Employment Tribunals and the Civil Courts: Isomorphism Exemplified

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ABSTRACT

This article traces the evolution of Employment Tribunals (ETs) in Great Britain over the last 50 years from distinctive and comparatively informal bodies to their proposed merger with the ‘ordinary’ civil courts. This reflects the tendency of an organisation to become similar to another organisation where both are in the same organisational field: institutional isomorphism. Such isomorphism occurs because of coercive pressures by the body controlling the organisation’s resources, in this case government. Such isomorphism occurs also because of mimetic pressures; in this case the relatively newly established ETs have adopted the paradigm of the long-established civil courts, and because of normative pressures due to the common values held by judges in ETs and judges in the civil courts arising from their common legal training, legal apprenticeship and role socialisation. The article then argues that this isomorphism has contributed to the juridification of employment relations.

1. INTRODUCTION

This article uses the concept of institutional isomorphism to explain the evolution of Employment Tribunals (ETs) in Great Britain over the last 50 years from comparatively informal bodies to becoming part of the civil court system. It argues that when Industrial Tribunals (as ETs were originally called) were first created, they had characteristics distinguishing them from ‘ordinary’ civil courts, for instance in respect of their composition, accessibility, speed and the informality of their procedures. Over time many of these distinctive characteristics have been eroded. Step by step,

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387
ETs have become more and more court-like, on account of the growth of both legislation and case law, increases in procedural formality, barriers to accessibility and successive limitations on tripartite adjudication (two lay members and a judge), with adjudication instead by a judge alone as in the County Court/Sheriff Court. With the merger of the administration of ETs with that of Her Majesty’s Courts Service in April 2011 and the Coalition’s plans for a unified judiciary, this process seems nigh on complete.

It is argued that this evolution of ETs to become more like the civil courts both in practices and in structure can be explained by the tendency of an organisation to become similar to another organisation, i.e. institutional isomorphism. Perhaps the writing was on the wall from the moment when the ET system was established with legal chairs and the right of appeal on a point of law to the higher civil courts. Nevertheless, isomorphism has reinforced this trend of juridification, that is the process of legal intervention and the dominance of legal norms in the employment relationship.

The structure of this article is as follows: first the concepts of isomorphism and juridification are considered and the historical background is briefly described. Next, the changes to ETs to make them more like the civil courts are mapped: changes to tribunal composition, changes because legal norms have superseded industrial relations norms and values, changes because of the formalisation of procedures in response to the growth of the law, changes resulting in the limiting of accessibility, and changes because of the introduction of the awarding of costs in certain circumstances. Then the merger of the administration of ETs is delineated, first with other tribunals to form the Tribunals Service, and then the merger of the administration of the Tribunals Service with that of the Court Service from April 2011. This has been followed by the proposed merger of the Tribunals judiciary with the Courts judiciary. Finally, we make some observations on the effects of these isomorphic developments.

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2. THEORETICAL CONTEXT

A theory must explain as well as state a relationship between factors or institutions, and we choose the sociologically based theory of ‘institutional isomorphism’ to explain how ETs have evolved to become like the civil courts. Di Maggio and Powell, the principal expositors of the theory of ‘institutional isomorphism’, denote it as a tendency for organisations in an organisational field to become similar to each other in structure, culture and output. In so doing they build on the work of Meyer and Rowan and argue that this similarity is the result of organisations’ quest to attain legitimacy within a given domain. They also cite and build on the work of Hawley, who identified a constraining process that forces one unit to resemble other units that face the same set of environmental conditions.

Di Maggio and Powell define an organisational field as ‘organisations that, in the aggregate, constitute a recognised area of institutional life: key suppliers, resource and product consumers, regulatory agencies, and other organisations that produce similar services and products. The state and the professions can then structure disparate organisations in the same line of what they term ‘business’ to become more similar to one another. Organisations adjudicating on legal disputes fit this definition of an organisational field.

DiMaggio and Powell then identify three mechanisms through which institutional isomorphic change occurs: coercive isomorphism, mimetic isomorphism and normative isomorphism. They emphasise that their typology is analytical, that the three types are ideal types and, as they are not always empirically distinct, they are not always easy to distinguish empirically.

