

PUBLIC EMPLOYMENT AND ACCESS TO JUSTICE IN EMPLOYMENT LAW

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Abstract

This paper discusses and analyses the current evolution of the exceptional employment law rules governing (certain) public sector employment and the implication of that evolution for access to justice for public employees. It starts with an analysis of the origins and justifications for the separation of the regulation of 'private' as opposed to 'public employees, and how that separation has evolved over time. The article then proceeds to outline some of the possible critiques of that separation, and the potential for the challenge to that separation in theoretical terms. In the third section, there is an assessment of the practical ways in which way public employees have recently sought to challenge this separation, and particularly their exclusion from private employment law rights. It discusses the reasons for the varying degrees of success of that challenge. The final section proceeds to discuss how far public law may step in to counteract the exclusion of public employees from the employment law regime. In particular there is a discussion of the realisation within the public law arena of a need to relax the strict separation of the public/private regime and the need to cater for particular individual circumstances.

1. Introduction

In the UK, the judicial system is founded on a separation between private law on the one hand and public law on the other.¹ In general terms, employment law sits uneasily on that public/private

¹ Indeed this separation is pervasive throughout the liberal democratic world. For an interesting discussion of the position in the USA, and its effect on labour law see: K E Klare, 'The Public/Private Distinction in Labor Law' (1982) 130 (6) *University of Pennsylvania Law Review* 1358. For a discussion of the position in France see: M

divide: although founded on a 'private' contract of employment the regulation of that contract is steeped in matters pertaining to the more general public interest. Moreover (and of particular relevance to this article), the public/private divide causes deep problems when it comes to considering the particular position of public sector employees within employment law. In these situations, it is not just the 'publicness' of employment law rules which is at issue, it is also to be considered how and when 'pure' public law rules should be applicable to these contracts. On the one hand there is the argument that such employees should be subject to the same private rules as any other: that all are equal before the law. On the other hand, the argument proceeds that there are special features of public sector employment which mean that such employment should be subject to a special and independent (public law) regime. The result is a rather fragmented picture, whereby some public employees are integrated into the private employment law regime, whereas others are excluded from private law protection (and have to rely on the application of pure public law rules).

Of course, it may be argued that this exclusion from private law protection is not necessarily a problem if public sector employees are able to take advantage of equivalent legal protection as a matter of public law, and there are instances where employees have been able to take advantage of public law rights.² More often though, excluded groups have struggled to navigate the public law regime, and have sought to be included instead within the scope of (more generous) employment law rights. On a domestic level, public sector groups have had a level of success at challenging their exclusion from private employment rights, and many of these groups are now included within employment law protection.³ Likewise, at EU level, there are examples of public sector groups mounting a successful challenge to their exclusion from the jurisdiction of private employment law.⁴

Troper, 'La distinction entre droit public et privé et la structure de l'ordre juridique' in M Troper (ed), *Pour une théorie juridique de l'Etat* (PUF 1995)

² This is discussed in section 5 of this article.

³ For an overview of the level of inclusion of public sector groups in the (private) employment law regime see: S Deakin and G Morris, *Labour Law* (Hart Publishing 2012) 191-200

⁴ This particular challenge is discussed in detail in section 4 of this article.

However, as will become evident during the course of this article, the inclusion of public sector employees within the private law regime of employment remains partial and fragmented. Even amongst those groups mounting a 'successful' challenge against their exclusion, they have rarely achieved inclusion within the entirety of private employment law protections.⁵ There are still other groups who have not been able to successfully challenge their private law exclusion at all.⁶

The aim of this article is to consider this fragmented picture and the current legal position of public sector employees. It starts, in section two, with an analysis of the origins and justifications for the separation of the regulation of 'private' as opposed to 'public' employees, and how that separation has evolved over time. The third section of the article outlines some of the possible critiques of that separation, and the particular areas in which that separation can be challenged in theoretical terms. This will be followed, in the fourth section, by an assessment of the practical ways in which public employees have recently sought to challenge this separation, and particularly their exclusion from employment law rights. The final section will proceed to discuss how far public law may step in to moderate the exclusion of public employees from the employment law regime, and the possible benefits to employees of a relaxation of that regime to cater for particular individual circumstances.

2. Justifications for differential treatment of private sector/public sector employees

At a theoretical level, the justification for the differential treatment of employees in the public and private sector can stem from the recognition of the important differences in public as opposed to private power.⁷ Private power may be characterised as 'economic' in nature. At the level of

⁵ For example, on a national level, prison officers who were once excluded from the majority of employment law rights are now largely included within this regime. However, they remain excluded from the right to take part in industrial action as a result of a statutory duty established in the Criminal Justice and Public Order Act 1994. At EU level, in a series of cases at the European Court of Human Rights, employees have successfully challenged their exclusion from employment rights on the basis that the exclusion constitutes a breach of their rights under Article 6 of the European Convention on Human Rights (right to a fair trial). However, their inclusion only extends to those rights 'within the scope of EU law', and therefore does not include unfair dismissal protection for example (see section 4 for further discussion on this point).

⁶ For example, domestic workers employed by diplomatic staff (see section 4 for further discussion).

⁷ A C L Davies, 'Ultra Vires Problems in Government Contracts' (2006) *Law Quarterly Review* 98, 99

employment, this economic power is usually understood in terms of differentials in bargaining power between employers and employees. The employer is represented as possessing a higher level of bargaining power than the employee, and this inequality dictates the structure of the contract of employment. In this situation, it is argued that it is not accurate to present the contract of employment as a freely negotiated and consensual agreement. It is the employer who decides on the contractual terms and offers the contract on a 'take it or leave it' basis. The employee has little or no opportunity to negotiate contractual terms, and is forced into accepting the contract of employment on the basis that the contract is necessary for his/her valued existence.⁸ In this scenario, the role of employment law is to step into ensure that the worst excesses of employer power are avoided. For example, employment law may establish the right to form and join trade unions to boost the 'social power' of workers or may act to create a set of minimum standards which set the boundaries for the operation of employment contracts.

