be consecutive or for the same employer and a part-week of work counts as a full week.

Earnings requirement

To qualify for maternity allowance the claimant's average weekly earnings must be at least equal to the maternity allowance threshold which is currently £30 per week. There are a number of ways of calculating average earnings but, for example, the highest earnings for 13 weeks out of the 66 weeks referred to above may be taken and divided by 13 to produce the average.

Flexible working

Under Part 8A of the Employment Rights Act 1996 (as inserted by s 47 of the Employment Act 2002) employers are under a duty to consider applications for flexible working from employees who are parents of children under age six or disabled children under 18. Changes in hours and times of work may be applied for.

Qualifying conditions for employees are:

- continuous employment with the employer for not less than 26 weeks. The purpose must be to care for a child.

  The employee must be:

  (i) the biological parent, guardian or foster carer of the child;
  (ii) married to a person within (i) above and lives with the child; or
  (iii) the partner of a person within (i) above and lives with the child.

  The employee must also have, or expect to have, responsibility for the upbringing of the child.
- The employee must apply before the fourteenth day before the child reaches six years of age or a disabled child reaches 18.
- The employer is then required to meet with the employee within 28 days of the application and the employer's decision must be notified to the employee within 14 days of the meeting. The employee must have a right of appeal. The employee also has the right to be accompanied by a fellow worker or a trade union representative at any meeting.
- The employee's application may be refused where the employer considers that one or more of the following grounds apply:

  (a) burden of additional costs;
  (b) detrimental effect on the ability to meet consumer demand;
  (c) inability to reorganise work among remaining staff;

(d) detrimental effect on quality;
(e) insufficiency of work during the periods the employee proposes to work, as where the employee proposes to be away at peak times and return at slack times when there might be a need for less staff;
(f) structural changes would be involved and require planning.

Where the employer fails to comply with his/her duties in regard to the application or bases his or her decision on incorrect facts, the employee may apply to an employment tribunal. If the employee's complaint is well-founded the tribunal may make an order to that effect and may order the employer to reconsider the matter and/or award compensation to the employee.

Additional rights inserted into the ERA 1996 by the Employment Relations Act 2004 make dismissal for trying to exercise the above rights automatically unfair and selection for redundancy also. The Work and Families Act 2006 extends the provision to the carers of adult persons.

Time off

There are circumstances in which employees may be entitled to paid time off work. Some of these rights, however, arise only if there is a trade union recognised for negotiating or collective bargaining purposes.

Trade union recognition

If a company has recognised a union and the union has appointed an employee as a safety representative, the employer must allow the employee paid leave to perform certain functions. These include investigating potential hazards and dangerous occurrences, investigating health and safety complaints; making representations to the company about these matters; and attending meetings of safety committees.

Branch officers and shop stewards of a recognised union are entitled to paid time off in order to carry out their duties as union officials. These include negotiation with the employer, informing and consulting the members about the negotiations and representing members in disciplinary matters as well as union courses of training.

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In this connection, the decision in *Davies* v *Neath Port Talbot CBC* (1999) *The Times*, 26 October is of interest. Mrs Davies was employed by the Council's meals on wheels service on a part-time basis. She was elected as a GMB union health and safety representative. She attended courses arranged by the GMB. The time involved on these courses exceeded the normal 22 hours a week that she worked. The Council nevertheless paid her for 22 hours only. The EAT ruled that she was entitled to be paid for the hours actually worked on the courses and the Council was liable to pay the shortfall. The EAT followed directly applicable case law of the ECJ rather than the replacement of wages provision in s 169(2) of the ERA 1996 which was in conflict with Art 141 of the EC Treaty.

Members of a recognised union are also entitled to *unpaid* time off for certain union activities, such as attendance at an executive committee meeting or annual conference.

The above provisions in terms of union recognition have become more important because the proposals of the Employment Relations Act 1999 have been implemented. The Act stipulates that employers must recognise trade unions where a majority of those voting in a ballot and at least 40 per cent of those eligible to vote are in favour of recognition though firms with fewer than 21 workers will be exempt. However, in those companies where more than

50 per cent of the workers are union members, there will be automatic recognition on the ground that there is a manifest demonstration that employees wish to be represented by the union for the purposes of collective bargaining.