Coercive isomorphism occurs when organisations are constrained and/or controlled by those upon whom they depend for resources and adopt

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5We are aware that there are several convergence theories, which we could use, but have rejected. For instance, public choice theory, a theory of producer capture, which could be applied here to legal professionals in employment tribunals and the civil courts, does not give a central role to the controller of resources (the state), unlike institutional isomorphism. Principal/agent theory emphasises control but ignores mimicry and the transfer of norms by professionals, unlike institutional isomorphism.

6See n.3.


9See n.3, at 148.
structures mandated by the body on which they are dependent. This article will show how governments (which fund ETs) have imposed a number of changes to ET procedures in an attempt to reduce the number and/or length of hearings. These changes have been mainly driven by the government’s quest for cost savings, but also partly made by government in response to lobbying by employers to ease what they regard as burdens on business. For instance, Beecroft, in his report, apart from suggesting several changes to the content of employment laws, strongly supported the government’s proposal to introduce fees for ET claimants, arguing that it was likely to ‘sharply reduce the number of unjustified claims’. Nevertheless, whatever the drivers, it is argued that the result of government changes has been to make ETs more like the civil courts.

Mimetic isomorphism, according to DiMaggio and Powell, occurs when the goals of an organisation are ambiguous, so an organisation seeks to model itself intentionally or unintentionally on similar organisations perceived to be more legitimate or successful. It is argued that the goals of ETs are neither straightforward nor unproblematic. They have an overriding objective: to deal with cases justly, but ‘[d]ealing with cases justly includes, so far as practicable...saving expense’. This assumes that justice and saving expense are never in conflict: a heroic assumption. Given this uncertain environment, ETs have accordingly modelled themselves on a body with higher status and greater longevity: the civil courts.

Normative isomorphic organisational change stems primarily from professionals who exhibit a similarity to their professional counterparts elsewhere because, whatever the organisation in which they work, they have been subject to the same cognitive base and professional training and interact through social and professional networks. This has resulted in their internalising normative rules about their behaviour. For instance, judges, in whichever tribunal or court they sit, have been subject to the same or similar legal training, legal apprenticeship and role socialisation or acculturation through their professional associations and, like other professionals, obtain greater authority and autonomy as their careers advance.

Di Maggio and Powell maintain that these institutional isomorphic processes can be expected to proceed (even) in the absence of evidence that they enhance organisational effectiveness, and they then go on to develop 12 predictors of isomorphic change. They posit, for instance, that where

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an organisational field is dependent on a single source of support for vital resources, the higher the level of isomorphism; the more ambiguous the goals of an organisation, the greater the extent to which an organisation is modelled on organisations perceived to be successful or to have greater legitimacy; the greater the degree of professionalisation in a field, the greater the amount of institutional isomorphic change; and the fewer the number of alternative organisational models, the faster the rate of isomorphism in that field.

We argue that the three isomorphic processes described above have led to E Ts becoming more court-like, and that this has contributed to the juridification of employment relations. Clark and Wedderburn define juridification as a process by which the state intervenes ‘in ways which limit the autonomy of individuals or groups to determine their own affairs’. Similarly, Heery and Noon define juridification as the process of increasing legal intervention in the employment relationship, but as Simitis points out, this does not only consist of an increase in employment legislation. Administrative measures and the influence of the courts contribute to juridification.

Blichner and Molander, who are of the view that juridification is an ambiguous concept, take this further. Not only does juridification cover the proliferation of law and legal procedures, it extends to the monopolisation of the legal field by legal professionals, the expansion of judicial power and the development of a legal culture. Masterman, who essentially echoes this, argues that juridification covers both the tangible and the intangible. The tangible include the proliferation of legislation as a tool of governance and regulation, the ability of the judicial branch to make law, and the utilisation of the law as a tool of dispute resolution. As to the intangible, this includes ‘the increased propensity of individuals and groups to see courts as the appropriate forum for the resolution of social disputes, and perhaps even simply an increased use of legal terminology in discourse’.

3. HISTORICAL BACKGROUND

Until the 1970s, employment relations in Britain were characterised by what has been termed ‘collective laissez-faire’. Workplace disputes and grievances were essentially resolved through collective bargaining and the implicit threat of industrial action as a sanction for transgression. The law of tort was sometimes invoked by employers to limit industrial action (see for example Rookes v Barnard, 1964), but otherwise industrial relations and law were two separate spheres, and the State adopted a largely abstentionist policy as regards employment law.