By contrast, public power has specific features which set it apart from private power. First, the government has access to 'coercive' power beyond that found amongst private bodies (in particular the ability to legislate and raise taxation).⁹ Second, public power is granted through a democratic process, and so the government is accountable to the electorate in the exercise of its power. In the context of employment, both of these features imply that the actions of state employers should be constrained in ways which may not be appropriate in a private context. For example, the payment of employees in the public sector essentially involves the use of public money. This means that these payment arrangements may (or should) be subject to scrutiny to ensure that they operate according to proper controls and systems of accountability. Furthermore, there is a level of accountability of the state as employer in relation to the disclosure of wrongdoing amongst its staff which may not exist in the private sector.¹⁰ Finally, there is the argument that the

⁸ J Laws, 'Public law and employment law: abuse of power' (1997) *Public Law* 455, 456

⁹ A C L Davies (n 7) 99

¹⁰ See for example the terms of the Civil Service Management Code discussed later in this section.

recruitment of public sector staff should be more highly regulated than in the private sector to ensure the requisite level of (public) openness and transparency.¹¹

A further justification for the distinction between the regulation of public and private sector employment is the idea of contractual status. Whilst the contract of employment forms the basis of both common law and statutory regulation of the private employment relationship, there are difficulties with the concept of a contract of employment to describe relationships between the state and its employees. Indeed, certain public sector groups have been designated 'officeholders' rather than contractual employees. For these purposes, an 'office' is a position of a public nature which has an existence irrespective of the person who fills it, and which is filled by successive holders.¹² The duties of an office are defined not by agreement but by law or by relevant statutory rules. Traditionally, the status of 'officeholder' conferred a number of advantages on public servants. For example, officeholders could only be dismissed for good cause, rather than for any reason or by proper notice as used to be the position at common law.¹³ Officeholders also potentially had access to administrative law rules, including for example the right to claim judicial review. These features led some authors to suggest that employment law could be separated into a coherent 'law of public employment' governed by public law rules, and a contrasting law of private employment which presented a 'contractual approach to the regulation of employment relationships'.¹⁴ For example, Freedland suggested that the 'contractual approach' to regulation concentrated on the 'substantive and specific aspects of the relationship' whereas the 'public law status approach' envisaged the office-holder as bound by more 'diffuse' procedural obligations. On the one hand the office-holder

¹¹ G S Morris, 'Employment in Public Services: The Case for Special Treatment' (2000) 20 (2) *Oxford Journal of Legal Studies* 167, 176

¹² Baroness Hale of Richmond in *Preston (formerly Moore) v President of the Methodist Conference* [2013] UKSC 29, para 37

¹³ *Ridge v Baldwin* [1963] 2 All ER 66, HL

¹⁴ M Freedland, 'Status and Contract in the Law of Public Employment' (1991) 20 ILJ 72, 72

was bound by the 'dictates of commitment' whereas the employer must proceed according to notions of 'fairness'.¹⁵

The importance of the officeholder/contractual distinction has waned over time, with many officeholders now able to claim dual officeholder/employee status for the purposes of accessing statutory employment law rights.¹⁶ However, the availability of public law remedies to public sector employees continues to be of relevance, and the contractual/non-contractual distinction is central to its determination. Administrative law remedies only exist for public sector employees where the dispute lies outside the scope of 'private' contractual rights. Indeed, the existence of a 'contract of employment' has been put forward as grounds for refusing access to judicial review.¹⁷ In order to rebut the presumption that the employment relationship is within the private realm, there need to be exceptional circumstances of 'publicness'. For example, a specific aspect of the employment relationship must be underpinned by statute or determined by prerogative, or the relationship must have a particular public quality.¹⁸ Furthermore, judicial review may be denied if the subject of the employment dispute falls outside the public duty owed to the employee. For example, judicial review was denied to a detective inspector of police who challenged a decision to send him back to his local force from his seconded position at the National Crime Squad. This decision was deemed to be of an operational nature, and therefore not part of the public function of the police force.¹⁹

The final justificatory distinction between regulation in the public and private sector looks to the particular function which (certain) public sector employees perform. The argument proceeds that certain public service functions (and by implication those who perform those functions) are

¹⁵ Ibid 72

¹⁶ *R v East Berkshire Health Authority ex parte Walsh* [1985] QB 152 CA; *Johnson v Ryan* [2000] ICR 236. That said, problems still remain for certain groups. The situation of the clergy is particularly contentious, and in the recent case of *The President of the Methodist Conference v Preston* [2013] UKSC 39, a Minister of the Methodist Church was denied employee status on the basis that she was an office holder and had no contract of employment.

¹⁷ *R v Lord Chancellor's Department ex parte Nangle* [1991] IRLR 343

¹⁸ G S Morris, 'The Future of the Public/Private Labour Law Divide' in C Barnard, S Deakin and G S Morris (eds) *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (Hart Publishing 2004) 165

¹⁹ *R (on the Application of Tucker) v Director General of the National Crime Squad* [2003] EWCA Civ 57 [2003] IRLR 439

matters of public interest and therefore 'justify regulation of a kind which has no counterpart in the general law'.²⁰ Indeed, this functional approach perhaps best describes the design of UK employment legislation concerning public sector employment. In the UK, there is no distinctive labour law regime for public service employment (in contrast to the position in other countries).²¹ However, certain areas are subject to specific laws and regulations according to their functional requirements.²² The extent of coverage of these specific laws and regulations varies between groups. For example, the police service is subject to an almost entirely separate statutory regulatory regime in terms of employment, as a result of the specific legal powers and responsibilities with which police officers are entrusted. Police officers are (either explicitly or implicitly) excluded from the majority of the protective provisions of the Employment Rights Act 1996 (ERA)²³ and they cannot take advantage of any of the provisions under Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). Instead, their terms and conditions of employment are governed by the Secretary of State, acting under powers granted by the Police Act 1996 (as amended). Misconduct and discipline are dealt with by a complex (separate) statutory regime, including the Police (Conduct) Regulations 2012 (replacing the Police (Conduct) Regulations 2008). Although police officers do now have rights under equality and working time legislation, their general exclusion from statutory employment protections (and indeed protections arising from the 'contract of employment') means that they must rely on judicial review to correct any breach of 'natural justice'. This ability to invoke judicial

²⁰ Morris (n 18) 160

²¹ For example in France, private contracts are regulated through the Code du Travail, whereas public sector contracts are regulated through a specific statute for public sector employees (law number 84-16, 11 January 1984)

²² G S Morris, 'Fragmenting the State: implications for accountability for employment practices in public services' (1999) Public Law 64, 64

²³ Police officers are explicitly excluded from the right to claim unfair dismissal in ERA 1996, s 200. The courts have also taken the view that they are implicitly excluded from the ERA for those rights on which their position is silent as a result of the absence of a contract of employment between a police officer and their employer. Deakin and Morris (n 3) 196

review extends to all ranks of the service and has recently been the subject of a number of cases in the High Court.²⁴

