JUDICIAL COLLEGE

TRIBUNALS
TRIBUNALS
AUTUMN 2016
TRIBUNALS

# Share your experiences

EDITORIAL By **Christa Christensen**

On behalf of the Editorial Board, and as its new Chair, I welcome all readers to this Autumn 2016 edition of *Tribunals*. It is with some trepidation that I endeavour to step into the shoes of the irreplaceable Jeremy Cooper but am buoyed in my task by knowing that I am supported by an incredibly talented, committed, experienced and enthusiastic Board.

## Aims and objectives

In taking on this role I found it very helpful to remind myself of the journal's aims. Although they appear on the back page, I wanted to highlight them here in my first editorial piece to remind both myself and you, our readers, why we exist.

1 To provide articles to help those who sit on tribunals to maintain high standards of adjudication while remaining sensitive to the needs of those appearing before them.

2 To address common concerns and to encourage and promote a sense of cohesion among tribunal members.

3 To provide a link between all those who serve on tribunals.

4 To provide readers with material in an interesting, lively and informative style.

5 To encourage readers to contribute their own thoughts and experiences that may benefit others.

With these in mind, I encourage you to e-mail the Judicial College Publications Team (at *jcpublications@judiciary.gsi.gov.uk*) if you have any thoughts regarding whether we are meeting these aims. I particularly bring Aim 5 to your attention and encourage you to consider whether you have an article inside you that is looking for a home or experiences that you wish to contribute. All contributions are considered by the Editorial Board. I am keen to encourage some new contributors and new themes to the journal.

## Introductions

Anticipating you might want to know something about me, here are some brief details. I am a solicitor by profession. I was a practitioner in company and

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commercial law and then an academic at the University of Bristol and the University of the West of England. I lectured in business and company law, employment law, financial services and negotiation skills on the (then) Legal Practice Course.

During this time, I was also a non-executive member of Avon Health Authority and the deputy chair of the discipline/service committee for primary health care practitioners and then a chair of the Health Service Appeal Authority when it was based in Harrogate. It was this work that gave me an entry route into the world of sitting in judgment on disputes and eventually into the world of the judiciary.

I was appointed a fee-paid Employment Judge in 1995 and a salaried Employment Judge in 2003. I was invited to join the President of Employment Tribunal (England and Wales) Training Panel in 2008 and became the Deputy Director of Training in that jurisdiction in 2014. I have been heavily involved in creating and delivering training to Employment Judges and non-legal members since 2008.

*It has caused me to realise the enormous diversity, talent and range within the tribunal world . . .*

Since taking up my post as the Judicial College Director of Training for Tribunals on 1 July 2016, I have been on a steep learning curve to ensure I understand the training regimes in the seven First-tier Tribunal Chambers (War Pensions and Armed Forces Compensation, Social Entitlement, Health Education and Social Care, General Regulatory, Tax, Immigration and Asylum and Property), the three Upper Tribunal Chambers (Administrative Appeals, Tax & Chancery and Immigration and Asylum), and the separate pillar of the Employment Tribunal (England & Wales and Scotland) and the Employment Appeal Tribunal.

I am very much indebted to the generosity of the Tribunal Presidents, training leads and administrative support teams who have assisted me in this task. It has caused me to realise the enormous diversity, talent and range within the tribunal world; these are features which are a great credit to the judiciary and this journal provides an excellent platform to extol and share them.

I am delighted to be able to welcome two new Board members who took up their posts on 1 September 2016 following an expression of interest (EOI) exercise in the summer. They are Deputy Chamber President Meleri Tudur and Regional Employment Judge Barry Clarke, who introduce themselves below.

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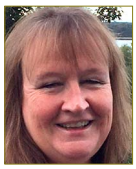
### MELERI TUDUR



My love affair with tribunals started as a trainee solicitor in the South Wales valleys in the 1980s, when Green Forms were green and tribunals were a convenient place to cut your teeth acquiring advocacy skills pre-qualification. I regarded their informality and closeness to the individual a far better forum than the formality and distance of the courts. Little did I realise then the part they would play in my career. With a young family to raise in the '90s, I acquired a portfolio of jurisdictions, across what is now the Social Entitlement Chamber and Health Education and Social Care Chamber, which complemented my practice as a high street legal aid solicitor.

I was appointed a salaried tribunal judge in HESC in 2011 and Deputy Chamber President in the same Chamber in 2014, with responsibility for three jurisdictions: Special Educational Needs and Disability, an English national jurisdiction, and Care Standards and Primary Health Lists which are cross-border England and Wales jurisdictions. I have retained my appointment in the devolved Special Educational Needs Tribunal for Wales and continue to sit in that jurisdiction.

At a time when change is the constant and information sharing is key to understanding the changing landscape, I join the Editorial Board with a conviction that the *Tribunals* journal has a role to play as an information-sharing tool

across jurisdictions, enabling opportunities to develop key judgecraft skills to ensure judicial office-holders continue to offer a high-level service to their users.

**BARRY CLARKE**

I have been the Regional Employment Judge for Wales since December 2015 and, prior to that, I was a salaried Employment Judge for nearly six years. I have also just been appointed as a Deputy Chairman of the Central Arbitration Committee. I am based in Cardiff but sit throughout Wales.

As well as deciding cases involving workplace disputes about pay, whistleblowing, dismissal and discrimination, I lead a team of five salaried judges, 11 fee-paid judges and nearly 50 non-legal members. I am also one of the designated diversity and community relations judges for Wales, a member of the Judicial College panel of experts on social exclusion, an IT liaison judge and a judicial mentor. I am a member of the national training committee for Employment Tribunals and have provided training on technology and social media to hundreds of judges and tribunal members in various jurisdictions.

