CHAPTER 2

THE BRITISH ARBITRATOR—A QUESTION OF STYLE?

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"I am not determining a point of law: I am restoring tranquility"[1]

That quotation from Edmund Burke, who was incidentally speaking of our rebellious North American colonies, encapsulates the distinctiveness of British industrial relations arbitration. It makes plain that there is a significant difference between a court and an arbitration: between a judge and an arbitrator. The distinction has arisen, as so many distinctions do, from practice rather than theory. It is one that is, it would seem, less obvious in the United States than it is in the United Kingdom. The present time appears to be directing attention to these differences in both our countries for somewhat similar reasons. The United States has a well-established and apparently flourishing system of arbitration. Yet the decline in trade unionism, the "escape" of employers from the supposed shackles of collective bargaining, appears to be threatening its future. The United Kingdom has never had other than a feeble role for arbitration.[2] The ground it might, indeed should, have colonised has in the last couple of decades been taken over by Industrial Tribunals, the infantry of the regular courts.[3] Although this has served to

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[1]Appropriately perhaps in *Speech on Conciliation with America*, March 22, 1775.

[2]The Advisory, Conciliation and Arbitration Service (the equivalent of the Federal Mediation and Conciliation Service) arranged the following numbers of arbitration:
1975—306; 1978—421; 1981—257; 1984—202; 1985—162.
There is no record of how many other arbitrations take place. Probably not more than the same amount again.

[3]The Industrial Tribunals were set up in 1964 (Industrial Training Act). Once unfair dismissal became a ground for compensation (Industrial Relations Act 1971), their workload mushroomed. The latest figures available are for 1984. Applications numbered 28,052; 20,474 (73%) were settled by conciliation, 7,578 (27%) went to a tribunal hearing.

give clear evidence of the weaknesses of the traditional legal approach being applied to industrial relations matters, it has made even less likely the growth of arbitration as a widely used method of dispute regulation. Those with an affection for irony will be pleased to note that this incursion of legalism into labour law is occurring at the same time as it is being partly supplanted by less formal processes in areas such as family disputes and small commercial claims.

It may well be that the impact of this point is less clear to an American arbitrator than it is to a British. To foreign eyes your arbitration appears to be pretty legalistic. Perhaps this is a misjudgment. Perhaps the strongly entrenched place of law in your society means that it is difficult for an outsider to detect the correct nuances. It does, however, seem important to explain the nature and style of arbitration in the United Kingdom and to do this it is necessary first to indicate the three principal influences that moulded the British style.[4]

Fundamental is the informal, voluntary nature of British industrial relations. Although that informality has been considerably modified of late, and especially since 1979 in the rules controlling industrial strife, it still remains substantially true of collective bargaining. Trade union recognition for bargaining is unregulated, being a question left entirely to the employer and trade union pressure. Collective agreements remain informal, binding in honour only, unless they stipulate otherwise, which they rarely do. So far attempts to change this have failed. In 1969, no doubt influenced by its parent company, Ford challenged its wayward unions on the basis that the collective agreement in question was legally binding.[5] The courts rejected that view and confirmed the widely accepted attitude that they were "binding in honour only." Soon after the Conservative government, by legislation, changed the presumption.[6] Agreements

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Statistics are published annually in the official Employment Gazette. The system has been exhaustively and brilliantly studied, see Dickens, Jones, Weekes & Hart, Dismissed, A Study of Unfair Dismissal in the Industrial Tribunal System (Oxford: Blackwell, 1985).

[4]The now classic overview of the British industrial relations system is the original series of Hamlyn Lectures given by one of the illustrious founders of the academic study of labour law, Professor Sir Otto Kahn-Freund. Subsequent revised editions still retain, but overlay, the original concept: Sir Otto Kahn-Freund, Labour and the Law, 3d Ed., Paul Davies and Mark Freedland, eds. (London: Stevens, 1983).

[5]*Ford Motor Co. v. Amalgamated Union of Engineering and Foundry Workers* [1969] 2 Q.B. 303.