Other groups of public sector employees also have specific laws and regulations applicable to them as a result of their function, but these may cover only certain aspects of their service, and may act alongside the statutory employment law regime. For example, civil servants are now included within the scope of both the ERA 1996 and the protective provisions of TULRCA 1992. They are also covered by equality legislation, as well as legislation pertaining to working time and the national minimum wage. It is thought that as a result of this protection and the possibility of a 'contractual nexus' between civil servants and their employer, civil servants are unlikely to be able to claim judicial review, and indeed civil servants have not been successful at claiming judicial review in the past.²⁵ However, civil servants remain subject to a particular Civil Service Management Code, which sets out the (onerous) standards of behaviour expected of public servants, and places restrictions on certain political activities.²⁶ It also states the high standards of reporting expected of civil servants where they become aware of any action committed in breach of the code. Likewise, prison officers are now distinguished in functional terms from police officers, and so can take advantage of most employment protection rights.²⁷ They are still though subject to limitations on their ability to take industrial action, as a result of a statutory duty arising from the provisions of the Criminal Justice and Public Order Act 1994. They are also still rules under the Prison Act 1952 which

²⁴ *R (Chief Constable of the Hampshire Constabulary) v Police Appeals Tribunal* [2012] EWHC 746 (Admin); *R (Montgomery) v Police Appeals Tribunal* [2012] EWHC 936 (Admin); *R (Chief Constable of the Derbyshire Constabulary) v Police Appeals Tribunal* [2012] EWHC 2280 (Admin).

²⁵ Deakin and Morris (n 3) 192

²⁶ The Civil Service Management Code is derived from the Powers set out in the Constitutional Reform Act Part 1 and is available at <http://www.civilservice.gov.uk/wp-content/uploads/2011/09/civil-service-code-2010.pdf> last accessed 30 March 2014

²⁷ The Criminal Justice and Public Order Act 1994, s 126 provides that prison officers are not to be treated as being in 'police service' for the purposes of the Employment Protection (Consolidation) Act 1978 (now the Employment Rights Act 1996 and the Trade Union Labour Relations (Consolidation) Act 1992).

determine the scope of misconduct in the prison service in line with the particular responsibilities and sensitivities of the employment.²⁸

The 'functional' approach to the separation of rights and protections between public and private sector employees also resonates with international and EU law. An example at international level is provided by the attitude of the Committee of Experts of the ILO to the application of the right to strike. The Committee has found that the right to strike is not absolute, and can be restricted for employees engaged in 'essential services', the interruption of which would endanger the life, personal safety or health of the whole or part of the population.²⁹ Public servants can also be explicitly excluded from the right to strike where they are 'exercising authority in the name of the State'.³⁰ Both the police and the army are also specifically mentioned as groups which could be legitimately excluded from the right to strike.³¹ Furthermore, in the jurisprudence of the European Court of Human Rights (ECtHR), the functional approach is adopted in the adjudication of the applicability of Article 6 of the European Convention on Human Rights to public servants. According to *Pellegrin v France*,³² the Court will consider the nature of the employee's duties and responsibilities in determining whether he/she can claim under Article 6 ECHR. Where disputes are raised by public servants whose duties are 'designed to safeguard the general interests of the State' then they will be excluded from the scope of Article 6 ECHR.³³ In *Pellegrin v France*, it was asserted that 'manifest' examples of these activities are provided by the armed forces and the police.³⁴ As a result, it has been held that these groups will not benefit from Article 6 protection.³⁵

3. The possible critiques of the justificatory regime.

²⁸ *R v King (Rebecca Mary)* [2013] EWCA Crim 1599.

²⁹ ILO, *General Survey on the Fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice and Fair Globalisation 2008: Report of the Committee of Experts on the Application of Conventions and Regulations* (Geneva 2012) para 131

³⁰ Ibid 130

³¹ Ibid 127

³² *Pellegrin v France* (2001) 31 EHRR 26

³³ Ibid para 66

³⁴ Ibid para 66

³⁵ *Derbyshire* (n 24) para 31

In the previous section, the different justificatory arguments for the separation of public employment from employment in the private sector were raised. There was also a discussion of the application of those different justificatory arguments to different public sector groups. It is clear from this discussion that instead of sitting neatly on either side of the public/private divide, different groups tend to straddle it, achieving employment law protection in some areas and not in others. The aims of this section is to delve a little more deeply into the justificatory arguments surrounding the public/private divide and reveal the possible problems in applying these arguments to the real world. Section 4 builds on these arguments by discussing how certain groups have attempted to challenge the public/private divide, and particularly the arguments used by those workers seeking inclusion within the statutory scheme of employment rights protection. The final section will discuss the varying degrees of success of those attempts and any possible alternatives for excluded public sector groups.

The first major problem with the justificatory arguments concerning the public/private divide, is the assumption that they work in tandem to produce a clear outcome. The argument proceeds that a private relationship will be contractual and involve private power and private functions, whereas a public relationship will involve the exercise of public functions and will not be non-contractual in nature. This division is very difficult to sustain in practice. Very often public sector workers will be employed both under a contract purporting to determine the boundaries of the relationship, and under a statutory framework which controls the functions of the public body and its powers.³⁶ Illustrations of this arrangement abound in for example the NHS, public corporations and the education service. To take one example, teachers in the public sector work under contracts of employment, but their contracts are with public bodies that derive their powers from statute. For teachers in most publicly funded institutions, the employer is the local education authority, although

³⁶ T Poole, 'Judicial Review and Public Employment: Decision-Making on the Public/Private Divide' (2000) 29 ILJ 61, 62

in practice many functions are delegated to the relevant school's governing body.³⁷ In any event, the Secretary of State retains the power to make provision for the determination of the pay of school teachers, and any other conditions of employment which relate to their professional duties or working time.³⁸ Therefore, whilst school teachers are deemed to have 'contracts of employment' as a matter of law, those contracts are not solely circumscribed by private power, but also by public power.

It may be argued that in practical terms, the 'public' features of these employment contracts do not affect the overall rights of these employees, as these rights are determined through (private) employment law. However, in some situations, this public/private division can be manipulated so that public sector workers fall outside the boundaries of *both* private law *and* public law. Civil servants provide a good example. Traditionally, it was held that civil servants could not have a contract of employment. Their employer was the Crown, and the Crown could not fetter its discretion by binding itself to contracts of employment.³⁹ In terms of private law, the contractual status of civil servants remains uncertain. Although civil servants are assumed to have contracts of employment for the purposes of statutory protection, their contracts remain theoretically subject to common law rules which are inconsistent with the general common law rules determining contracts of employment. It therefore appears that civil servants may face problems in claiming under (certain of) the common law rules relating to contracts of employment (such as rules which seek to limit the

³⁷ Education Act 2002, s 35. In fact, with increasing fragmentation in the provision of public sector education, governing bodies have gained more and more power. In the case of free schools and academies, the governing body now acts as the employer of the school's staff (rather than the local education authority), as well as having other admissions responsibilities and the ability to own school land. For more detail on the functions of governing bodies across the range of school types see Department for Education, 'Governor's Handbook: For governors in maintained schools, academies and free schools' (January 2014) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270398/Governors-Handbook-January-2014.pdf last accessed 24 June 2014

³⁸ Education Act 2002, s 122. It is worth noting however, the increased flexibility given to governing bodies in the determination of teachers' pay (for example the introduction of performance-related pay). For further details see Department for Education, 'Reviewing and Revising your School's Approach to Teachers Pay' (August 2013) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277766/130807_2013_stpc_d_accompanying_advice_master_final.pdf last accessed 24 June 2014

³⁹ *Rederiaktiebolaget Amphitrite v R* [1921] 3 KB 500. See discussion in Deakin and Morris (n 3) 192

variation of contractual terms). By contrast, as a matter of public law, it is now accepted that civil servants can possess contracts of employment.⁴⁰ Of course, where that contract of employment exists for the purposes of public law, it excludes the possibility of civil servants bringing claims for judicial review. It is therefore possible that civil servants will not be able to take advantage of either public or private law relating to their employment.