From the 1970s, however, UK governments, which no longer enjoyed a benign economic climate, wanted to limit industrial action over dismissals, by providing workers with an alternative legal route for dispute resolution. At the same time, the UK joined the European Union with its emphasis on the social dimension and workers’ legal rights. Accordingly, in the 1970s and to a lesser extent in the 1980s, governments brought into effect many individual statutory employment rights, though space precludes a fuller discussion of the reasons for this. A concomitant was that successive governments decided that ETs, originally established as administrative tribunals, should adjudicate on the increasing range of party versus party employment disputes resulting from these new individual statutory employment rights.

From the outset, ETs shared certain characteristics with the civil courts; for instance, in both forums there is a legally qualified chair, evidence is given on oath, and there is a right of appeal on a point of law ultimately to the highest civil court. Nevertheless, a Royal Commission was of the view that they would be distinguishable from the ordinary courts as they would be ‘easily accessible, speedy, informal and inexpensive’. Furthermore, in 1971 the Conservative Government established the National Industrial Relations Court (NIRC), inter alia, to hear appeals on points of law from ETs instead of such appeals going to the High Court. The subsequent Labour Government abolished the NIRC in 1975, giving its appellate function to a new body, the Employment Appeal Tribunal (EAT).

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18[1964] AC 1129 (HL).
From the 1990s, partly as a result of the growth in employment legislation and partly because of the decline of trade unions, ETs were faced with a rapidly increasing caseload. The caseload grew from 39,191 in 1984/85 to 71,161 a decade later and this resulted in increased cost to the public purse, as ETs were (and still are at the time of writing) wholly state-funded. This led governments to introduce changes to the system. However, the contention of this article is that while cost saving and the quest for efficiencies were overt drivers, there were more subtle forces at play, and in particular institutional isomorphism. In other words, although ETs from the outset had a kernel of ‘legalism’, the process of institutional isomorphism has resulted in ETs increasingly becoming like the civil courts, so eroding distinctions between these two institutions. Accordingly, we first trace the changes to ETs, which have made them more like the civil courts before explicitly explaining these changes by isomorphism.

4. CHANGES TO EMPLOYMENT TRIBUNALS

A. Tribunal Composition

Unlike the civil courts (County and Sheriff Courts), which are presided over by a judge sitting alone (with exceptions for defamation, malicious prosecution and false imprisonment), ETs from their inception under the Industrial Training Act 1964 were constituted on a distinctive, tripartite basis with a legally qualified chair and two lay members, one drawn from a panel nominated by the Confederation of British Industry (CBI), the other drawn from a panel nominated by the Trades Union Congress (TUC). All three

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24Employment Department, Resolving Employment Rights Disputes: Options for Reform, Cm 2707 (London: HMSO, 1994) at 11–3.
members of the tribunal were given (and still have) equal voting rights so that, for instance, the lay members can outvote the legally qualified chair, whether on matters of fact or law, although this is rare in practice.\textsuperscript{26} This same tripartite structure was adopted in the NIRC and in its successor EAT.

The erosion of tripartism essentially started in the 1990s with the Trade Union Reform and Employment Rights Act 1993, when the government estimated that lay members cost £5 million per year,\textsuperscript{27} but since then there have been further erosions, stretching on a piecemeal basis over more than a decade and a half. At the time of writing, the legally qualified person can sit alone in a wide range of specified categories of cases, or in any case where the parties so agree. These specified categories include claims for breach of contract, unauthorised deductions from wages, redundancy payments, interim relief applications, written statements of employment particulars, itemised pay statements, certain complaints under the National Minimum Wage Act, stage 1 hearings under the equal value provisions and holiday pay and as from April 2012 unfair dismissal cases. Moreover, at the time of writing, the government is legislating to exclude lay members altogether from the EAT.\textsuperscript{28} Nevertheless, in all these cases, there is, and will remain, discretion for the legally qualified person to opt for a full tribunal.\textsuperscript{29}

In addition, all pre-hearing reviews (PHRs) are now normally heard by the Employment Judge (EJ) alone, although the EJ has discretion to opt for a full tribunal and a party can request in writing a full tribunal at least 10 days before the date scheduled for the PHR. PHRs cover many a preliminary issue, for instance whether a claim has been submitted within the time limits, and whether a person has a disability or a religion or belief and can thus claim discrimination on the grounds of one of these protected characteristics. Meanwhile, tripartism has been undermined symbolically by the Tribunals, Courts and Enforcement Act 2007, whereby ET chairmen have been renamed ‘employment judges’ from December 2007. In contrast, ET and EAT lay members are now called non-legal members, emphasising what they, unlike employment judges, do not possess. They have not been named lay judges, although they are required to take the judicial oath.\textsuperscript{30}