[6]s.34(1) Industrial Relations Act 1971, repealed and reversed, s.18 Trade Union and Labour Relations Act 1974.

were to be legally binding unless they stated otherwise. This led to the regular appearance of Tina Lea—this is not a legally enforceable agreement. It was generally accepted that the trade unions were implacably hostile to such status and the employers had serious doubts and reservations. Recently, again under foreign influence, in this event Japanese as well as North American, there are faint signs of growing interest. But tradition is hard to change and there is a firm attachment to the flexibility of the nonbinding collective agreement.

The second factor that has influenced arbitration is a connected point. Because collective agreements are not legally binding it is difficult to apply the fundamental distinction between rights and interest disputes with any certainty. The point has obvious validity in that there is a clear difference between the extremes: the pay disputes as compared with a disagreement upon the interpretation and application of a clause in a collective agreement. There is, however, considerable overlap. Since an agreement is always renegotiable, the rules it enshrines are changeable. The arbitrator may be asked to rework the rule before he applies it. Although this may surprise and shock the traditional lawyer it has considerable merit. The rule as originally drawn may be a bad fit as far as the facts in question are concerned. They plainly had not been anticipated at the time the rule was established. So the arbitrator, rather than being asked to apply an inappropriate rule to fresh circumstances, is invited to devise the appropriate rule and then apply it. If he's any good the result will be better than it would otherwise be.

Thirdly, and again the point links closely with those just made, arbitration is regarded as a perfectly possible method of resolving a pure interest dispute. There is a paradox. Although the unthinking and universal answer to the question of how a pay dispute should be settled would be by conciliation, mediation, and arbitration, there is not a great deal of such arbitration. But the small number of disputes settled thus does not lessen the firmly held view that arbitration is a useful and available course of action. The average arbitrator will be called on, from time to time, to act in such disputes. It flows from a long history. In the late nineteenth century so-called conciliation committees often involved final resolution by an independent chairman. A wide range of individuals filled that role, mayors, clergy, members of Parliament, and other such notables! In a sense the modern arbitrator has inherited their work as part of his function. The

outcome has been that the average arbitrator will be asked to adjudicate a proportion of interest disputes.

It is now possible to appreciate the influences that have formed the British style of arbitration. They stem essentially from the impact of interest disputes. This springs not only from the interest disputes themselves. Lack of the clear distinction means that many cases which appear merely to involve the application of rules may involve rule making itself. The arbitrator has to be vigilant on this, fearing far-reaching effects known to the trade as "knock on." So, put negatively, the arbitrator can rarely feel he is merely interpreting a rule and applying it to the facts of the particular case. His horizons have to be wider, his awareness sharper, and his understanding deep. The arbitrator is moulded in his self-awareness by these considerations. So when an arbitrator, if he has had the courage to announce himself as such in polite company, is asked to explain, as he often will be, the difference between what he does and what a judge does in court, he will not be at a loss. He knows in his own mind that there are crucial differences although he is likely to turn to superficialities to explain.

For in general an arbitration is less well set up and the arbitrator less well served than the judge or chairman of a tribunal. His process is ad hoc rather than regular. He will rarely have his own hearing room. Although a Board of Arbitration will sit with a clerk, a single arbitrator will not. And so on.

These are trivialities. Yet there are vital differences between an arbitrator and a judge. They are largely a question of style but they flow from the idea set out in the quotation first cited. The judge finds facts, enunciates and applies the law. The arbitrator tries to solve problems. To do so he uses precisely the techniques of the judge but he goes further. He has another primary concern—to ensure as far as possible that his award runs with the grain of the parties' relationship, that his award heals and ameliorates that relationship, above all that it does not do further damage. When one of our most incisive judges, Lord Donaldson M.R. wrote "there is nothing an arbitrator can do which a specialised labour court cannot do better" he either missed this essential point, which is doubtful, or overemphasised the power of a labour court to break free of the shackles of legal tradition. It would appear to be the latter because in a brief period when there was a National Industrial Relations Court, 1971–1974, he proved to be a most innovative judicial chairman. One would

wish to see the two styles merging but there is strong evidence from the recent history of the industrial tribunals that it is a vain hope. The legal tradition is too powerful: the average judge and lawyer too conservative and set in hallowed ways.