Trade union activities

An employee who is a member of an independent trade union which the employer recognises is entitled to reasonable unpaid time off for trade union activities such as relevant courses. ACAS has published a code of practice which gives guidance on the time off which the employer should allow for these activities and also for union learning representatives (see below). Paid time off for union officials for union duties is considered above.

Union learning representatives

These workers have a right to unpaid time off under s 168A of the Trade Union and Labour Relations (Consolidation) Act 1992 (inserted by s 43 of the Employment Act 2002). The learning representatives' function is to advise union members about their training and educational and development needs. The advice is usually given at the place of work often through face-to-face meetings with individuals. Union members are entitled to unpaid time off to consult their learning representatives.

Young persons – time off for study or training

Section 32 of the Teaching and Higher Education Act 1998 inserts s 63A into the Employment Rights Act 1996. It allows persons aged 16 to 18 to take reasonable paid time off work during working hours in order to undertake study or training leading to an external qualification: attainment of which would be likely to enhance the young person's prospects whether with his or her employer or otherwise. The young person is entitled to pay for the time off (see s 63B of the ERA 1996). These rights are enforceable by way of complaint to an employment tribunal. If an employee is dismissed for asserting these rights, the dismissal will be automatically unfair so that no period of service is required to assert the right. The Right to Time Off for Study or Training Regulations 1999 (SI 1999/986) set out the external qualifications referred to above. These include, e.g., the qualification awarded by the Association of Accounting Technicians.

Public duties

Employees have the right to take unpaid time off for certain public duties.

The public duties for which time off may be taken include the duties of a justice of the peace, a member of a local authority, a member of any statutory tribunal, a member of a health authority or NHS trust and a governor of a local authority school or member of a police authority.

The employer must allow as much time off as is reasonable in the circumstances.

Other cases

Other cases in which employees are entitled to paid time off are mentioned below. These are the cases of pregnant employees who require paid time off for ante-natal care, redundant employees who require paid time off to look for work or for training, and the Pensions Act 1995 introduces a new right for employees who are also pension fund trustees to be given paid time off work so that they may perform their duties and undergo relevant training. Like other statutory 'time off' rights, the right is to 'reasonable' time off taking into account all the

circumstances. In addition, the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999 (see further p 482) provide that in a redundancy situation an employer may consult elected workers' representatives instead of or as well as a recognised trade union. These representatives are entitled to reasonable time off with pay during normal working hours to carry out their duties as representatives. All of these rights to time off are now contained in Part VI of the ERA 1996. It is necessary to add now time off for dependant emergencies. Here the employer is under no obligation to pay those taking such leave (see further p 455).

The Health and Safety (Consultation with Employees) Regulations 1996 (SI 1996/1513) carry similar provisions for employee safety representatives.

Remedies

Refusal to allow an employee the time off to which he or she is entitled or a failure to pay for it where this is required can lead to an employment tribunal application which must be made within three months of failure to allow the time off or to pay the employee for that time (as the case may be). If the complaint is successful, the employment tribunal can award compensation.

Insolvency of employer

An employee whose employer becomes insolvent is entitled to obtain payment of certain debts owed to him from the National Insurance Fund. The legal rights and remedies in respect of the debts covered are transferred to the Secretary of State for Trade and Industry so that he can try to recover from the assets of the insolvent employer the cost of any payments made. Employees must apply for payment to the employer's representative, e.g. administrator or liquidator, who, if unable to pay the claim in the near future, will submit the application to the Secretary of State for payment from the National Insurance Fund which remains in existence for this purpose. Debts included are arrears of pay currently up to £310 per week for a period not exceeding eight weeks, holiday pay up to £310 per week with a limit of six weeks in the last 12 months of employment; payment in lieu of notice for the minimum statutory period relevant to the employee up to £310 per week; any outstanding payment in regard to an award by an employment tribunal of compensation for unfair dismissal; reimbursement of the fees of an apprentice or articled clerk.

It should be noted that the above amounts are reviewed annually by ministerial order.

There is no period of qualifying service before an employee becomes eligible and virtually all people in employment are entitled. The amount of £310 refers to the employee's gross pay.

Health and safety at work

The HASAWA (the Health and Safety at Work etc. Act 1974) lays down certain general duties of employers to their employees in the field of health and safety. There is a general duty on employers to ensure as far as is reasonably practicable the health, safety and welfare of all employees while at work.