\textsuperscript{27}\textit{Resolving Employment Rights Disputes Options for Reform}, above n.24, at 41.
\textsuperscript{28}\textit{Enterprise and Regulatory Reform Bill}.
\textsuperscript{29}See Employment Tribunals Act 1996, s 4 for full details concerning the exercise of this discretion.
The example of civil court juries is instructive as regards the erosion of tripartism. ET lay members are often called the industrial jury, although they retire with the judge, not separately as in the civil courts. Juries in civil courts, although not formally abolished until the 1920s (with exceptions for defamation, malicious prosecution and false imprisonment as noted above), became optional well before that, and as soon as they became optional, they became rare.31

B. Legal Norms

Composition apart, ETs have become more like civil courts through the subordination of employment relations practice to legal norms and values, particularly the common law concepts of contract, for instance, in respect of frustration, repudiation and breach, which apply in the civil courts. Space precludes a full discussion, and thus one example only is given: constructive dismissal. It was held in Western Excavating (ECC) v Sharp32 that the test for whether or not there was a constructive dismissal was whether there was a fundamental breach of contract, a common law test, not what was reasonable in the circumstances, a test based on workplace practice.

Another way in which legal norms have come to dominate is because of the increased use of legal representation at the expense of lay or self representation. In 1978, one-third of claimants and one-half of respondents were represented by lawyers.33 Statistics from the latest survey of ETs indicates that 62 per cent of claimants had a legal representative (solicitor, barrister or some other kind of lawyer) at the hearing in 2008. For respondents, the equivalent figure was 60 per cent.34 As the then President of the ETs said in 2006: ‘there is far more participation by legal representatives than was envisaged when the Industrial Tribunals were first set up’.35

35See Meeran (2006), above at 143.
This is not necessarily to be decried; the use of legal representatives is possibly advantageous in influencing the outcome. Nevertheless, the key actors, both the representatives (solicitors and barristers) and the judge, have enjoyed the same or similar legal training (where certain behaviours are embedded); they share the same language and points of reference (statutes and cases) and so inevitably reflect the dominant paradigm of the courts with their common law and adversarial underpinning. So ‘it is to ask a great deal to expect legally trained personnel to shed their ingrained habits’. Furthermore, unlike Germany, where there is a completely separate structure for employment disputes from first instance to the Federal Labour Court, appeals from ETs (although they first go to the EAT) then feed into the civil appellate hierarchy, the Court of Appeal and the Supreme Court. Thus the higher courts consider cases from ETs alongside cases from the ‘ordinary’ civil courts, where legal norms, not industrial relations norms, prevail.

C. The Formalisation of Procedure

A major isomorphic pressure on ETs to become more court-like has been the growth of employment law: both statutes and cases, as a result of the increase in the number of jurisdictions regulating the employment relationship.

The first major statutory right for employees was the Redundancy Payments Act 1965 (RPA), but statutory rights increased by leaps and bounds from the 1970s as noted above.

Today there are nearly 80 jurisdictions (i.e. categories of complaint), and this has been mirrored in the increase in the number of claims from 39,191 (as noted above) in 1984–5 to 218,100 in 2010–11. There is a compendium of employment law (Butterworths Employment Law Handbook) edited by Peter Wallington QC. It first appeared in 1980. It reached its 18th edition in 2010, with 1,335 pages of statutes, 928 pages of statutory instruments, not to mention European Union employment law material, statutory codes of practice and practice directions; in all, 3025 pages plus contents and index.

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36See Peters et al. (2010) above.
37See Munday above at 151.
This legal complexity is also reflected in the length of cases. For instance, a Newcastle Employment Tribunal spent over 40 days on a PHR in the case of *Hartley v Northumberland Healthcare NHS Foundation Trust*\(^{39}\) between 6 October 2008 and 24 March 2009, while the mean number of days spent on a case involving a decision rose from 1.3 days in 2003 to 1.8 days in 2008.\(^{40}\) It is also reflected in the growth of case law and employment law reporting. For example, *Industrial Relations Law Reports* in its first monthly issue had 33 pages. By March 2011, the number of pages per month had doubled (70). In 1978, Lord Denning (then Master of the Rolls) voiced his regrets about the accumulation of case law in respect of just one point (time limits for unfair dismissal),\(^{41}\) but how much more would he decry the growth of case law since then, for instance the many cases on the burden of proof in discrimination cases?