It should be noted that in proceeding to identify the major differences of style too great an impression of dissimilarity may be given. Indeed in looking at the board of arbitration and the industrial tribunal very powerful similarities appear. Most notable is that the wingmen, that is to say the lay members drawn from trade union and management circles, may be the very same persons. But a glance at the Chairman discloses the underlying difference. That powerful seat will always be occupied by a lawyer in a tribunal and his professional expertise will add even greater weight to his voice. It has already been noted that although an arbitrator may be a lawyer he is more likely to be rag, tag, or bobtail.

The major differences that merit attention are the written basis of an arbitration, the informality of the hearing and the objective of problem solving. Each warrants extensive consideration. What follows is a brief and inadequate summary of the differences in these spheres.

1. Writing

The requirement of full, written cases in an arbitration contrasts strongly with the courts' emphasis upon oral proceedings.[7] It is only possible to note how, over the centuries, the courts in civil as opposed to criminal cases have shifted the emphasis away from formal, i.e., written pleading, towards the forum of the trial itself. The model has been the criminal action where pleadings were long confined to a short formal accusation and a simple plea of guilty or not guilty. This is a point to which reference will be made again in the next section.

The impact of full written statements of case is largely twofold. The principal difference between the parties are made clear as are the usually extensive areas of agreement. No time need be wasted on these. No questions are asked to elicit information or views already known and unchallenged. The proceedings are

[7]The so-called written "statement of case" is usually required 14 days before the hearing. It resembles the U.S. brief. The parties not only submit copies to the arbitrator: they also exchange copies. Replies are rare, but permissible. They usually are presented at or shortly before the hearing.

shorter and more succinct. The arbitrator starts with considerable background knowledge. The judicial unease, that to preinform is to prejudice, is a strange notion explicable only by a judge's admission of frailty. Certainly a robust arbitrator (and there are none of the other sort!) will have no difficulty in amending his initial and conditional appreciation of the facts and the problem.

Indeed the foreknowledge of the arbitrator is the second key point. It enables him to direct proceedings to key issues, to check irrelevance or the tendency, sometimes seen in lawyers, to stick excessively to their strong points and avoid the weak. Of course this point has added importance because of the more active role played by the arbitrator. It is customary in the United Kingdom for the arbitrator to bat first, raising doubts and issues after the side has orally introduced its written case. The lawyers, and they appear rarely but increasingly, are left to mop up. It is so different from the impartial and aloof judge.

The written statement of case is therefore an excellent base upon which the arbitration can be built and the arbitrator's style developed. However, there is one snag to be faced. The individual cannot be expected to provide a statement of case without assistance. If he is a trade union member, that will be available to him from his union. Otherwise he will have to seek assistance elsewhere, which is likely to be difficult or expensive to obtain and may well overlay the naturalness of his own approach and perhaps formalise matters unnecessarily. Certainly if the British system of arbitration is to expand it must tackle and solve the dilemma. It would be harmful to leave the individual feeling grossly unequal: it would be unfortunate to stifle his case by forcing it into a formal mould. It may well be that independent organisations such as Citizens Advice Bureaux[8] could help fill this gap but they would require increased funding. Failing that the form filled in now by applicants to tribunals would suffice.

2. *Informality*

For the parties the central aspect of arbitration is the hearing, at least until they get the award. It will undoubtedly create tension, however informal it is: the experience itself will stay in

[8]A charitable body with offices in most big towns. Gives general advice, including initial legal advice. There are also free neighbourhood law centres mainly in the big cities: they are under financial pressure, likely to contract rather than expand.

the memories of those principally concerned. The British style of arbitration recognises this and seeks to be as informal and relaxed as possible. The day in court is not a substitute for trial by ordeal.

The nature of what is being done reinforces the concept that arbitration is not a criminal trial with an impersonal State accusing a citizen. Even a dismissal or discipline dispute, which comes nearest, is at heart a "family" affair. An employee has allegedly transgressed and an outsider is called in to arbitrate between people who inevitably, because of the employment relationship, have been close. An interest dispute is even more obviously familial. The trade union and management have taken differing views. The disagreement may have become heated, but the parties will have to live together once the award is given. The departing arbitrator does well to remember that.