Prior to taking up my salaried appointment, I sat as a fee-paid judge in both the Employment Tribunal and what was then called the Asylum and Immigration Tribunal. I was a solicitor in private practice for 14 years and a partner in the national law firm Russell Jones and Walker. At various times I have also been an ACAS arbitrator, a trustee of Cardiff Law Centre, a member of the statutory Wales committee for the Equality and Human Rights Commission, and (between 2006 and 2008) the national chairman of the Employment Lawyers' Association. I have also edited a book entitled 'Challenging Racism'.

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It is likely that the journal will run a further EOI exercise in 2017 so give some thought as to whether you might wish to apply. More information will follow in later editions.

*. . . a conversation that reflects on the transformation that Professor Jeremy Cooper brought to the world of tribunal training.*

**Articles in this edition**

As part of his regular contribution to this journal we have an article on page 21 from the Senior President of Tribunals, Sir Ernest Ryder, providing an extract of his speech to the Bar Council on 15 October 2016. I am particularly pleased that, following this editorial, there is a piece by Tribunal Judge Melanie Lewis in which she interviews Professor Jeremy Cooper and reflects on the transformation that he brought to the world of tribunal training. There is a link in her article to a 15-minute conversation with Jeremy that I recommend to you.

Spring 2016 addressed the issue of judicial diversity and this theme continues in this edition with two more articles on this topic. One is by Regional Tribunal Judge Hugh Howard and is a personal piece providing some reflections on his role as a diversity and community relations judge (see page 4). Hugh's sense of frustration is powerfully expressed and provides an interesting contrast to the second piece, on page 7, on diversity in the judicial appointments process by Lori Frecker of the Judicial Appointments Commission.

On page 10, Tribunal Judge Leslie Cuthbert provides some practical, invaluable thoughts on cognitive bias. Digitalisation and the reform agenda is tackled by Chamber President John Aitken on page 12. Mrs Justice Simler, on page 15, writes about her role as President of the Employment Appeal Tribunal and in which she offers some thoughts on the future positioning of the Employment Tribunal and Employment Appeal Tribunal. Upper Tribunal Judge Paula Gray provides an overview of a fascinating talk given by Lord Sumption (see page 16). An article by Mrs Justice Asplin, on page 17, gives an overview of work done on the Litigants in Person Project and includes a link to the LMS e-learning produced on this topic. For the first time the journal includes links to relevant external publications (see page 19) which has been collated by Adrian Stokes.

### Consultation on modernising judicial terms and conditions

In case readers are not already aware, there is a consultation under way on proposals to introduce a new tenure for fee-paid office-holders, provide for fixed-term leadership positions and modernise judicial terms and conditions. It closes on 10 November. You can contribute to the consultation here.

### Stop press

The consultation period for Transforming Our Justice System, which addresses tribunal panel composition, has been extended to 24 November. There is information here on the judicial intranet and the consultation document can be found here. Once you have considered the document, you can submit a response here.

# Transformation from a world of silos

By **Melanie Lewis**

On 23 June 2016, I had a conversation with the outgoing Director of Tribunals Training, Professor Jeremy Cooper. The difference from other conversations with Jeremy was that on this occasion it was filmed to mark his retirement, a word that he had banned given the very full programme of activities that he has planned. Life goes in circles it seems and part of those plans will take him back to his undergraduate studies in history.

He reflected on what his own background in law centres and academic research and teaching had enabled him to bring to his role as a judge when he first took a part-time appointment. When at least the tribunal judiciary are drawn from an increasingly wide circle, his view was that there were a lot of benefits. Having previously been dean of a law faculty and an experienced tribunal judge in the mental health jurisdiction, he was well equipped to take on the role of first an adviser to the Senior President and then the first Director of Tribunals Training at the birth of the Judicial College.

He oversaw a time of transformation of views. Initially, training leads sat firmly in their own 'silos', fiercely guarding their budgets and their way of doing things but this changed. With the introduction of courses like 'The Business of Judging' and the increasing opportunities to sit in more than one jurisdiction, they came to see the benefits of cross-jurisdictional training. There was an acknowledgement that any judicial office-holder who has the core skills can sit in a variety of settings where things may be done differently, yet the core skills needed to enable you to conduct a fair hearing and issue a reasoned decision are the same.

Those changes took place over eight years but our reflective conversation lasted for only 15 minutes. You can watch the interview here on the LMS.

**Melanie Lewis** is a judge in the First-tier Tribunal (HESC) *Back to contents*

# 'Yes we can,' someone once said

DIVERSITY A personal view by **Hugh Howard**

Reaching out to the community and promoting diversity is much like motherhood and apple pie – an excellent idea. However, in these days of austerity, a diversity and community relations judge (DCRJ) faces enormous challenges in finding the time during the day to undertake activities. No official time is made available so most of the engagement is done out of hours.

Fortunately, the lack of funding to support the work is more than compensated for by a varied and enthusiastic cohort of judges who spend much of their own time (and sometimes money) in promoting diversity. They are supported by a small team of equally committed staff in the Judicial Office.

In the past year, I have undertaken 20 'engagements'. I opened the 2015 Diversity Conference with a presentation on discrimination against people with disability in the judicial process. I was asked to reprise that by the Lord Chief Justice of Northern Ireland, as a result of which they are setting up their own DCRJ scheme.

I talk to children, young people and adults from a wide range of backgrounds in schools and when they visit courts. I have judged moots designed to encourage social mobility and access to the legal profession. In one, I had to decide on a contractual dispute between a fictional X Factor-style boy band and their record producer. In feedback, I was heartened to receive the comment 'The judge was really cool and had a good knowledge of One Direction songs' because I had been able to filter many of their lyrics into my judgment. Marvellous what having eight-year-old granddaughters and Wikipedia does for your street cred.

I have hosted a number of foreign judges and law students. Trying to explain the concept of the separation of powers and judicial independence to the political officer of a Chinese court was 'interesting'. However, a rapport was quickly established when I observed that not only were we both judges but also that my parents, like his, had been born in China.