From the outset, ETs were more informal than fully-fledged courts, as the Royal Commission chaired by Lord Donovan in 1968 noted (see above) and elements of procedural informality remain; for instance, strict rules of evidence do not apply, unlike the normal position in the civil courts and the judge does not wear robes. Nevertheless, the government has increasingly sought to formalise procedure in response to greater ET activity and legal complexity and in so doing has brought ETs closer to the more formal civil courts. One example of formalisation adopted by ETs is the trend away from oral evidence. When ETs were first constituted, parties gave oral evidence. In England and Wales, however, but not Scotland, about a decade ago it became increasingly common for the ET judge to require the preparation of witness statements and, under 2004 rules, to require them to be sent or exchanged in advance.\(^{42}\) This brings ETs into line with the civil courts, where the default position is that not only are there witness statements but they are taken as read. While legal personnel are trained and accustomed to drawing up such statements for their clients, unrepresented parties may find that daunting.

A further example of formalisation is the use of case management discussions (CMDs). Although the power of the (then termed) chairman to

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\(^{39}\) These days included reading days and days for deliberation.

\(^{40}\) See Peters et al. above at 76.

\(^{41}\) *Walls Meat Co Ltd v Khan* [1978] IRLR 499.

\(^{42}\) See Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2012.
undertake case management had always existed, the 2004 Regulations and Rules made specific reference to CMDs. As a result, the file is reviewed after the employer’s response has been lodged and CMDs are now routinely held, for instance, to fix timetables, to give orders to the parties to take particular steps and to identify issues. This practice of CMDs in ETs reflects previously established practice in the civil courts as a result of recommendations by Lord Woolf, which were enshrined in the Civil Procedure Rules 1998.

Above all, however, is the gradual advance of adversarialism in ETs, despite attempts to halt it by the Justice Committee and by the Acas arbitration schemes. The Justice Committee in its report, *Industrial Tribunals* published 25 years ago, noted that ETs varied widely in their practice: ‘an informal investigative approach at one end of the scale to a formal adversarial approach little different from an ordinary court.’ The approach selected, according to the report, seemed to depend on a range of factors, such as the complexity of case, the personality of the tribunal chair and whether the parties were legally represented. The Justice Committee recommended an investigating officer for the vast majority of dismissal cases, with adversarialism limited to a minority of cases (such as equal pay), which would start in an upper tier tribunal not the ETs. The Conservative Government, however, ignored these recommendations and, as shown above, both the use of legal representation and legal complexity has increased since the Justice Committee’s report was published over two decades ago.

In a similar attempt to provide for a more informal and less adversarial system of dispute resolution, the Advisory, Conciliation and Arbitration Service (Acas) launched a scheme in 2001 to provide arbitration in respect of unfair dismissal, and in 2003 it launched a further scheme for arbitration in respect of flexible working claims, with both schemes providing an alternative to adjudication by an ET. Yet the parties seem to prefer the more court-like ETs to more informal Acas arbitration. Since these schemes’ inception, there have been less than 80 unfair dismissal arbitrations and only three flexible working arbitrations.

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45 Space precludes a discussion of why these Acas arbitration schemes have failed to take off. These figures can be gleaned from a careful study of successive Acas annual reports.
D. Accessibility Limited

One of the hallmarks of ETs in their early days was that they were more accessible than the ordinary courts, but this accessibility has been eroded as a result of government action, which has resulted in ETs becoming more like the civil courts. One aspect of accessibility is location. Initially tribunals held hearings in ad hoc venues, ‘hotels, houses, libraries, council chambers, civic centres and other government accommodation’, a total of 84 different locations in 1971.46 Now, like civil courts, they operate in fixed court venues, of which there are 26 in England, Wales and Scotland at the time of writing.

