CHAPTER 7: THE EMPLOYMENT APPEAL TRIBUNAL’S JURISDICTION
Consultation Question 51.
Should the EAT be given appellate jurisdiction over the CAC’s decisions in respect of trade union recognition and derecognition disputes? If such an appellate jurisdiction were created, do consultees agree that it should be limited to appeals on questions of law?

Answer: We do not consider that the EAT should be given appellate jurisdiction in respect of Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992 and the current provisions should remain. It is the view of the CAC that judicial review is an appropriate safeguard in relation to the CAC misdirecting itself in law and should remain as the sole means of legal challenge. If, contrary to our view, appellate jurisdiction were to be given to the EAT, appeal grounds should be limited to Wednesbury unreasonableness.

Background and introduction

1. The main issue is whether the EAT should be given appellate jurisdiction over the Central Arbitration Committee’s decisions in recognition disputes (as it already has in some other areas), as opposed to being subject to applications for Judicial Review before the High Court in which the CAC traditionally adopts a neutral stance unless matters fundamental to the CAC’s operation are at issue. A subsidiary issue arises over whether any such appellate jurisdiction as may be granted to the EAT should be limited to appeals on questions of law.

2. The Central Arbitration Committee (CAC) is a specialist non-departmental body sitting outside the legal framework for tribunals created by the Tribunals, Courts and Enforcement Act 2007. Section 260(3) of the Trade Union and Labour Relations (Consolidation) Act 1992 explicitly recognises this and states that the Secretary of State may appoint as members of the CAC only persons experienced in industrial relations.

The High Court and Court of Appeal have consistently and repeatedly acknowledged the specialist nature of the CAC – a specialist body in a specialist area - and have deferred to it when issues of industrial relations have been raised. They have reiterated that, in the words of Elias LJ (as he now is) it is not “desirable that these procedures should become a happy hunting ground for lawyers”¹ and more recently Underhill LJ in Lidl v CAC & GMB [2017] EWCA Civ 328 when the court cautioned against zealous judicial interference with CAC decisions on the appropriateness of a bargaining unit.²

¹ upheld and re-affirmed by the Court of Appeal, R (Kwik-Fit (GB) Ltd) v Central Arbitration Committee [2002] EWCA Civ 51

² "16. It is in my view clear that that structure, adopting a broad criterion of “appropriateness”, subject to specified considerations to be “taken into account”, rather than setting hard-edged criteria, reflects an intention on the part of Parliament to allow full range to the expert judgement of the CAC in making decisions about bargaining units. It follows that the Court should be very cautious in entertaining legal challenges to decisions of the CAC under paragraph 19. I endorse, without setting out in extenso, the observations of Moses J in R (British Broadcasting Corporation) v Central Arbitration Committee [2003] EWHC 1375 (Admin), [2003] ICR 1542, at paras. 12-15 (pp. 1548-9), which themselves adopt observations of Elias J in R v Central Arbitration
If the appellate function was moved to the EAT from the Administrative Court, even if restricted to points of law, it would have the inevitable consequence of increasing complexity and uncertainty. As the courts have recognised we are recognised as an expert tripartite body and that expertise should be respected. We believe that judicial review should remain as the appropriate safeguard in relation to the CAC misdirecting itself in law.

The CAC has a number of specific concerns regarding the Law Commission’s recommendation

3. There is no inconsistency with the appellate route for recognition and de-recognition disputes to be via judicial review, in comparison to the CAC’s other first instant jurisdictions.

3.1 The reasons why judicial review, rather than the EAT, was chosen as the appropriate route for challenges to CAC decisions under its trade union recognition and de-recognition jurisdiction under Schedule A1 to the 1992 Act when the Employment Relations Act 1999 was implemented (unlike its other jurisdictions) was because the CAC functions in Schedule A1 are different in kind to its other jurisdictions. Our other jurisdictions with a right of appeal to the EAT are similar to some of the ET jurisdictions concerning collective rights. It is thus appropriate for those other collective rights to be heard on appeal in the EAT, but not the Schedule A1 decisions. For example, the exercise of gauging likely support for recognition or de-recognition within 10 days after the receipt of the application for recognition or de-recognition, which is a pre-requisite of the application being able to proceed, has no parallel in other areas of employment law and is outside the expertise of the EAT.

3.2 Our dual duty both to facilitate agreement between the parties and decide disputes where necessary in recognition cases also marks out our function in recognition and derecognition cases as different, and requires us to engage constructively with both sides during the application process.

3.3 An application for recognition or de-recognition of a trade union by an employer is a process with a number of stages, some of which, but by no means all are identified in the consultation document at paragraph 7.12. The CAC is required to apply specific statutory tests at each stage. Each decision point is, theoretically, open to challenge, but the rigour of the judicial review procedure


3 Such as the collective consultation rights under Transfer of Undertakings (Protection of Employment) Regulations, and s188 Trade Union and Labour Relations (Consolidation) Act 1992 collective redundancy consultation rights.

4 For example other important decisions that may be required of a CAC panel, that are not listed at para 7.12 of the consultation document include: the decision whether to accept an application; whether to hold a ballot; the form that the ballot should take; access arrangements during and preceding the ballot; and whether unfair practices have been adopted by one side or the other (or both)
deters many hopeless challenges to CAC decisions. The EAT procedure would be insufficient to deter tactical and spurious appeals which could have the effect of derailing valid applications.

3.4 The current position is not therefore a quirky anomaly which requires rectification or streamlining, but was the result of careful thought and sensible choice.