A second problem is the inconsistencies *within* the different justificatory approaches for separating the public and private regime of regulation. For example, police officers are designated as holding distinct 'independent offices'; the rules and regulations which determine their service are laid down by Parliament and their disciplinary procedures have a statutory basis.⁴¹ This lack of an employment contract (and also their distinct functional status) means that they are implicitly excluded from some employment protections, and explicitly excluded from others. However, this exclusion is not consistent, and police officers do have protection under equality law and under working time legislation. This implies a level of contractual personal service or 'subordination' as a matter of law. Furthermore, it has been argued that, in practice, police officers are subject to a high level of control by their superiors despite the particular functional responsibilities and 'independence' associated with the position of constable. Their scope for individual action is severely limited. It is therefore difficult to sustain a logical theoretical argument that police officers should be excluded from employment protection legislation.⁴²

4. The drive for inclusion in the private law regime

The theoretical inconsistencies in the regulatory public/private divide provide the background to the claims amongst public sector workers for inclusion within the scope of private sector rights. In historical terms, these claims have met with varying degrees of success. For example, prison officers have been able to achieve inclusion into the majority of private employment rights, and certain

⁴⁰ *R v Lord Chancellor's Department ex p Nangle* [1991] IRLR 343

⁴¹ *Chief Constable of Lincolnshire Police v Stubbs* [1999] ICR 547, para 552

⁴² *Morris* (n 18) 163

officeholders have managed to achieve employee status as a matter of statutory law.⁴³ The pattern for other groups has been more fragmented, and certainly police officers and army personnel remain excluded from most employment protection legislation. The following section discusses more recent challenges to the scope of employment protection legislation by public sector groups, and the continued difficulties many groups face in achieving access to employment protection rights. It appears that despite dubious theoretical grounding, some groups remain excluded from protection in employment law, whilst even the most 'successful' groups face have not achieved access to the whole range of employment rights.

The Challenge to Statutory exclusion

The recent case of *Gordon McKinnon*⁴⁴ provides a good example of a failed attempt to challenge the (rather dubious) public/private separation in the designation of employment law rights. In this case, a member of the Redbridge Parks Police Service challenged his exclusion from unfair dismissal rights protection under the ERA 1996. Under the ERA 1996, 'police officers' are explicitly excluded from protection under section 200 (1). That exclusion extends to persons in 'police service'. 'Police service' is defined in section 200 (2) as 'service as a member of a constabulary maintained by virtue of an enactment' or 'service in any other capacity by virtue of which a person has the power or privileges of a constable'. The exclusion is therefore functional, and extends to those persons who have the functions of police officers even though they might not come under the auspices of the police force as such. In this case, the Defendant Council argued that the Claimant was rightly excluded from unfair dismissal protection because he came within either or both of the limbs of the definition of police service under section 200 (2). The Claimant's position was that he should not be excluded from protection because neither limb of section 200 (2) aptly described his position. He

⁴³ A good example is provided by Registrars of births, deaths and marriages. The relevant law is found in Section 69 (1) Statistics and Registration Services Act 2007, which provides that 'every person who immediately before commencement of this section hold a relevant office becomes an employee of the local authority'.

⁴⁴ *Gordon McKinnon v The London Borough of Redbridge* [2014] EWCA Civ 178

argued that above all else he was an employee of the Defendant Council and therefore should have the normal right to claim unfair dismissal.

The Court of Appeal accepted that all thirteen members of the Redbridge Parks Service were employees of the Defendant Council. They were issued with job descriptions by the Council which set out their roles and they were subject to the Council's disciplinary rules and procedures. However, the Court of Appeal also accepted the 'special status' of those employees as constables appointed pursuant to the relevant statutory powers.⁴⁵ That special status meant that they were required to make a declaration before a justice of peace as to their public service, and also that they were invested with certain 'public' powers such as the power of arrest. That special status also meant that they were excluded from the Employment Rights Act 1996 by virtue of both sections 200 (2) (a) and 200 (2) (b). The Redbridge Parks Service was a constabulary maintained by 'virtue of an enactment' and the constables were entrusted with powers and privileges which put them outside the scope of the Employment Rights Act. As a result, the Court found that the Claimant could not claim unfair dismissal as a matter of employment law.

The Court did recognise the inconsistency and unfairness of this result, and stated a number of elements of 'injustice'.⁴⁶ First, as the constables of the Redbridge Parks Police Service were employees of the Council and not employees of any police service, there could be 'no rational policy reason' why those constables should not be able to recover compensation in the event of unfair dismissal (in line with other Council employees).⁴⁷ Second, these constables did not have access to the 'elaborate' (public) remedies available to the member of police forces and the British Transport Police. In contrast to the position for regular police officers therefore, the public law remedies did not compensate for the lack of private law protection. Finally, the Court raised the difficulties in

⁴⁵ The relevant law appears in section 77 of the Public Health Acts Amendment Acts 1907, which gives local authorities the powers to appoint officers to be sworn in as constables for the purposes of maintaining public health, and article 18 of the London Parks Order provided in Schedule 1 of the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967.

⁴⁶ *Gordon McKinnon* (n 44) para 68

⁴⁷ *Ibid* para 68

relying on a functional distinction to delineate the public/private divide. Other groups which did have some enhanced public powers were now included within the protection of employment law. The Court cited the position of prison officers who are now included within the unfair dismissal regime.⁴⁸ However, the Court recognised that it was not possible 'in the guise of interpretation' for it to 'rewrite section 200 in order to remedy what appears to be an injustice'.⁴⁹ It called instead upon Parliament to consider, in the light of the judgement, whether member of the Parks Police service should be exempted from the operation of section 200 ERA 1996 and included within the employment law statutory regime.