### Diversity in the judiciary

My much-repeated remark when I undertake diversity engagement is: 'I will be retiring in the next few years. It will be seriously depressing if, when I go, I am replaced by yet another white, male, public school educated judge.' And I mean it. I do not think my time is being wasted when I hope to plant the seed in the minds of 40 children from Black, Asian and minority ethnic (BAME) backgrounds on visits to the Royal Courts of Justice. If there is a lightbulb moment in just one of their 12-year-old minds in 20 years' time, I will have thought my 20 minutes chat will have been well spent.

The latest statistics for diversity in the judiciary show that we have a long way to go.[1]

While tribunals compare more favourably than the courts, neither can say that it has a diverse judiciary. It has taken five years for the percentage of female circuit judges to creep up from 22.3% to 26%, an increase of 0.74% per annum. At that rate we will not achieve parity until 2060. Five percent of court judges declared themselves to be from a BAME background (down from 6% in 2015) compared with 9% in tribunals.

It is all very well to observe that 51% of judges under 40 are women and 8% of judges under 40 are from BAME backgrounds but that is hardly representative of the judiciary as a whole. JAC statistics show that the greater number of applicants for the most recent Recorder competition were in the higher age groups 46–55 years (55 applicants – four appointed), 55–65 (42/10) and 36–45 (36/7). Fourteen were over 45 and seven under. Sixty-four percent of candidates recommended for circuit judge appointments fell in the 46–55 range. It is taking far too long to change the profile of the judiciary.

## A statement of policy

**'The direction and purpose of the judicial diversity strategy will be threefold.**

**First, it will be aimed at serving office-holders, supporting those who wish to progress to the more senior levels of the judiciary; at the legal professions, encouraging suitable applicants from all backgrounds to consider applying for judicial office; and at law students and others who may be considering a career in legal practice and have the potential to become the judges of the future.**

**Second, it will remind all judicial office-holders of their responsibilities for promoting diversity, both within their courts and tribunals, and as part of their outreach to the wider community.**

**Third, it will support the work of informing the general public about the role of a judicial office-holder and the justice system so as to improve their understanding of and confidence in the rule of law.'**

***Lord Chief Justice***
***5 October 2012***

## Mentoring

The Lord Chief Justice and Senior President of Tribunals have set up a project specifically aimed at women and those from a BAME background. Judges were recruited as role models and mentors.

Many of us will remember the person who first suggested, to our shock, that we might become a judge. In my case it was a judge who asked me (aged 33) to stay behind after a hearing. Wondering what on earth I had done, he merely said, 'Can you help me Mr Howard? Many of us this side of the bench are wondering why you are not sitting here with us. Why aren't you? Think about it.' And he got up and walked out. In the same week, I received a round robin letter from my then trade union urging those who might qualify to apply for judicial appointment. And the rest is history.

Mercifully, we no longer have the question at interview, 'Is there anything in your background that were it to become known to the Lord Chancellor would cause him embarrassment?' At the time I was so naive I thought they were asking about my income tax returns and not my sexual orientation. Gender, ethnicity, sexual orientation and disability are no longer bars to judicial office although candidates are asked in their self-assessment evaluation to declare anything that might cause embarrassment.

Over the years I have encouraged a number of people to become judges and when I achieve a 'home run' I am immensely happy. One woman literally pitched up on the doorstep of my venue early one morning and asked about becoming a judge. She now holds two posts. When I was first appointed to a salaried position I was 'warned' about one of my fee-paid judges, a woman from a BAME background who was described as performing poorly. I observed her and was blown away by her competence. I have since encouraged her to apply successfully for two salaried positions. In references, I have observed that I believe her ethnicity and gender had previously held her back. The result is that the judiciary benefits from a particularly gifted judicial office-holder who might otherwise have been lost to us.

Most of us need that special someone to encourage us. In my case it was no too far removed from a 'tap on the shoulder'. The interview could not be described as a competitive one – more designed to confirm I was a 'decent egg'. Nowadays, things are done much more properly. What we need to do is to build up a critical mass of potential candidates from women and BAME backgrounds. When I talk on mentor training courses, I explain that we can't get them all through but until we have that critical mass the chances of change are remote.

## My mentee

What gives me particular delight with my present mentee is watching her grow in confidence in her own ability. She has changed her way of thinking and working. In a recent e-mail, she said:

> 'Your mentoring is, of course, about enabling me to make the best application that I can and will do, but it is also much more than simply that to me, and I am glad we are able to have conversations about these things.'

I can only speculate what it is like for a woman or someone from a BAME background to make their way in the profession. It was easy for me to arrange for her to meet women and BAME judges but before I did that I made her approach judges direct for a conversation.

Part of the problem is that some people dismiss the prospect of judicial appointment because 'judges aren't like me'. Well neither normally is 'Hamlet'. Part of my mentee's homework was to see the current predominately black RSC production.

> 'I saw Hamlet last night. It was intense and brilliant. Thanks for the recommendation.'

'Yes we can,' someone once said!

## Expressions of interest

Is there a tension between promoting career opportunities for the existing cohort of judges and achieving diversity across the judiciary if we only recruit from within?

When I review judicial prospects with my mentee there are precious few entry-level judicial appointments to apply for. The recent Deputy District Judge (Magistrates' Courts) competition attracted over 1,100 candidates for 18 posts. The only other competition this year is for the Valuation Tribunal. The competition is ferocious. Even if every person who is appointed is from a BAME background and/or a woman, it will barely register in percentage terms.

Instead, by far the largest tranche of appointments is by way of 'expressions of interest' (EOI) which means that we are recruiting from the existing pool of the judiciary. This will inevitably increase the age profile of the judiciary year on year and may cause problems for those unable to travel for caring or other reasons to take up new posts. At a recent seminar of mentors a number observed the difficulty when people may be appointed to a particular circuit or region and find themselves sitting a hundred miles or more from home and personal responsibilities.

I have two additional appointments by way of EOI. Any number of tribunal judges hold at least two judicial offices. In the past couple of years I have written around 200 references for EOI competitions.