Accessibility can also be measured in terms of the ease of making a claim. From the inception of ETs until October 2005, claims and responses were not required to be presented on designated forms: for instance, a letter could suffice, unlike in the civil courts. The only details that were required were the name and address of the claimant and/or, if different, an address to which all documents and notices were to be sent; the name and address of the person(s) against whom relief was sought; and brief details of the complaint. From October 2005,47 the government prescribed that claims and responses (ET1 and ET3 respectively) could only be lodged on designated forms, thus mirroring civil court practice, and could be rejected if all the required information was not included.48 Moreover, the forms themselves have grown from two pages49 to 14 pages at the time of writing.

The erosion of accessibility can also be seen in the devices now adopted to screen claims before a full hearing. Before 1980, a claim could be lodged without any screening mechanism. From 1980, however, the government introduced a procedure of pre-hearing assessments to weed out unmeritorious claims whereby a tribunal of its own motion, or at the request of one of the parties, could filter out worthless claims, for example, because the claimant did not have employee status. To that end, it would consider the

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48A substantial number of claims were rejected, at least initially following the introduction of the requirement according to the Annual Report of Employment Tribunal Service 2005–2006. Also on rejected claims, see P. Latreille, ‘Characteristics of Rejected Employment Tribunal Claims’, Employment Relations Research Series, No. 96 (London: Department for Business, Innovation and Skills, 2009).
claim form, the notice of appearance (the respondent’s reply) and any other written representations, and also hear the parties who could make oral representations but not call witnesses. If the tribunal decided that there was no prospect of success, it would warn the party and state that if that party still wished to proceed, it could do so and a differently constituted tribunal would hear the substantive case. Should the party who had already been warned lose, however, that tribunal could award costs. According to Hepple and Fredman, ‘in the year ending September 1984, [pre-hearing] assessments were arranged for just over 3,000 cases, but of the 40 per cent warned, only 79 eventually had costs (at an average of £136) awarded against them.’

The government amended this procedure in 1993, replacing pre-hearing assessments with PHRs and deposit orders. At a PHR, if a judge, having considered written and any oral representations by the parties, decides that there is little reasonable prospect of success, he/she can require a party, who nevertheless wishes to proceed to a substantive hearing, to pay a deposit. The amount is set taking account of the party’s means up to a limit. Where a deposit order is made, and the party pays it rather than withdrawing, the substantive case is heard by a different tribunal, with the deposit refunded if that party wins.

Another more draconian mechanism further limiting accessibility was also introduced by the government in 1993: the strike out. This is the power of the employment judge to strike out a claim if it has no reasonable prospect of success, but the judge can only exercise the power after appropriate notice has been given to the affected parties, who must be given the opportunity to request that a strike out not be made otherwise than at a hearing. The government has now said that it ‘is minded’ to expand the use of strike out powers to align them with civil court procedure, but is awaiting a review of all the procedural rules governing the ETs and EAT.

Last but not least, accessibility can be measured by whether or not there is a financial barrier to lodging a claim. At the time of writing, a claim to an ET and an appeal to the EAT can be made free of charge, and this has been the position since ETs were established over half a century ago. It contrasts with the position in the civil courts where fees have long been the norm.

Now this principle is to be breached as the government has announced that it will charge fees for those who wish to make a claim to an ET or lodge an appeal at the EAT, taking as its model the fee-charging mechanisms for family and civil disputes. It argues that all party versus party disputes should be treated similarly, whether being adjudicated in ETs or in the civil courts, ignoring what is often an inequality in resources in ETs between the claimant (employee/worker) and the respondent (employer). It says:

Users in the civil courts in England & Wales and the separate Scottish civil courts have been charged fees for many years and introducing fees will place employment tribunal users on the same footing... Employment tribunal users, potentially vulnerable though they may be, have no more reason not to pay fees than those seeking to gain access to their children.53

E. Costs

One of the distinctive characteristics of ETs and the EAT has been that costs do not follow the event.54 Unlike the High Court and most cases in the County Court, a party cannot expect to be awarded costs if they win, but neither will they have to pay the other side’s costs if they lose. This distinction, however, has been partially eroded.