The Challenge to Immunity

A further recent challenge to exclusion from employment law jurisdiction has come from employees working at UK based embassies. Traditionally, those employees have not been able to claim employment protection because of the operation of the doctrine of state immunity (a (foreign) state is immune from the jurisdiction of the UK courts). In the UK, this doctrine is enshrined in the State Immunity Act 1978 (SIA), which provides immunity to states in relation to contracts of employment of 'members of a diplomatic mission' (section 16 SIA) and in relation to contracts of employment generally subject to certain exceptions (section 4 SIA). In the SIA, the definition of members of a diplomatic mission is given very wide scope, and extends to 'diplomatic staff' as well as administrative and technical staff. Early approaches to the interpretation of this section revealed that it operated to afford blanket immunity to embassy staff. For example, in the case of *Sengupta v India*,⁵⁰ an Indian national, employed as a clerical officer at the Indian embassy in London, attempted to challenge his exclusion from unfair dismissal rights. The Court found against him, and upheld the Indian state's claim to state immunity. It found that the dismissal of the Claimant was an exercise of

⁴⁸ To that argument could also be added the contention that the exclusion of Parks Police on functional grounds does not sit well with the ability the Chief Officer of Police is able to grant police powers to civilians, so that those civilians can fulfil the same functions as police officers, but still maintain employment protection status.

⁴⁹ *Gordon McKinnon* (n 44) 68

⁵⁰ [1983] ICR 221

sovereign power and outside of the Court's jurisdiction. Any investigation into that dismissal would be 'wholly inconsistent with the dignity of the foreign state'.⁵¹

More recently, there has been a shift in the climate in which this judicial interpretation operates. For example, it is no longer accepted as a point of international law, that states should have blanket immunity from jurisdiction.⁵² It is recognised that there are situations in which the harshness of this rule (in restricting access to justice) is not justified, particularly where the rule conflicts with fundamental rights, such as the right to a fair trial under the ECHR. Furthermore, there is a move to recognise a distinction between acts of a state which are private (acts *jure gestionis*) and acts which are acts of a sovereign nature which no private party could normally perform (acts *jure imperii*).⁵³ Whilst the latter may attract state immunity, it is understood that the former should not be subject to state immunity rules. This raises the possibility that contracts of employment are merely private matters and do not involve the exercise of sovereignty. As a result of this shift, there has been a greater judicial willingness (at European level) to consider the particular circumstances of the employees claiming immunity to discern whether their contracts include sovereign functions which would attract immunity. For lower grade embassy staff, it is no longer accepted that these staff necessarily carry out acts of a public nature which put them outside the normal jurisdiction of the courts.⁵⁴

A good example of this more restrictive approach to state immunity is provided in the case of *Benkarbouche*.⁵⁵ This case concerned a challenge to state immunity brought by two members of domestic staff at state embassies based in the UK. Both employees argued that the doctrine of immunity was a violation of their right to court access under Article 6 ECHR and that, accordingly, the SIA should be interpreted to allow their claims to proceed. As an alternative (and if a favourable

⁵¹ Ibid 228

⁵² R Garnett, 'State immunity in employment matters' (1997) *International and Comparative Law Quarterly* 81, 81

⁵³ Ibid 82

⁵⁴ *Fogarty v United Kingdom* (2002) EHRR 12; *Cudak v Lithuania* (2010) EHRR 15

⁵⁵ *Ms F Benkarbouche v Embassy of the Republic of Sudan*; *Ms Janah v Libya* (2013) WL 5336838

interpretation of the SIA were impossible), they argued that they should be allowed jurisdiction on the basis of the operation of Article 47 of the Charter of Fundamental Rights and Freedoms (the right to access a court). As Article 47 formed a 'general principle' of EU law, the Court was bound to disapply those sections of the State Immunity Act which were in conflict with it. The Court first considered whether the provisions of the SIA were in conflict with Article 6. It noted the restrictive approach to immunity in the balancing exercise undertaken by the European Court of Human rights (ECtHR): in a number of cases it had found that although state immunity may pursue a legitimate aim, where employee functions did not interfere with sovereign state interests, immunity was a disproportionate response and therefore a violation of Article 6.⁵⁶ The pivotal question was whether the claim involved any public aspect of the employee's work.⁵⁷ In the *Benkarbouche* case, the Court found that there was insufficient public aspect in the work of either of the domestic embassy workers to justify their exclusion from access to a court to bring their claims. The difficulty the Court then faced was the impossibility of the interpretation of the State Immunity Act to bring it in line with Article 6. As a result, the Court moved to consider whether Article 47 of the Charter could operate as a general principle of EU law and disapply the offending provisions of the SIA. Following *Kücükdeveci*⁵⁸ the Court held that the Charter could have horizontal direct effect for those employment rights within the scope of EU law. Accordingly so far as the claims relating to working time, discrimination and harassment were concerned, the relevant sections of the SIA were to be disapplied.

This case does represent a modest victory for employees seeking to challenge their exclusion from employment law jurisdiction.⁵⁹ However, a number of points should be made about the potential of Article 6 in general (and this case in particular) in providing greater access to justice for public employees. The first point to make is in relation to the operation of the functional distinction

⁵⁶ *Fogarty* (n 54); *Cudak* (n 54)

⁵⁷ *Benkarbouche* (n 55) para 33

⁵⁸ Case C-555/07, *Kücükdeveci v Swedex GmbH & Co Limited* [2010] IRLR 346

⁵⁹ It should be noted however, that this case is currently subject to appeal given the sensitive and potentially wide-reaching nature of the findings.

between public and private in the Article 6 jurisprudence of the ECtHR.⁶⁰ It is clear that this functional approach is helpful to many employees in gaining access to employment rights,⁶¹ and it allowed the Claimants in *Benkarbouche* to gain nominal recognition of their claims under Article 6. It still remains the case though that the functional approach remains a barrier to access to justice for the majority of public employees. In particular, Article 6 will not be open to police or army personnel in light of the comments made in *Pellegrin v France*. Second, there can be still be sovereign acts which take precedence over access to justice claims, even where employees fall on the right side of the functional distinction line. For example, the case of *USA v Nolan*⁶² concerned a claim by a civilian army employee that her employer (the USA) had failed to properly consult her in relation to the redundancy implications of the closure of an army base in the UK. State immunity was not pleaded in this case, although the Courts (at both domestic and European level) made it clear that the USA could have relied on their immunity to avoid the proceedings. The act complained of (closure of the army base) was an act *jure imperii* and so outside the jurisdiction of the Courts. Implicit in these findings was that the sovereign nature of the Defendant's act outweighed any access to justice claim, and the functional distinction between the civilian nature of the Claimant's activities and those of other army personnel made no difference to the outcome.