Supporting career development and progression from within the existing cohort of judges is a laudable objective but so also is increasing the diversity of the judiciary. Is the current balance right?

### Conclusion

Being DCRJs and mentors is an immense privilege and in our own very small way we aspire to make a difference. As I say, I hope that when I am replaced I am not replaced by another me – or as someone else more eloquently said:

> 'It may be hard for an egg to turn into a bird: it would be a jolly sight harder for it to learn to fly while remaining an egg. We are like eggs at present. And you cannot go on indefinitely being just an ordinary, decent egg. We must be hatched or go bad.'[2]

**Hugh Howard** is Regional Tribunal Judge and a diversity and community relations judge *Back to contents*

[1] Judicial Diversity Statistics 2016.

[2] CS Lewis.

# A judiciary to reflect the society it serves

DIVERSITY By **Lori Frecker**

Improving judicial diversity has always been at the core of the Judicial Appointments Commission's work. The JAC was established in 2006 to make the judicial appointments process transparent and accountable. In addition to our statutory duty to select the most meritorious candidates, we must also 'have regard to the need to encourage diversity in the range of persons available for selection'.

Greater diversity brings enormous benefits, including a broader range of experience and perspectives to the bench. It is important for maintaining public trust and confidence that the judiciary reflects the people it serves.

Promoting diversity is embedded throughout our processes in three key ways, by:

- Targeted outreach.
- Ensuring the selection process is fair and transparent.
- Working with partners to break down barriers.

**The Judicial Appointments Commission (JAC) selects candidates for judicial office in courts and tribunals in England and Wales, and for some tribunals with UK-wide jurisdiction. The JAC is an independent body and was set up on 3 April 2006 to select candidates for judicial office on merit, through fair and open competition.**

### Outreach

Effective, targeted outreach is important to encourage applications from a wide field of candidates.

When selection exercises are launched, we notify the legal professions, diversity groups and judicial organisations so that they can inform their members. All vacancies are advertised on the JAC website and included in our monthly newsletter, *Judging Your Future*, which has over 11,000 subscribers. We also publicise vacancies on social media through Twitter and LinkedIn.

We have almost 60 case studies in which judges from different tribunals and courts, and a wide range of backgrounds, talk about why they chose to apply for judicial appointment, how they found the selection process and what their roles involve. These case studies provide important role models, particularly for those from under-represented groups. They can have a significant impact by demonstrating to candidates that 'someone like them' can become a judge.

JAC Commissioners and staff also speak at events and seminars run by our partners in the Judicial Office and the legal professions in order to encourage candidates and raise awareness about how to apply. This year we have taken part in events and workshops run by the Judicial Office, the Law Society and the Bar Council, as well as workshops aimed at candidates from under-represented groups that are run jointly by the legal professions.

### Fair and transparent processes

Gone are the days of the 'tap on the shoulder' and 'knowing the right people' as a means of appointing judges. Candidates are now appointed through fair and open competition.

*Gone are the days of the 'tap on the shoulder' and 'knowing the right people' as a means of appointing judges. Candidates are now appointed through fair and open competition.*

The JAC's selection process is extremely competitive. The average ratio of applications to recommendations is seven to one, and in some selection exercises it is much higher. In a recent exercise for fee-paid judges of the Upper Tribunal (Immigration and Asylum Chamber), we received 147 applications for 20 posts.

How do we ensure selection processes are fair, open and transparent when dealing with thousands of applications each year?

Details about each stage of the selection process are published on the JAC website before each exercise is launched. There are videos and written guidance as well as a dedicated information page for each vacancy that explains eligibility criteria and other details about the role. This means that candidates from all backgrounds can find out what is involved in the process and the criteria that they must meet to apply.

Competency frameworks are used throughout the selection process to assess whether candidates meet the requirements for each role. Using competencies helps to ensure fair and accurate selection because candidates are assessed against clear criteria. A bespoke competency framework is designed for each type of role, aligned with the Judicial Skills and Abilities Framework. Candidates are asked to demonstrate the required competencies when they apply.

We have introduced a second stage of shortlisting, such as a written or telephone assessment, in some recent large exercises. Second-stage shortlisting reduces candidate numbers more gradually and increases the certainty in the quality of those progressing to the next stage by assessing a broader range of skills. For smaller exercises, usually those involving more senior full-time roles, a sift process may be used that considers candidate self-assessments, references or submissions of recent work. Shortlisted candidates are invited to interview at selection day, which may include situational questions, a presentation or a role play.

All selection materials are developed with judges and reviewed by JAC staff and subject-matter experts to ensure that they will not have an adverse impact on any particular group. The JAC Advisory Group, which includes representatives from the judiciary and the legal professions, also provides advice and guidance during the development of selection exercise materials.

We follow independent, expert guidance on the structure and content of qualifying tests and other materials. We also carry out dry runs with mock candidates to test the selection materials and ensure that they are fit for purpose, making any necessary adjustments. We also consider reasonable adjustments for disabled candidates and candidates with a short-term injury or temporary illness, to ensure that they are not disadvantaged by the selection process.

### Breaking down barriers

It is important that all partners in the judiciary and legal professions continue work to break down barriers to increasing the diversity of the judiciary. The Judicial Diversity Forum meets quarterly to discuss measures aimed at improving judicial diversity and to monitor progress against a single action plan for doing so. The JAC chairs the forum, which comprises the legal professions, judiciary, Judicial Office and the Ministry of Justice.

*The EMP will not solve the issue of increasing judicial diversity on its own. It is, however, making a positive contribution alongside the other efforts of the JAC, the legal profession, government and the judiciary.*

The JAC commissioned research into barriers to application in 2008 and again in 2013. It identified the factors that discourage under-represented groups, such as those from Black, Asian and minority ethnic (BAME) backgrounds, women, solicitors, those with disabilities and others from applying for judicial appointment. The barriers identified included a lack of diverse role models and the limited availability of flexible working. Several provisions of the Crime and Courts Act 2013 were aimed at addressing these, including the extension of salaried part-time working to the High Court and above, flexible deployment of judges and the equal merit provision.