However, particular, as distinct from general, health and safety duties are set out for most workplaces in the Management of Health and Safety at Work Regulations 1999

(SI 1999/2051). The Health and Safety Commission has issued an Approved Code of Practice to accompany these Regulations. Examples of some of the major duties of the employer are as follows. He must provide and maintain plant and equipment and safe systems of work; avoid risks to safety and health in handling, storing and transporting articles and substances; provide and maintain safe premises and safe means of entering and leaving them; provide and maintain adequate welfare facilities and arrangements; provide information, training and supervision as required in order to ensure the safety and health of employees; prepare and/or revise policy statements on the safety and health of employees and give proper publicity to these.

The statement of policy provisions does not apply to an employer with *fewer* than *five* employees.

An employer must also conduct his undertaking in such a way that so far as is reasonably practicable those who are not his employees are not exposed to risk. Additionally, an employer must ensure so far as is reasonably practicable that premises which are open to others not employed by him are safe. There is also a duty to use the best practical methods to prevent noxious or offensive substances going into the atmosphere.

Employees must take reasonable care of their own and other people's health and safety and co-operate with the employer in the carrying out of his duties. The Act also states that no person shall intentionally or recklessly interfere with or misuse anything which is provided in the interests of health, safety and welfare, e.g. safety equipment, and no employer may charge any employee for anything done or provided to comply with the employer's statutory duties. Finally, those who design, manufacture, import or supply equipment, machinery and plant must ensure that the design and construction is safe.

Also of interest are the Health and Safety (Display Screen Equipment) Regulations 1992 (SI 1992/2792). These Regulations, which are in force, deal with the risks involved with work on display screens, e.g. muscular problems, eye fatigue and mental stress.

The Regulations apply where there are one or more employees who habitually use display screen equipment as a significant part of daily work. The employer's duties are to:

(*a*) assess display screen equipment workstations and reduce any risks which are discovered;
(*b*) ensure that workstations satisfy minimum requirements in terms of the display screen itself, the keyboard, desk and chair, working environment, task design and software;
(*c*) plan work on display screen equipment so that the user has breaks or changes of activity;
(*d*) provide information and training for display equipment users.

Users are also entitled to eye and eyesight tests and to special spectacles where normal ones cannot be used.

Health and safety in the office

Offences and civil claims for accidents at work are more likely to arise in a factory than in an office. However, the following are examples of accidents which can occur and medical conditions which can arise in an office environment:

(*a*) injury in a fire caused by a discarded cigarette or by an overloaded or defective electrical system;
(*b*) a fall or other injury caused by a defect in the premises, such as a dangerous and badly-lit staircase;
(*c*) an electric shock caused by badly fitted or defective electrical equipment;
(*d*) injury caused by a defect in or careless use of equipment, such as a guillotine or stapler;
(*e*) a medical condition caused by defective or ill-designed chairs supplied to employees, particularly secretaries;
(*f*) eye strain and other conditions caused by exposure to VDU screens.

There has been a large number of claims for repetitive strain injury caused to workers using keyboards of one sort or another. The Court of Appeal has now decided that an employer is under a duty to instruct employees on the risks of repetitive strain injury and the need for taking breaks (see *Pickford* v *ICI plc* [1996] IRLR 622).

It is also necessary to note the case of *Walker* v *Northumberland County Council* [1994] NLJR 1659 where damages, eventually settled out of court at £175,000, were awarded to Mr Walker when he suffered psychiatric damage because he was overworked by his employer. The employer was in breach of his duty to provide a safe system of work for the employee and was, therefore, liable in negligence for not doing so.

However, these and other relevant cases are also considered in Chapter 21 (Negligence of employers) since these stress related cases can also be brought under the common law rule that an employer must provide a safe system of work. The Display Screen Regulations provide that information be given to employees regarding health and safety risks with VDUs and that risk assessments be made but claims for damages are brought at common law. Civil liability for breach of the relevant regulations is strict and the employer may be liable even though there is no negligence. Thus in *Stark* v *Post Office* [2000] IRC 1013 the Court of Appeal ruled that a postman was entitled to damages when the front wheel of his bicycle locked throwing him over the handlebars. The employer was liable even though there had been no negligence in terms of the bicycle's maintenance. The case was brought under the Provision and Use of Work Equipment Regulations 1992 which do not exclude civil claims.