A third point to make is that the courts have recently approached the balancing exercise under Article 6 quite differently in relation to diplomatic (as opposed to state) immunity, with a negative outcome for public sector employees seeking to enforce private rights. Diplomatic immunity in this context refers to the immunity of members of diplomatic staff as against claims by their personal

⁶⁰ This jurisprudence provides that in relation to the applicability of Article 6 to public servants, there should not be blanket exclusion from rights. A functional approach should be adopted which assesses the nature of the employee's duties and responsibilities. Where those duties typify the specific activities of the public service then the employee will be excluded from scope of Article 6. Where an employee's post does not involve participation in the exercise of public power they will not be excluded. See *Pellegrin v France* (n 31)

⁶¹ For example in the case of *Devlin v United Kingdom* (2002) 34 EHRR 43 an applicant for an administrative assistant post in the Northern Ireland civil service was permitted to bring a claim under Article 6. It was held that the post of administrative assistant could not be described as a post where the incumbent was wielding a portion of the State's power.

⁶² [2014] EWCA Civ 71

employees. In the case of *Abusabib v Taddese*,⁶³ the Court followed the state immunity line, allowing two domestic workers to bring employment claims against their diplomatic employers on the basis that their functions did not interfere with the performance of the diplomatic mission. However, a different approach was taken in *Mr Jarallah Al-Malki*.⁶⁴ In this case, the Court was asked to consider the claim by a cook and a domestic worker that the assertion of immunity by their diplomatic employer was a denial of their right to access a court under Article 6. The Court then proceeded to conduct the balancing exercise required under Article 6 in relation to their claim, namely whether diplomatic immunity was a legitimate aim and whether the court's action in allowing diplomatic immunity was proportionate in relation to that aim. The Court considered that diplomatic immunity should be given expansive treatment. In contrast to state immunity, diplomatic immunity was a personal immunity designed to protect the 'special vulnerability' of a diplomatic agent. Diplomatic agents should be entitled to 'inviolability' of their person in order not to interfere their official functions.⁶⁵ Furthermore, the Court considered that whilst there was a move in European and international law to interpret state immunity more restrictively and according to context, this move was not apparent in relation to diplomatic immunity. As a result, the Court found that in this case, the assertion of diplomatic immunity was a legitimate aim and that the restriction of court access which followed was a proportionate response to that aim.

5. Making use of the public law regime

The previous section makes clear that despite a number of challenges to the existing regime, there are still a number of public sector employee groups who find themselves excluded from (some or all) 'private' employment law rights. As noted in the introduction, this exclusion is not necessarily problematic if those employees have equivalent, or even better, protection as a matter of public law. The next section discusses the availability of the public law system to those excluded from private rights and the advantages and disadvantages of relying on the public law regime for those

⁶³ [2013] ICR 603

⁶⁴ *Mr Jarallah Al-Malki, Mrs Al-Malki v Ms Cherrylyn Rees, Ms Titin Suryadi* [2013] WL 5338237

⁶⁵ *Ibid* para 34

who can access it. In particular there is a discussion of the different grounds of judicial review and the potential they provide for public sector employees seeking to challenge employment practice. The final part of the section analyses the potential of the judicial movement towards a relaxation of the 'pure' public regime in line with individual circumstances. It is argued that this provides an opportunity for public sector employees in the vindication of their rights.

The central concern of public sector employees in terms of the public law system is the availability of judicial review. The availability of judicial review, discussed in detail in section 2, is limited to those public sector employees who do not have a 'contract of employment' and can show further elements of 'publicness' in the operation of their employment relationship. These criteria dramatically limit the number of public sector employees who can bring a judicial review claim. However, for those groups who do have access to it, judicial review can operate to moderate unfairness in the conduct of public bodies and their exercise of statutory law. Judicial review proceeds on a number of grounds, and those grounds can be classified in a different ways. A good starting point is Lord Diplock's formulation of three grounds of review in *Council of Civil Service v Minister for the Civil Service* (GCHQ),⁶⁶ namely illegality, irrationality and procedural impropriety. The first ground of 'illegality' is concerned with whether decision makers have acted *ultra vires* or outside the bounds of their statutory or common law powers.⁶⁷ The second ground is 'irrationality'. This investigates the quality of the decision made by the decision maker and assesses whether it is 'so outrageous' that 'no sensible person who had applied his mind to the question' could have arrived at it.⁶⁸ The final ground of judicial review is that of 'procedural impropriety'. This ground looks at the fairness of the decision-making process by public authorities. It requires decision makers to follow certain procedural rules dictated by the principles of natural justice. To those grounds can now be added 'proportionality' in relation to the decision, following the dictates of the Human

⁶⁶ [1985] AC 374, para 401.

⁶⁷ P Craig, *Administrative Law* (Sweet and Maxwell, 7th edition 2013) 567

⁶⁸ GCHQ (n 66) para 401

Rights Act 1998.⁶⁹ Of course, it must be noted that like any classification system, Lord Diplock's formulation is somewhat artificial. As will become apparent later in this section, the different grounds of judicial review can overlap, and similar facts can give rise to different categorisations of review.⁷⁰ Nevertheless, for the purposes of this section, Lord Diplock's formulation does provide a framework for the consideration of the different judicial review claims that have been brought by (or even against) public sector employees, and helps in understanding the outcomes of those claims.

The first ground of judicial review has not often arisen in the context of employment in the public sector. Employment contracts appear to come within the scope of a public authority's power,⁷¹ and so are not usually open to challenge through the *ultra vires* doctrine. The main problem with this doctrine for public sector workers is that there is nothing to prevent a public sector body from relying on it to escape an unfavourable contract or unfavourable contract terms.⁷² For example, in the case of *Gibb*,⁷³ the Claimant's employer (an NHS Trust) sought to argue that its undertakings in a compromise agreement were *ultra vires* and therefore unenforceable. On the termination of the Claimant's employment, the Trust had signed an agreement to the effect that the Claimant was entitled to £250,000 in settlement. It in fact only paid the Claimant £75,000 on, arguing that the £250,000 was 'irrationally generous' and an abuse of power. It asserted that the level of the award was contrary to statutory intervention, which provided that compromise payments should not exceed the value of statutory entitlement. Its assessment of the level of statutory entitlement (the maximum unfair dismissal award and contractual period of notice) was just £145,000. In the High Court, it had been decided that the terms of the compromise agreement were *ultra vires* because of the lack of financial rigour applied to the assessment of the sum. On

⁶⁹ M O'Brien, 'Judicial Review' (*Insight*, 15 November 2013)

⁷⁰ W Elliot, 'Judicial Review: grounds' (*Insight*, 6 November 2013)

⁷¹ Generally speaking, a public authority's contracting powers are widely given and broadly construed. For example, section 111 (1) of the Local Government Act 1972 provides that '...a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.'