### Equal merit provision

The equal merit provision (EMP) enables the JAC to choose a candidate on the basis of diversity where two or more candidates are assessed as being of equal merit.

The JAC launched its EMP policy on 1 July 2014 following a public consultation in which 69% of respondents supported the application of the EMP.

The EMP policy is currently applied to the protected characteristics of race and gender, and used at the final decision-making stage of the selection process. It is used only where two or more candidates are judged by the Commission to be of equal merit when assessed against the advertised requirements for a specific post, and there is clear under-representation in respect of race or gender in the relevant level of the judiciary. The latter is determined by reference to national census data and judicial diversity data from the Judicial Office.

From 1 July 2014 to 31 March 2016, 21 recommendations were made as a result of using the EMP policy.

The EMP will not solve the issue of increasing judicial diversity on its own. It is, however, making a positive contribution alongside the other efforts of the JAC, the legal profession, government and the judiciary.

### Looking ahead

As Orla Kilgannon-Avant pointed out in her recent article (*Tribunals*, Spring 2016), tribunals are more diverse than the courts. This is just one reason why we welcome more flexible deployment of judges between courts and tribunals, which also provides more opportunities for career development.

The JAC is not complacent and recognises there is more to do to increase judicial diversity. In 2015–16, 9% of JAC selections were BAME individuals; we want to improve that. We also want to see more candidates applying from different professional backgrounds, such as academia and the public sector.

Diversity is improving across the judiciary with faster progress in some areas than others. Last year, 45% of the JAC's recommended candidates were women. Recent statistics published by the Judicial Office show that 46% of tribunal judges are women and 12% are BAME. They also showed that the younger cohorts of judges are more diverse, a positive indicator for the future. We want the judiciary to reflect the society it serves and will continue to work with the government, judiciary and legal profession to ensure further progress is made.

**Lori Frecker** is Head of Equality and Diversity at the JAC *Back to contents*

# Cognitive biases: 15 more to think about

DECISION MAKING By **Leslie Cuthbert**

In Lydia Seymour's article in the Spring 2014 edition of *Tribunals*, she explained about a key unconscious bias known as 'confirmation bias'. In the Autumn 2015 edition, I then described about the risks involved in being overconfident. However, these are only two of the many cognitive biases that exist. Here are 15 other common cognitive, or unconscious, biases that we are all prone to falling foul of whether as witness, party or decision-maker.

1) ***Anchoring.*** This involves people being over-reliant on the first piece of information that they receive. For example, if deciding how much money to award if initially given the sum of £10,000 the average amount awarded is likely to be higher than if the initial sum requested was £3,000.

2) ***Availability heuristic.*** People overestimate the importance of information that is available to them. We judge the probability of events by how quickly and easily examples come to mind. For example, are people with mental illness more likely to be the perpetrators or victims of violence? Because of media stories we are more likely to initially believe the former when in fact the latter is true statistically.

*Failing to recognise your own cognitive biases or considering yourself less biased than others is a bias in itself!*

3) ***Bandwagon effect (or herd effect).*** The probability of one person adopting a belief increases based on the number of people who hold the belief. If other members of the tribunal speak first and are in agreement, the last person to speak may just go along with the view already expressed to fit in or look like they know what they are doing.

4) ***Blind-spot bias.*** Failing to recognise your own cognitive biases or considering yourself less biased than others is a bias in itself! For example, I have an appraisal which says I ask inappropriate questions, I believe it to be wrong preferring to focus on the fact that I've never received a complaint about my questioning.

5) ***Choice supportive bias.*** When you choose something you tend to feel positive about it even if that choice has flaws and you remember your choice as better than it actually was. For example, when a decision you have been involved in is overturned on appeal you are sure that the appeal body has not taken into account all of the factors you did and so your decision was the better one.

6) ***Clustering illusion.*** This is the tendency to see patterns in random events. For example, fluctuations in the stock market price of shares where we ignore differences in data but stress similarities.

7) ***Conservatism bias.*** Where people favour prior evidence over new evidence or information that has emerged. Similar to cognitive dissonance whereby new evidence is discounted or discredited (see *Tribunals* Autumn 2015) this minimises new evidence in favour of our pre-existing way of looking at the world.

8) ***Information bias.*** The tendency to seek information when it does not affect action – more information is not always better. For example, asking an independent expert to prepare a report on an issue when two other reports already exist in respect of the same issue.

9) ***Ostrich effect.*** The decision to ignore dangerous or negative information by 'burying one's head in the sand'. There are plenty of examples you can think of yourself!

10) ***Outcome bias.*** Judging a decision based on the eventual outcome – rather than on the quality of the decision at the time it was made. This is similar to hindsight bias whereby the 'correct' choice at the time the decision was originally made appears obvious subsequently.

11) ***Recency.*** The tendency to weigh the latest information more heavily than older data. Therefore, if you have a run of recent cases with the same issue appearing within it, you are likely to conclude that this is an issue which is affecting other decision-makers within your tribunal.

12) ***Salience or saliency bias.*** Our tendency to focus on the most easily recognisable features of a person or behaviour. For example, when trying to explain someone's behaviour we usually only have observable external information about that individual. This leads to these salient factors being more influential in determining the cause of the person's behaviour.

*. . . zero-risk bias makes us wish to eliminate risks completely.*

13) ***Selective perception.*** Tied to cognitive dissonance, this is where we allow our expectations to influence how we perceive the world. For example, if we have the opinion that the advocate due before us is incompetent, from prior dealings with them, we are likely to focus our attention on their faults and miss any positive behaviours.

14) ***Survivorship bias.*** An error that comes from focusing only on surviving examples or past successes rather than on past failures, causing us to misjudge situations. For example, rather than focus on those cases you concluded which were upheld on appeal, study instead those cases where you were overturned.