Before 1980, costs could be awarded by an ET only if a party pursued a case ‘frivolously or vexatiously’. Under Regulations in 1980, the words ‘otherwise unreasonably’ were added to the test for costs. In 1993, the test for costs was broadened to abusive and disruptive behaviour. In 2001, Regulations further added to the test with the phrase ‘otherwise misconceived’, although the word ‘frivolously’ was dropped. In addition, the maximum sum of unassessed costs has been increased; first they were £500, then £10,000, and (at the time of writing) £20,000,55 while a preparation time

53Ministry of Justice, ‘Charging Fees in Employment Tribunals and the Employment Appeal Tribunal’ (2011), http://www.justice.gov.uk/downloads/consultations/charging-fees-in-et-and-eat.pdf (date last accessed 16 December 2011) at 11. At the time of writing, the government is consulting on the level of fees for employment tribunals, the fee structure and whether 100 per cent of the tribunal costs should be borne by users, as will be attained in the civil courts in England and Wales by 2014–15.

54Costs are termed expenses in Scotland and there is a Sheriff’s Court, not a County Court as in England and Wales.

55See Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2012. The limit excludes wasted costs (i.e. an order made against a representative as a result of that representative’s conduct) where there is no cap.
order, also subject to a limit, can be made for a party not legally represented at a hearing.

F. Mergers

When they were first established, ETs and the EAT were stand-alone bodies. This began to change as a result of the Leggatt review, which recommended a unified Tribunals Service to bring the ET/EAT administratively (albeit not judicially) together with over 70 other tribunals, mainly dealing with appeals against administrative decisions by government departments or other arms of the State. Leggatt argued that such unification would provide tribunals with a higher profile and status and more challenging and fulfilling careers for staff, enabling the legally qualified chairperson to sit in a number of jurisdictions, while non-legal members would also have opportunities for what was termed cross-ticketing. This recommendation was accepted by government in 2004, and one of the results is that both lay and legal ET and EAT personnel can sit in other tribunals. According to the Judicial Office in 2009, ‘about 43 members were recruited to the Employment Tribunal Service (England & Wales) through an “expressions of interest” exercise amongst members of other tribunals’ jurisdictions’.

With ETs/EAT part of the ‘Tribunals Service’ administration, albeit as a separate pillar, further developments led to ET/EAT judges and members being brought closer to their court colleagues. Thus, the Constitutional Reform Act 2005, which introduced new arrangements for appointing judges through the Judicial Appointments Commission and disciplining judges as a result of procedures under the Lord Chief Justice/Lord President of the Court of Sessions, extended those arrangements to ET/EAT judges and members as well.

More significantly, the then Justice Secretary, Jack Straw, announced in 2010 that there would be a unified courts and tribunals service which, inter alia, would also ‘facilitate the building of a unified judicial family’.

57 Department for Constitutional Affairs, Transforming Public Services: Complaints, Redress and Tribunals, Cm 6243 (London: Department for Constitutional Affairs, 2004).
58 Email to the author 12 July 2011 from Simon Carr, Judicial Office.
59 See n.1 above, at 1.
for a unified judiciary. To what extent this will in practice lead to EJs moving to other jurisdictions is as yet unclear, but already a new Judicial College has been created to bring together the training of judges in the courts and the judges in the majority of tribunals. This unified training organisation will allow judicial office-holders across the spectrum of courts and tribunals to benefit from shared good practice...and will be the central professional learning and development institution for the judiciary. The then Senior President of Tribunals, commending the ‘assimilation’ of courts and tribunals, has maintained that tribunal judges and members ‘are likely to be strengthened by closer links with the court system’.

5. DISCUSSION AND CONCLUSIONS

The then Senior President of Tribunals, referring to tribunals generally, has argued that their main distinguishing features compared to the ‘ordinary’ courts are the specialist expertise of their members and the flexibility of their procedures, but this article has shown how these distinctions have largely been eroded in respect of ETs. We have also argued that these changes have resulted from isomorphic pressures.

DiMaggio and Powell maintained that isomorphic change occurs where there is an organisational field, and organisations adjudicating legal disputes fit their definition of such a field (see above). They then identified three mechanisms through which institutional isomorphic change occurs: coercive isomorphism, often brought about as a result of state action; mimetic isomorphism, often found where an organisation that operates in an uncertain environment strives for legitimacy; and normative isomorphism, where a profession spreads values.

As shown above, over the last half century, the government has made changes to ETs to make them more like the civil courts—coercive isomorphism—for instance by changes to the composition of ETs, with the result that there has been a gradual erosion of the industrial jury, by limiting

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60 See n.2 above.
62 See n.30 above, at 10.
64 See n.3 above.
accessibility and by introducing a costs regime in certain circumstances. Recent changes introduced by the Coalition Government to ETs based on civil court practice include taking witness statements as read like the civil courts, ending the ET practice of reimbursing witnesses and voluntary representatives for their expenses such as travel costs, again like the civil courts, and charging fees.