⁷² A C L Davies (n 7) 101

⁷³ *Rose Gibb v Maidstone & Tunbridge Wells NHS Trust* [2010] EWCA Civ 678

appeal, the Court of Appeal overturned the decision on the basis that a lack of financial rigour did not make the decision *Wednesbury* unreasonable (irrational) and that the considerations (length of service, costs in defending an unfair dismissal claim) were not legally irrelevant. The Trust was therefore duty bound to pay the Claimant the relevant sum under the compromise agreement.

The second ground of judicial review is potentially of more assistance to public employees seeking to claim judicial review. It implies that public decisions are subject to the *Wednesbury* test: decisions will be unlawful if they are 'so unreasonable that no reasonable authority could have come to it'.⁷⁴ Although it is widely accepted that the *Wednesbury* unreasonableness test provides only a weak standard of review,⁷⁵ there is evidence of a '*Wednesbury*-type test' emerging in the case law which may help public sector employees. For example in the case of *Hampshire*⁷⁶ a police officer was accused of making inappropriate sexual remarks to female colleagues and dismissed from office. He appealed under section 4 (4) (a) of the Police Appeals Tribunal Rules 2008 on the grounds that the misconduct finding was unreasonable.⁷⁷ The Court considered the standard of reasonableness required under section 4 (4) (a). It concluded that the test was a '*Wednesbury* test shorn of technicality'. This allowed a Tribunal to 'decide for itself, whether the Conduct Regulations were breached and, if not, whether there was other unfairness'.⁷⁸ On this formulation, the standard of review surpasses that under a traditional *Wednesbury* test, which does not normally allow a court to step into substitute its own view on the merits of decision.⁷⁹ This case was followed by *Derbyshire*⁸⁰, which also concerned an appeal by police officers against a finding of misconduct. The Court adopted a similar stance on the question of reasonableness to that put forward in *Hampshire*. It

⁷⁴ *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, para 230

⁷⁵ The approach in *Andrew Crosbie v Secretary of State for Defence* [2011] EWHC 879 (Admin) is illustrative (discussed in more detail below). In that case it was consistently pointed out by the Court that any claim of irrationality did not allow it to interfere in the Army board's decision. For example, in relation to the Claimant's drunken behaviour as a factor in the dismissal, the Court stated (at para 68) that 'it was a matter which the Army Board itself could properly take into account. Doing so was not contrary to the earlier decision. Doing so did not make the decision irrational'.

⁷⁶ *Hampshire* (n 24)

⁷⁷ The Police Appeals Tribunal Rules have recently been superseded by the Police Appeals Tribunal Rules 2012.

⁷⁸ *Ibid* para 25

⁷⁹ *Great Northern Eastern Railway Limited v Office of Rail Regulation* [2006] EWHC 1942 (Admin)

⁸⁰ *Derbyshire* (n 24)

found that the standard was ‘whether the decision on finding or outcome was within the range of reasonable findings or outcomes to which the Panel could have arrived’.⁸¹ The similarity of this test to that adopted in private dismissals is striking.

The *Derbyshire* case also considered claims under the third ground of judicial review. The third ground relates to claims of natural justice, which require both that the individual concerned is given adequate notice of the charge and an adequate hearing, and also that there is no bias on the part of the adjudicator.⁸² In *Derbyshire*, the police officers claimed that they had not been given adequate notice of the claims against them. In particular they took issue with the fact that the Misconduct Panel which finally decided their fate referred to breaches of standards of professional behaviour which were not detailed in the initial notices of misconduct served upon them.⁸³ The officers argued that if the Panel did decide during the course of the hearing that there were further conduct issues to be raised against them, the proper procedure would have been to give notice of that further ground and adjourn proceedings to allow the officers to respond. The Court found that there had been a breach of natural justice, on the basis that all of the alleged breaches of professional behaviour by the officers should have been included in the initial notice. Whilst the *Derbyshire* case dealt with the first limb of natural justice claims, there have also been claims by public employees that their treatment was in breach of the second limb, namely there was bias in the adjudication of their dispute. This particular claim arose in the case of *Crosbie*.⁸⁴ In this case, an army chaplain challenged the decisions of various army bodies (Army Commissioning Board and the Army Commissioning Appeals Board) not to extend his Commission. Central to his case was that these decisions had been prejudiced by material given to the army by a Church of England official. He argued that this information was wrong and that, in any event, he had not been given the

⁸¹ Ibid para 37

⁸² Craig (n 67) 339

⁸³ The Police (Conduct) Regulations 2008, Regulation 21 provides the requirement for such a notice as follows: ‘Where a case is referred to misconduct proceedings, the appropriate authority shall as soon as practicable given the officer concerned (a) written notice of (i) the referral (ii) the conduct that is the subject matter of the case and how that conduct is alleged to amount to misconduct or gross misconduct as the case may be’.

⁸⁴ *Crosbie* (n 75)

opportunity to comment on it. However, the Court held that, although bias was a potential ground for review, the requirements of natural justice had been met by his opportunity to raise these complaints at the Army Board, and that the Board had not erred in law in rejecting his Commission.

The above discussion presents a very mixed picture. On the one hand, it appears that public law claims can ensure that procedural safeguards are maintained in relation to the adjudication of employment disputes. On the other hand, the traditional standards of review under public law traditionally provide only a minimum benchmark, considerably below the standards required under (private) employment law. Furthermore, that standard is procedural rather than substantive in nature. Perhaps the best outcome for public employees has arisen when the courts have been willing to adjust the public law standards to the particular context by for example, the construction of ‘*Wednesbury*-type test’ which allows the court to assess the range of reasonable responses required by a public body. This approach moves the standard closer to that required in private law, and is perhaps a recognition of the artificiality of the distinction between public standards as applied to public employees and private standards applied to private employees. It is an approach which not only offers a greater possibility of access to justice for public employees, but makes more sense in theoretical terms: both public and private actions can amount to an abuse of power against which individuals must be protected.