15) ***Zero-risk bias.*** Sociologists have found that we love certainty – even if it's counterproductive – hence we ignore probability and focus on the potential impact were the event to occur. We wish to entirely eliminate risks even when an alternative option might produce a greater reduction in risk overall. For example, choosing to keep the status quo rather than grant an application where there is a risk that things might go badly wrong which will not happen if the current situation is maintained. Of course, there is the possibility things will be even better but zero-risk bias makes us wish to eliminate risks completely.

Unfortunately, there are many, many more biases but being forewarned means forearmed and if you bear these 15 in mind you will minimise the impact they have on your decision-making. Furthermore, if you sit with others you will have the benefit of their assisting you in spotting when cognitive biases may be affecting your decision-making just as they benefit from you identifying when they may be falling under the sway of one of their own biases.

**Leslie Cuthbert** is a judge in the First-tier Tribunal (Health, Education and Social Care) ***Back to contents***

*Sources:* Brain Biases; Ethics Unwrapped; Explorable; Harvard Magazine; HowStuffWorks; LearnVest; Outcome bias in decision evaluation', Journal of Personality and Social Psychology; Psychology Today; 'The Bias Blind Spot: Perceptions of bias in self versus others', Personality and Social Psychology Bulletin; 'The Cognitive Effects of Mass Communication', Theory and Research in Mass Communications; 'The less-is-more effect: Predictions and tests', Judgment and Decision-Making; The New York Times; The Wall Street Journal; Wikipedia; You Are Not So Smart; ZhurnalyWiki.

# Lessons from a trailblazer model

TECHNOLOGY By **John Aitken**

The beginnings of justice systems always speak of the parties entering the presence of the person (often a royal figure) to whom an appeal for justice is made, and explaining the case, the judge then gives an *ex tempore* judgment; almost unknown is talk of case management and adjournment. Despite this lack of case management, the decision is still often held up as an example to us all as to how proceedings should work and justice be done.

We now have technology to assist us, but too often that is viewed as a hindrance to justice rather than an effective aid. In the Social Security and Child Support (SSCS) Tribunal jurisdiction we hope, by looking at what is required at a fundamental level and building upon that, rather than taking our present paper-and-post based system and trying to run that in a more efficient way, to get closer to the ideal of good decisions without unreasonable waiting time.

It is the pace, accessibility, transparency and encouragement of full engagement with the proceedings that technology brings to justice that will transform the experience of our tribunal users. Through continuous online hearing or perhaps case management, the judge can start to focus the proceedings from the outset, engaging the parties in a shared objective of achieving the right outcome of the appeal at pace that gives dynamic effect to its purpose.

*Anyone with doubts as to how technology, properly used, can assist a judicial process should look closely at what has been achieved [in the TPT]*

## Some lessons from a trailblazer model

The concept and evidence that this may work arises in the hearings of the Traffic Penalty Tribunal (TPT) where the Chief Adjudicator, Caroline Sheppard, has long advocated and indeed, innovated with the use of technology to provide user-friendly solutions for appellants. Anyone with doubts as to how technology, properly used, can assist a judicial process should look closely at what has been achieved, not only in terms of efficiency but in user-friendliness, and staff satisfaction. The TPT has already experienced greatly improved case closure time and impressive resource savings for the respondent authorities as well as the tribunal.

What brought the idea to the fore were the results of the TPT's own pilot schemes, introducing a form of online dialogue between the appellant, respondent local authority and the designated adjudicator dealing with the case. Not only are hopeless cases (from either side) resolved more quickly at an earlier stage, but also interaction between the adjudicator and the parties results in the more cases being determined without the need for a hearing. Previously, case management had been done on a 'courts' model of letters or e-mails with applications and directions as necessary. Following the introduction of an online dialogue, instructions from the tribunal through messaging – an e-mail-like process where the time for responses can be set – both sides can see the 'conversation' trail.

This process starts at an early stage, with the adjudicator referring to material points in the evidence, and where necessary asking for additional documents that would cast light on unsubstantiated submissions, clarifying misunderstandings on the part of the parties, and most importantly identifying the real issues in any appeal. It has also led to an increase in confidence in the adjudicator dealing with the case, by making it plain at an early stage that they understand the issues and that they appreciate the nature of evidence. Previously, an appellant saw only technical requests and demands before an oral hearing, and had no idea whether his case had been seen by an adjudicator and if so was it understood?

In redesigning their processes, the TPT now asks appellants whether they want a hearing *after* both sides' principal evidence has been uploaded and there has been a dialogue. There is the facility to comment on each item of

evidence and it is only after each side has had the opportunity to add comments and highlight the areas of contention that the hearing option is exercised. There comes a point (surprisingly quickly) when the parties agree that the appeal can be decided. This approach has led to a significant reduction in requests for hearings (12% of TPT appeals are now decided at a telephone hearing with 9% being listed for a face-to-face). The proportion of 'no-shows' has also been reduced because the appellant has engaged from the outset.

### Application to SSCS

In the past at the TPT there had been evidence bundles prepared by the local authorities that were the size of a typical SSCS evidence bundle with the different items of evidence and copies of the relevant bylaw contained in a single bundle. Now they are uploaded item by item, with the bylaws and explanation of the regulations accessed through a link to a folder of general information. In SSCS, links to commonly used documents such as regulations or leading cases could be provided. Clear indexing prevents duplication and the evidence remaining in the case file is materially relevant to the appeal.

The openness and immediacy of the process has been shown to promote confidence in the appellants after online interaction. More than 75% at the TPT are content for an adjudicator to make a decision on the material supplied and the comments made by the parties online. It has, in short, revolutionised the way the work of the TPT is undertaken. A clear majority of appellants now want and have confidence in having their 'hearing' online and on the materials supplied.

*It has, in short, revolutionised the way the work of the TPT is undertaken. A clear majority of appellants now want and have confidence in having their 'hearing' online . . .*

A project team has been set up and the benefits of an interactive system of online communication for case management coupled with electronic file handling are such that they are not considered to be in doubt, even where superimposed on our present system. Such a system would make files available to anyone who needs them and storage and access easier, enabling case management to be done much more quickly and efficiently.