Civil claims: reforming regulations

The Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003 (SI 2003/2457) give new rights to employees to bring civil law claims for damages from their employers if they have suffered injury or illness because of a breach by the employer of the Management of Health and Safety at Work Regulations 1999 and the Fire Precautions (Workplace) Regulations 1997. Employers are also able to make claims against employees for their breaches of duty under the above regulations.

Typically, health and safety regulations have excluded civil claims. Trade unions who often support workers in claims welcomed the Regulations and have become involved in claims.

The proceedings are brought in the county court or the High Court, not in employment tribunals. There is a general time limit of three years and damages can be reduced by a percentage on the grounds of the claimant's contributory negligence.

Smoking in the workplace

It is also arguable that at common law an employer is at fault in requiring employees to work in an atmosphere containing heavy concentrations of cigarette, pipe or cigar smoke, although it may be possible to call medical evidence to challenge the existence or degree of the risks involved in 'passive smoking'. In fact, in *Bland* v *Stockport Metropolitan Borough Council* [1993] CLY 1506, a woman who had been exposed to passive smoking from 1979 to 1990 when her employer implemented a no-smoking policy, received £15,000 damages for injury to her health, including, in particular, chronic bronchitis and sinusitis. There is, of course, a statutory duty now that the Health and Safety Regulations apply. Certainly there is no implied contractual right to smoke at work and if an employee leaves because he or she is not allowed to smoke, there is no constructive dismissal (see *Dryden* v *Greater Glasgow Health Board* [1992] IRLR 469, EAT), and it may well be that a dismissal for infringement of a no-smoking rule properly communicated and agreed with by the majority of staff would not be unfair.

More recently, the Employment Appeal Tribunal has decided that a secretary in a solicitor's office who left because of discomfort caused at the workplace by colleagues who smoked was constructively dismissed (see *Waltons and Morse* v *Dorrington* [1997] IRLR 488). In previous passive smoking cases the complainant has suffered physical injury. However, in this case, the EAT, after ruling that it is an implied term in all employment contracts that the employer will provide and continue to monitor, as far as is reasonably practicable, a working environment which is reasonably suitable for employees to carry out their duties, went on to comment that the right of an employee not to be required to sit in a smoky atmosphere affects the welfare of employees at work, even though employees who complain cannot necessarily prove that there has been any health and safety risk to them. It would appear that discomfort is enough.

The Health and Safety Commission has issued a code of practice on passive smoking. The code has no legal force as such but could lead to a successful claim for damages by an employee at common law if put in evidence to show that the employer was in breach of it.

A workplace smoking ban

The government has issued and consulted on the draft Smoke-free (General Provisions) Regulations. The Regulations will ban smoking in enclosed public places, including most workplaces by the summer of 2007. The Regulations give definitions of 'enclosed' and 'substantially enclosed' premises, together with requirements for displaying no-smoking signs in smoke-free premises and duties to prevent smoking in smoke-free vehicles, enforcement by local authorities and the form of penalty notices for offences.

As regards penalties, employees caught smoking in regulated areas after the Regulations are in force will face a fixed penalty of £50. Those who pay within 15 days will have the fine reduced to £30, but those who fail to pay could face a fine of up to £200 and a criminal record. Company cars must also be non-smoking if they are likely to be used by more than one person, unless the car is a convertible and the roof is open.

The consultation can be accessed at **www.dh.gov.uk/Consultations/fs/en**.

Drink and drugs in the workplace

Because of the duties of care placed upon them by statute and common law, employers must take reasonable steps to ensure that their workers are not under the influence of drink or drugs where it would create a risk to the health and safety of others if the workers' performance was impaired in this way. Employees who are under the influence of drink or drugs or who fail to report fellow workers who are may also be in breach of their own common law or statutory duties of care.

Except for these rather general duties there is little specific regulation with regard to drink and drugs in the workplace, though there is some regulation in regard to railways. The Transport and Works Act 1992 states that those who work on railways, tramways and other specified transport systems are guilty of a criminal offence if they are under the influence of drugs or alcohol while on duty.

Consultation

The Health and Safety (Consultation with Employees) Regulations 1996 (SI 1996/1513), impose duties on employers who do not have safety representatives appointed by a recognised trade union to consult their employees on certain specified health and safety matters. Employers have the choice of consulting employees directly or through representatives elected by the employees they are to represent. Employers must provide relevant information

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

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

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

Enforcement

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

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

Trade union membership and activities

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

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

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

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

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