The relaxation of public law standards in line with individual circumstances is also demonstrated in the case *Shoosmith*.⁸⁵ The outcome of this relaxation was extremely beneficial for the employee, not least because it gave her access to very extensive remedies not available in the private context. The case concerned the dismissal from office of the Director of Children’s Services (DCS) for Haringey Council following a number of very high profile child abuse convictions within the Haringey district. The Claimant brought judicial review proceedings against those bodies involved in her dismissal, namely the Office for Standards in Education, Children’s Services and Skills (OFSTED),

⁸⁵ *The Queen (on the application of) Sharon Shoosmith v Ofstead & Ors* [2011] EWCA Civ 642

Haringey Council and the Secretary of State. The claim against OFSTED concerned a Joint Area Review conducted in the wake of the convictions and on the request of the Secretary of State. The Claimant challenged the fairness of this report, and claimed a breach of natural justice as she had no opportunity to raise comments or discuss the report. This particular claim was not upheld in the Court of Appeal on the basis that there were no personalised findings or recommendations relating to the Claimant in the report and so the requirements of natural justice did not require her to be able to comment on it. The claim in relation to the Secretary of State concerned the exercise of its powers under section 497 (4B) of the Education Act 1996, which essentially involved the replacement of the Claimant by alternative office holders.⁸⁶ The Claimant's argument was that this exercise did not observe the requisite standards of procedural fairness. In the High Court, Foskett J had rejected these claims on a number of grounds. First, he referred to the fact that the Secretary of State was not involved in a disciplinary process as such in the exercise of section 497 (4B) and so was not subject to the natural justice rules. Second, and in any event, the traditional safeguards concerning the rights of an individual to a fair hearing necessarily assumed a 'considerably lower profile' than they might otherwise have done given the urgency of the issue (the protection of vulnerable children).⁸⁷ Finally, even though the Claimant was not given the opportunity to express an opinion on her fitness for office, that it would have made no difference to the outcome. The Court of Appeal disagreed with these findings. In particular it noted that in considering the context of judicial review, it was not only the social context which was important (the protection of vulnerable children) but also the individual context of the potential 'catastrophic consequences' of the Secretary of State's finding.⁸⁸ The Court stated that although there was some degree of urgency, it was not 'such as to necessitate a truncation of the requirements of fairness to the extent that occurred here'. The Claimant was still entitled to the 'protections that have long been accorded to

⁸⁶ Section 497 (4B) states that 'The Secretary of State may under this subsection ...give the authority or an officer of the authority such other directions as the Secretary of State thinks expedient for the purpose of securing that the function is performed to an adequate standard.'

⁸⁷ *R (on the application of Shoesmith) v Ofsted* [2010] EWHC 852, para 387

⁸⁸ *Shoesmith* (n 85) para 60

responsible and accountable office holders'.⁸⁹ Furthermore the 'no difference' argument could not stand up to the scrutiny of natural justice because that involved the judge making assumptions about the outcome of a process before it had been conducted. The final claim raised was against Haringey Council. The Court found that the Council's actions on dismissal did constitute a breach of natural justice. Again, the special status of 'office-holders' as a matter of public law was raised: 'There is an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence in explanation'.⁹⁰

This office holder status was particularly important when it came to a consideration of the remedies available to the Claimant under judicial review. In the High Court, Foskett J found that the claim against Haringey was not amendable to judicial review because an alternative and equivalent remedy was available (unfair dismissal compensation). The Court disagreed. It found that more extensive remedies were available to the Claimant under public as opposed to private law as a result of her office holder status. It referred to the case of *McLaughlin*,⁹¹ in which it was stated that if a public authority dismisses a holder of public office in breach of natural justice, that dismissal is 'null, void and without legal effect'.⁹² Thus the office-holder remains in office, entitled to the remuneration attaching to his office until the tenure is lawfully brought to an end. Although the Court did not make a final ruling on relief (which was remitted back to the Administrative Court), it stated that a *McLaughlin*-type ruling was a possibility. The compensation arising from that ruling would exceed any unfair dismissal compensation because the Claimant would be entitled to her salary and any other benefits from the date of the dismissal to the date of the Court of Appeal ruling (£150,000 plus benefits over two years).

6. Conclusions

⁸⁹ Ibid para 65

⁹⁰ Ibid para 77 quoting Reid L in *Ridge v Baldwin* (n 13) 66

⁹¹ *McLaughlin v Governor of the Cayman Islands* [2007] 1 WLR 2839

⁹² Ibid para 14

Access to justice for public sector employees is both fragmented and partial. Some public sector groups have access to the majority of private law rights. Other public sector groups are largely excluded from the private law regime. As far as public law is concerned, there are also considerable discrepancies between those public sector employees who are able to claim judicial review and those who are not. The reasons for this fragmented picture are at once historical, theoretical and practical. Historically speaking, the starting point for the formation of the employment law regime in the UK was the Diceyan understanding that, in principle everyone should be equal before the law. As a result there was no special public law regime for public sector employees. At the same time, certain groups were excluded from the private regime on the basis of their functional requirements, and the particular public law rules which concerned the abuse of power by public sector employees continued to apply. From the very start then, there was a fragmented picture in terms of access to justice for public sector employees. However, this fragmented picture was not simply a quirk of history. It has persisted and even intensified over time. One possible explanation for this pattern is the difficulty in the theoretical separations which underpin the public/private divide. Dichotomies such as public versus private power, contractual versus non-contractual status are very difficult to sustain in practice. The 'functional' distinction between public and private employees is also difficult to sustain in light of the privatisation of many previously public functions, and the move towards more and more complicated public/private partnerships.

The weaknesses of the theoretical underpinnings of the public private divide are well demonstrated by recent legal challenges to the employment law exclusions as a matter of private law. The 'non contractual' exclusion has been successfully challenged by 'office-holders' such as local council Registrars, on the basis that the 'office-holder' label should not denote a lesser contractual status for Registrars compared to other council employees. The functional exclusion has been challenged by council employed 'constables' who are excluded from (unfair dismissal) protection as a result of their 'special status'. This functional exclusion was found inconsistent with the treatment of other similar groups (for example prison officers), but the challenge was ultimately unsuccessful

(it required Parliamentary intervention). Finally, the distinction between public and private power as the basis for the exclusion of public sector employees from employment rights has also been subject to challenge. For example, the employees of UK based state embassies have successfully challenged their inability to bring employment law claims as a result of the operation of the doctrine of state immunity. They have argued that by entering into contracts of employment with civilian staff, a state is exercising powers which are private rather than public. As a result these rights can be 'balanced' with an employee's individual right to a fair trial under the ECHR, and where the functions of the employee do not interfere with the exercise of sovereign power, the individual's rights should prevail.

Despite the successful (theoretical) challenge to the public/private divide by some public sector employees, it appears that certain public sector groups are likely to remain excluded from (the majority of) private law rights. For these groups, it may be argued that the greatest potential lies in the recognition within the public law regime of the particular private context. On occasion, this recognition has allowed a relaxation of certain strict public law rules, and has even brought certain of those rules more in line with the standards of private law. This approach is valuable because it recognises that in reality the separation of public from private standards rests on rather shaky theoretical ground. The approach opens up the possibility of thinking about the divide in a more pragmatic way and according to what justice demands. It suggests that, at base, the law of employment is united by just one principle: that abuse of power is not to be tolerated. That principle *applies* in different ways in different situations, but that application is simply a recognition of the particular priority given to employee freedom in any particular context.⁹³

⁹³ Laws (n 8) 466