Even assuming an appellant handles only paper and the file has to be printed out for a panel or judge to deal with at an oral hearing, it would still represent a significant improvement in the efficiency of our present systems, always of course assuming the implementation is well done. We would expect it to be more efficient and hearings to take place more quickly and with less delay due to adjournment, in part because of better engagement.

We do not, however, consider case management to take full advantage of the benefits which are available. There is, we feel, an opportunity here to fundamentally improve the system, to one which does not require the use of case management as a compensatory system for problems in the oral hearing system. Case management is after all designed to make sure that the parties are fully prepared for the oral hearing and the relevant (and only the relevant) material is before the panel or judge, with the issues narrowed down as far as possible.

The problems are, of course, the reverse of that list, parties are often unprepared, taken by surprise by the needs of the tribunal or the other party and issues are often wide ranging and have not been narrowed appropriately if at all. Case management by someone other than the judge who will be hearing the case is also fraught with problems. If a decision has been made, is it the same as the hearing judge would have made? If the decision is so obvious that any judge would have made it, why did it need making in the first place?

The use of a continuous online dialogue involving the judge and parties has the capacity to deal with such matters, and indeed is doing so at the TPT. Such a system throws up its own problems, and part of the work of the project team is to identify them and any solutions. The first which often occurs is the ability of unrepresented appellants to take full part in such a system.

Doubts are often expressed about capacity to interact online and there is always concern for the appellants who may not have access to technology, or have the experience to use it confidently. The TPT had those concerns but recognised that the transformation of the back office meant that the administrators, no longer required to input data and scan papers, could become customer service representatives. This has had the effect that appellants now have a more bespoke and improved user experience than they did before the digital reform.

Those not wanting or able to appeal online can telephone for a form. They are telephoned back by a customer service representative who talks them thorough the process, and 10% are assisted in appealing online when it becomes clear they use email. The others can send the form back to the named customer service representative, who, as a 'PA' to the appellant, creates a 'proxy' appeal in the system. This enables the respondent authorities and adjudicators to continue to use the digital functionality. The assigned customer service representative sends letters and prints out messages for the appellant, and sends them with a personal note. The experience of the 'offline' has been enormously positive, without holding back the digital initiative.

It is clear that in SSCS we must make assistance available to engage fully. Substantial research is being undertaken to see how this can be achieved, and there will continue to be a need for significant numbers of staff to provide assistance in the customer services role. There may also be a role for supporting representatives financially, outside of legal aid, to enable interaction. There is a need to look at other bodies which offer and provide assistance to make sure we stop no one accessing their rights to appeal and benefiting from a new system. We expect, certainly in the early stages that online appeals are chosen because of the quality of service offered and that there is such an appetite if it is properly done appears from the work of the TPT. Once filed the appeal is visible to the appellant and the Department for Work and Pensions (DWP) office will simultaneously see the new appeal on their departmental dashboard, alerting them to upload their response documents. Since they will have had the evidence ready when they undertook the mandatory reconsideration, they should be able to upload their response to the appeal comparatively quickly. A judge will be allocated when this has happened (or the time to file it has expired).

The file provides for making notes and sending messages to any or all the parties, or privately between the judicial member or admin team. The continuous dialogue, like an e-mail trail, is similar to a transcript of oral proceedings. Anything a party says (writes) is recorded in the transcript and is available to the parties throughout. The parties are free to have a dialogue with each other, to sort out any misunderstandings. The judge or panel then begins a (non-synchronous) dialogue in writing identifying issues and the evidence in the case, in just the same way as is done at an oral hearing. Further evidence can be sought, or prompted. If necessary directions can be issued, time limits put on actions which will create an alert for the judge to consider. Once the parties have had their say and filed their documents, a decision can be taken. It will be open to the judge at any point to suggest a hearing, of whatever type. This dialogue remains part of the hearing.

*Once the parties have had their say and filed their documents, a decision can be taken. It will be open to the judge at any point to suggest a hearing, of whatever type. This dialogue remains part of the hearing.*

### Advancing the new digital project

There are a number of incidental, but important, advantages to such a system. In England, representatives are rare for both sides. We envisage that a representative will be able to join in the dialogue easily and much more efficiently than in the quickest oral or even telephone hearing, making representation far more common – we see this as a key benefit of the system. Firms of representatives can have their own dashboard enabling them to manage their caseload – the savings and efficiencies created will enable them to represent more appellants.

There will be transformational benefits for the DWP, not only in time and postage savings in responding to appeals, but also because they will be able to see the later evidence presented by the appellant, have a chance to comment,

or even concede the appeal if the evidence is conclusive. Lack of representation means that frequently a judge or panel will make a decision on information very different from the first decision-maker. That will disappear. An online system presenting all of the evidence and opportunity to explain it on the desk of the person who made the decision removes the likelihood of any misunderstanding. Furthermore, the result of the appeal can be viewed immediately in the DWP office so they can take immediate steps to give effect to the outcome.

We in SSCS fully appreciate that only by testing such a system will we see all of the hurdles to be overcome, and possibly some further advantages, and to that end experimentation will commence soon with the assistance of the TPT which is facilitating dummy runs with judges, the DWP and representatives on cases with life-like scenarios to begin exploring the full potential of such a system.

**John Aitken** is President of the First-tier Tribunal (Social Entitlement Chamber) *Back to contents*

# It's time to join civil courts structure

The EAT By **Ingrid Simler**

Returning to the Employment Appeal Tribunal in January 2016 as its 14th President (having appeared there as counsel regularly throughout my career at the Bar) has been a privilege and a pleasure. It was always a forum I enjoyed, in part because of the high quality and expertise of the tribunal itself. I now appreciate more than ever the quality of the staff at the EAT, the registrar, associates and many others, who are both effective and highly efficient in their 'cradle to grave' case management of appeals, matching that high quality and playing a vital part in the smooth functioning of the EAT.