It follows that the hearing itself, though rigorous, must do as little as possible to lessen the standing and dignity of either side. The ability of lawyers to puncture, to humiliate, to embarrass must be kept within reasonable bounds. Yet the greatest infelicities pass unnoticed by the "trial" lawyer who brings along his techniques, unamended. For example the eliciting of evidence, be it fact or opinion, at the traditional lawyer's pace, within the straightjacket of question and answer is strange to the average layman. Try it on your spouse and the point will be rapidly made clear: it is unnatural, daunting, offensive.

Cross-examination is even worse unless carefully controlled. It is here where the honest witness can be gratuitously humiliated in a trial of strength so often between practised professional and raw amateur. It is a lawyer's article of faith, yet a badly flawed one. The British lawyer's "I put it to you that when you say that you are mistaken" can, in inappropriate use, be downright silly. The honest witness reaffirms his position: the liar repeats his untruth. Only the confused or the feeble-minded submit. The technique derives much of its strength from the presence of a jury to whom the dispute is once more made obvious. But an arbitrator is not a lay jury: to equate the two is to forget that the arbitrator has read the statements of case and to underestimate, in most cases seriously, the arbitrator's intelligence and specialised knowledge.

So the arbitrator's approach is crucial. The best analogy is that of an office lawyer taking instructions from a client. He needs to know all the facts and opinions, as accurately as possible. Unlike

the office lawyer the arbitrator has two clients who have conflicting views between which a decision has to be made! It is a difficult concept for a lawyer to accept, yet it is worth pondering. Which leads to a final point. The arbitrator must, in all but a few cases, assume that each party has an honestly held position. So the loser will, except in those rare cases, merit and benefit from a few words of recognition of his genuineness. They will enable the trade union official to explain his determination to resist to his disappointed members or the industrial relations executive to assuage the doubts of superiors on the correctness of the initial advice. Such words from an arbitrator, except in the mulish or vexatious case, are not weakness, they show real understanding and strength.

3. Problem Solving

The special role of the arbitrator can be succinctly stated. What is said can be best defended by considering the traditional judicial approach and selecting illustrations of its weakness in industrial relations cases.

An arbitrator is faced with an "in-house" dispute. He is called on to adjudicate. The decision as to the merits of the cases is the easiest part of the task. The cause of the dispute may be even more important: the result of its outcome not less so. For example, the disagreement may stem from faulty rules. At least this must be pointed out. Where the defect is lack of precision, or obvious inappropriateness, the rule must be applied to fit with the grain of the relationship. It is here where the experience in interest arbitration points the arbitrator in a different direction from the judge, especially the "literalist" judge. The arbitrator has two concerns. To achieve a fair result on the issue and to leave the industrial relations relationship at a minimum no worse than he found it. So a bombshell decision has to be accompanied with a clear explanation of how such a result occurred and if at all possible an indication of what is required to restore the damage.

A judge, it is submitted, would substitute for that industrial relations obligation a fidelity to the fabric of the law. The decision must fit easily within the growing structure of the law. It must be suffused with legal logic—would that lawyers could be persuaded that logic leads so quickly to absurdity. It certainly fails to recognise the bounds of common sense. Several instances

can be cited indicating how the generalist lawyer can damage the pattern of industrial relations.

At an early stage in dismissal cases it was established that the statute could be read to cover "constructive dismissal." This arose from a fine decision by the National Industrial Relations Court (since replaced by the Employment Appeals Tribunal). It was then necessary to determine the appropriate test. Two were considered. Did the worker act unreasonably by reacting to the employer's acts and attitude by leaving? Or, was the act of the employer such as to indicate a fundamental breach of contract so as to indicate a refusal to be bound in the future? Two tests—one easily understandable by the layman the other familiar to a lawyer who has studied the law of contract. You can guess which the judge chose: and the consequent difficulty of explaining it to trade union officials and line managers.[9]

So, in an amazing case, the Court of Appeal ruled that where a trade union official asked for recognition on behalf of his members in a firm and those members were dismissed, it was held to be the official's activity which counted and members were not protected against anti-union discrimination.[10] Equally surprising is the decision of the Employment Appeals Tribunal that exemption from joining a trade union in a closed shop be expanded by addition to the traditional ground of religion and the newer statutory "grounds of conscience or other deeply held personal conviction" of general dissatisfaction with the trade union that led the member to resign.[11]

Such cases, and there are a considerable number, are to be expected. British appellate judiciary is not specialised and above all the demands of logical and ingenious arguments lead into strangely inapt pathways.