These changes to make ETs more like the civil courts may reduce government expenditure. They will not, however, necessarily make ETs more efficient for users, but as Di Maggio and Powell pointed out, isomorphic processes may proceed irrespective of whether they enhance efficiency.

As to mimetic isomorphism, this is a response both to ambiguity and uncertainty. We have already noted that the goals of ETs are problematic. In addition, decisions of the European Court of Justice have not always been consistent, for instance, as regards transfers of undertakings, so tribunals have been faced with uncertainties as regards the law. In such a context, an organisation seeks legitimacy by adopting the practices of a model enjoying higher status and greater longevity, i.e. the civil courts, and in several recent government documents, the government has cited practice in the civil courts as the exemplar.

Normative isomorphism, as noted above, stems from professionals’ values and modes of behaviour. Employment judges are recruited from solicitors and barristers of seven years’ standing, while solicitors and barristers appear in ETs. These lawyers, whether solicitors or barristers, have absorbed a discrete body of knowledge, with practice of that knowledge gained through legal apprenticeship. After qualification, lawyers have an explicit or implicit licence to carry out certain activities that are different from those of others; enjoy autonomy from the state in that they are self-regulating; are subject to a code of ethics; have a shared understanding of success (material and non-material); and, above all, share values spread through collegiate institutions.

65 Other savings in government expenditure include the reduction in legal aid in both in the civil courts and the EAT. As these do not relate only to the employment sphere, they are not included in this discussion of isomorphic trends. Indeed it is strongly arguable that the circumcision of legal aid will have a greater impact in the civil courts than in the ETs where there is no legal aid, although there is legal help.

66 The Council of Employment Judges’ response to the Government’s consultation document Resolving Workplace Disputes points out that certain government proposals may well not lead to efficiencies but rather to a greater caseload.

such as chambers for barristers and partnerships for solicitors. The use of legal language (harmonised ‘frames of reference’) in ETs by representatives and judges alike both reflects and reinforces normative isomorphism.68

We remind ourselves that Di Maggio and Powell maintained that isomorphic pressures are greatest where an organisation is reliant on a single source, as are ETs, which are solely government-funded; where one organisation is perceived to be more legitimate than another and the civil courts have a greater provenance than ETs; and where the field is dominated by professionals, judges in this case.

We remind ourselves also of DiMaggio and Powell’s contention that while coercive, mimetic and normative isomorphism are three analytically distinct types of isomorphism, they are ideal types. They are not necessarily empirically distinct, and state action, with its centralising tendency, has been an important ingredient in all three isomorphic processes described here.

The Judicial College established in 2011 to train judicial office holders in the tribunals and the courts exemplifies this intertwining of isomorphic processes and the centralising tendency of the state. The formation of the Judicial College has been brought about by government (coercive isomorphism), but it essentially builds on and will in turn—as its training gets underway—reinforce the shared understandings and values of judges, whether in ETs or the courts (normative isomorphism), being modelled on the Judicial Studies Board (mimetic isomorphism), which was responsible for organising training for judges in the High Court, the Crown and County Courts and for magistrate and legal adviser training.

To reiterate, we have argued that in very many respects ETs have become like the civil courts, although this does not sit easily with the Coalition Government’s stated objective of making employment regulation more business-friendly. Civil courts, where legal norms prevail, are alien to most employers. Moreover, these changes contribute to juridification which ‘is arguably the single most important trend in the real world of industrial relations of recent decades’.69 Of course, the seeds of juridification were sown when ETs were first established with a legally qualified chair, the giving of evidence on oath, cross-examination, the adoption of a mainly adversarial approach and a right of appeal on a point of law to the higher civil

courts. This is in contrast to the arbitral model in respect of workplace disputes, where even with what Rideout has termed ‘regulated arbitration’ (i.e. regulation within a legal framework, such as disclosure of information for collective bargaining), the chair does not have to be legally qualified, no oaths or affirmation are required, there is no cross-examination, the arbitrator(s) in the main adopt an inquisitorial approach, and there is no right of appeal (judicial review apart). Nevertheless, even if the seeds of juridification were sown almost half a century ago as Dickens et al. argued, this article maintains that these seeds have germinated and flowered as a result of isomorphic pressures.

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