4. Increased juridification and legalism around collective labour law.

4.1 Over many years, we have witnessed the increased formalism around the Employment Tribunal’s work. For example, the law of unfair dismissal has developed, in large measure, into a limited review mechanism around tests of reasonableness over which lay members have, since 2012, have had little or no say. A similar approach in CAC decisions would run contrary to the tradition of voluntarism that has long surrounded collective bargaining. In our view introducing a general right of appeal to the Employment Appeal Tribunal (EAT) is bound to make our proceedings more legalistic and adversarial, and undermine our unique lack of formality, speed and focus on problem solving, that is so highly regarded by both sides of industry.

4.2 Moreover, a differently-composed EAT in the future may be inclined to interfere more readily on the sort of questions where the CAC has developed its own flexible jurisprudence and procedures. Ultimately, this could weaken the focus on industrial relations which is at the heart of the work of the CAC.

5. Delay.

5.1.1 Another major concern regarding the introduction of a right of appeal to the EAT in the context of the recognition and derecognition jurisdictions is that such a right would almost certainly lead to delay. Many of the recognition and derecognition provisions are governed by tight statutory deadlines – typically 5 or 10 working days from receipt of information or application. The specification in Schedule A1 of tight time limits for CAC decisions acknowledges the importance for efficiency and speed in the process to avoid the problems of the precursor legislation in the 1970s.

5.1.2 At present the CAC is the subject of relatively few judicial reviews and where these occur we continue with the procedure unless and until we are ordered by the court to desist. Currently we halt our procedures only if required to do so by a court and that requires an application by a party for this to happen.

5.1.3 The availability of a right of appeal would inevitably build delay into the system and would probably encourage more challenges to our decisions. In some instances this may be done with the object of delaying matters. Delay is not a
neutral act in the context of these procedures. The delay caused by an appeal may be used by a party for tactical purposes, for example to sway the democratic mandate in a borderline case around majority support or to re-engineer the composition of the bargaining unit.

6. **Increased numbers of appeals in comparison to Judicial Review (JR) applications.**

6.1.1 An appeal to the EAT has traditionally been free of charge, save for the period between 2013 and 2017 when fees were in operation, and it is generally a costs-neutral jurisdiction. A party which brings an application for JR to the High Court must pay a fee and then face a costs order if the application fails – even if it gains some form of costs protection. This forces parties to stop and think. The risk is that, with no costs associated with an appeal to the EAT, parties would be encouraged to bring an appeal for the sake of it, delaying the swift and voluntary resolution of collective disputes.

6.1.2 Even if a fee regime is re-introduced in the EAT, the more stringent procedural requirements of the High Court and costs consequences for an unsuccessful party instil a greater discipline in a putative judicial review applicant.

6.1.3 If the EAT were to be given this appellate jurisdiction, then it ought to be limited to pure questions of law using the same standards as apply in administrative law. Many employment lawyers will know that challenges to findings of fact are often dressed up as questions of law. In our view, there is a greater risk of the line between questions of law and questions of fact becoming blurred if there was a right of appeal to the EAT and that such decisions could impact negatively on the cogency of the CAC’s work.

7. **Geographical Extent of the Right of Appeal.**

7.1.1 Despite its name, the CAC has a jurisdiction which operates throughout England, Wales and Scotland. The current discussion around a right of appeal emanates from a report from the Law Commission for England and Wales only.

7.1.2 The Consultation paper makes clear that the Law Commission can only make recommendations for changing the law in England and Wales. It also acknowledges that only the Scottish Law Commission can make recommendations to change the law in Scotland. It also recognises that power over Employment Tribunals and the EAT in Scotland is likely to be devolved to the Scottish Parliament and Government when the powers provided by the Scotland Act 2016, s.39 are activated. But such powers do not extend to the jurisdiction of the CAC which is a specialist non-departmental tribunal not covered by either the Tribunals and Inquiries Act 1992 or the Tribunals, Courts and Enforcement Act 2007.
7.1.3 This creates the strange conundrum that authority over the CAC will continue to be vested in the UK Parliament yet as the Law Commission acknowledges any change in the law that it might recommend can only apply in England and Wales. We wonder how this circle will be squared. The last thing we need would be the bizarre situation of a CAC panel sitting in Carlisle with a right of appeal to the EAT but one sitting in Dumfries only challengeable through judicial review to the Court of Session.

8. The proposition that the EAT might “be a more suitable way of ensuring the correctness of the CAC’s decisions than using public law principles which may not sit easily with the review of the CAC’s quasi-judicial functions” (consultation paragraph 7.14) is not fully understood.

8.1.1 We do not understand how or why it would be “more suitable” for the appellate route to be to the EAT. If the intention is to alter the appeal criteria, more work should be done to explore what an “error or question of law” in the context of the trade union recognition and de-recognition procedure would mean in the EAT, as compared to the Admin Court, given the considerable body of case law from the High Court and Court of Appeal providing a considerable margin of appreciation to the CAC’s decisions.

8.1.2 It is not clear what is meant by the term “correctness” of decisions. Successful challenges to CAC decisions are remarkably rare, partly because of the robust procedures in place to ensure fair process in our decision making and partly because of the scope of the CAC’s powers and discretion conferred by Sched A1. For example, in deciding what is “appropriate” in deciding a bargaining unit, or what will be “in the interests of good industrial relations” in deciding whether a secret ballot should be held in cases where there is majority union membership. It would be unfortunate if a procedural change inadvertently affected the substantive law.

9. For the above reasons the CAC considers that the current position should remain.