There is a final pressure which has to be noted. There is a strong tendency to confuse the role of judge and jury. A board of arbitration, an industrial tribunal, and a single arbitrator are plainly exercising both functions. It is essential therefore to keep the two distinct. This is because the judicial enunciation and handling of the law is always appealable. The jury's decision on determination of facts and application of the law is not. This distinction has not been kept clear. The Employment Appeals

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[9]*Western Excavating (ECC) Ltd. v. Sharp* [1978] IRLR 27 (CA).
[10]*Therm A Stor Ltd. v. Atkins* [1983] IRLR 78.
[11]*Home Delivery Servs. Ltd. v. Shackcloth* [1985] IRLR 470.

Tribunal can only hear appeals on points of law. Some Presidents have interpreted this narrowly, others widely.[12]

The influences on this widening or narrowing of the impact of appeals are twofold. First there is the personality of the judge. Is he a lawyer, pure and simple, or does he want to make his feelings on the issue clear? That variation is uncontrollable. The second is not. It is the custom to give full reasons for the initial decision. A recitation of the finding of fact, of the principles of law applied, and the results of the process have to be given. They can subsequently be crawled over by lawyers. Any infelicity is the possible basis of an appeal. The distinction between law and fact is blurred.

It is a true dilemma. Too little indication of why a decision is reached and the parties may feel cheated. Too much and an appeal is more likely. Again it is interest arbitration which has guided the usual arbitrator's approach. Since there is rarely a water tight explanation why a 5 percent rise has been set rather than a 4 percent—it is ultimately a matter of feeling and judgment—reasons would be self defeating. The common practice is to indicate the general matters that influenced the decision: not to justify it logically but to indicate to the parties the way the arbitrator's mind was tending.

Conclusion

This is not the place to attempt to adjudicate between the two styles. It would need an arbitrator or a judge to do that—and both would be debarred for bias. In the United Kingdom, despite views such as those so well expressed by Linda Dickens *et al.* in the book, *Dismissed*, the legal system is likely to win, indeed will win.[13] If in winning it sticks rigidly to its traditional ways this will be to many a misfortune. If the experience of arbitrators, small though it is, brings modification for the reasons already set out, there is not a great deal to fear. But it is unlikely.

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[12]Initially a wide view of what was law rather than fact was taken by the Employment Appeal Tribunal, see Mr. Justice Phillips, *Some Notes on the E.A.T.*, (1978) 10 Indus. L. J. 137. Guidance was given in some detail, *Williams v. Compair Maxam Ltd.* [1982] IRLR 83. Critics of the usurpation of the jury function followed, *Walls Meat Co. Ltd.v. Khan* [1978] IRLR 499, where Lord Denning M.R. expressed his usually clear opinions. More recent cases to consult are *Bailey v. BP Oil Kent Refinery Ltd.* [1980] IRLC 287 and *O'Kelly v. Trust House Forte plc* [1983] IRLR 369. For a fuller discussion see I.T. Smith & J.C. Wood, Industrial Law, 3d ed. (London: Butterworths, 1986), pp. 221 *et seq.*

[13]See note 3 above.

The heart of the matter was put, succinctly as usual, by an American sage who came from Baltimore. He was discussing what is now a sensitive subject—why women did not make headway in the legal profession. That absence of women in the law has changed but he blamed not women but the law which he said

> Requires only an armanent of hollow phrases and stereotyped formulae and a mental habit which puts these phantasms above sense, truth and justice.[14]

That is precisely what a good arbitrator does not do and what makes his role both fitting and honorable.

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[14]H.L. Mencken, *In Defense of Women* (1958 revised). Reprinted A Mencken Chrestomathy, ed. H.L.M. (New York: First Vintage Books, 1982), at 26.