The EAT, a superior court of record exercising authority at the same level as the High Court, was established in 1976, with a limited jurisdiction to hear appeals from employment (then industrial) tribunals. It replaced the National Industrial Relations Court, which had in addition to its appellate jurisdiction an original jurisdiction that brought it into conflict with the trade unions.

The scope of employment protection legislation has grown significantly since 1976 and with it the EAT's appellate jurisdiction has expanded beyond recognition. Tribunals and the EAT now have jurisdiction to determine more than 70 types of claim, many of them legally complex, including whistle-blowing detriment and TUPE[1] claims, and claims of unlawful discrimination on grounds that vary from gender, race and disability to age, religious belief, sexual orientation and pregnancy.

*The scope of employment protection legislation has grown significantly since 1976 and with it the EAT's appellate jurisdiction has expanded beyond recognition.*

Unlike with most other tribunals, these are disputes between private parties rather than between private parties and the state. The civil courts nevertheless retain jurisdiction in relation to many employment related claims: for example, wrongful dismissal, pension disputes and high-value contractual claims relating to pay and bonus, and the High Court has jurisdiction over collective disputes, industrial action and ballots, and injunctions in restraint of trade and confidentiality actions. Claims of unlawful discrimination outside the employment field, in goods and services, are also reserved to the civil courts.

During the intervening 40 years since it was established, the confidence of both unions and employers in the EAT has grown and its specialist employment expertise is recognised and valued on both sides. No doubt in part in response

to changes that have occurred since the 1970s, the interim and final reports of Lord Justice Briggs on the Civil Courts Structure Review 2016 recognise the increasingly anomalous position of Employment Tribunals and the EAT which are 'uncomfortably stranded between the civil courts and the main tribunal service'.

Lord Justice Briggs identifies three possible ways forward: maintaining the status quo; bringing both tribunals into the First-tier and Upper Tribunal structure; or bringing them under the wing of the civil courts structure.

Maintaining the status quo is the least viable option in the context of the current vision for reform and modernisation of courts and tribunals with its emphasis on coherence, rationalisation and better quality outcomes. Of the remaining options, I favour the third way and consider (as did my predecessor, Langstaff J) that the EAT and Employment Tribunals should be brought into the civil courts structure.

In my view, the time has come (in a sense, once again) for the EAT, as an Employment, Equality and Appeal Court or list of the Queens' Bench Division of the High Court, to have a first-instance jurisdiction for cases of the highest complexity (including those involving restraint of trade and industrial disputes), value and/or public importance, in addition to its existing appellate jurisdiction (which should itself extend to unlawful discrimination in all areas including goods and services).

*Maintaining the status quo is the least viable option in the context of the current vision for reform and modernisation of courts and tribunals . . .*

This would make significantly better use of the specialist judicial expertise in employment and equality disputes that exists among the senior judiciary selected to sit at the EAT, and ensure its use across the field in appropriate cases, at first instance and on appeal. A greater degree of coherence and consistency of judgment is likely to be achieved, with better outcomes for litigants. It would also address the unsatisfactory jurisdictional limits that currently prevent many employment cases being determined in full in the civil courts or the Employment Tribunal, and mean that litigants must often bring two sets of claims to resolve what should be a single employment dispute.

Primary legislation would be required to achieve structural change of the nature I favour, but might not be feasible in the current political climate. Whatever approach to reform is adopted for Employment Tribunals and the EAT, the devil will inevitably be in the detail, but it will be critical to preserve the tribunal culture, procedures and rules that have served litigants (many of them self-represented) in Employment Tribunals and the EAT so well, and have contributed, in particular to the EAT being as efficient and effective as it is, and has been for many years.

**Ingrid Simler** is President of the Employment Appeal Tribunal *Back to contents*

[1] Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246

# With a little help from Jane Austen

Lecture By **Paula Gray**

The Administrative Appeals and Immigration and Asylum Chambers host an annual event on a matter of joint interest. Last year, we enjoyed a lecture from Professor Alan Patterson of Glasgow University on the history of the Supreme Court, and this year Lord Sumption, a justice of that court who prior to his legal career was a notable academic historian, came to the Rolls Building to talk about the role of 'The Historian as Judge' to us and judicial colleagues from the High Court Bench and the Court of Appeal.

The tenor of the lecture was the value of the historical method to the work of a judge in these islands where the system of law is a customary one, borne out of judicial precedent, which Lord Sumption spoke of intriguingly as the legal implications of a very large number of tiny human stories. He drew a distinction between the codified law of other countries and the study of common law, describing the latter as an intensely historical process; questions of law may not be answered without consideration of what earlier generations of judges have thought and said about the issues.

The talk reflected Lord Sumption's view of the importance of history in shaping the present and the value of using historical perspective to inform decisions. Illustrating the point with recent case law, he set an example in the area of statutory construction. How, historically, legislation came about, in response to what perceived mischief, may provide the key to whether a rule is inapplicable or redundant, and even where that information is not definitive it will aid understanding. He enthused about the study of history, the perusal of learned academic works and social sources such as grants of pardon, as well as the novels of the likes of Jane Austen and Anthony Trollope as providing useful insight into the social mores of their day.

Judges, in common with all others, have of course only limited personal experience; some might say that judges are particularly limited in life experience terms, but that may be to underestimate the value of vicarious experience in adding breadth, and how a knowledge of history, in particular social custom and the development of human societies, contributes much to the understanding of those things that we cannot experience personally, making for a better judge.

The whole was entertaining and thought-provoking in equal measure – the full lecture is now available here on the Supreme Court website. It is a stimulating read for anyone, but particularly those whose responsibility includes legal or quasi-judicial decision-making of all kinds, whether via the assessment of evidence or through interpretation of the law.

**Paula Gray** is a judge in the Upper Tribunal (Administrative Appeals Chamber) *Back to contents*

# The need to coordinate LIP initiatives

Litigants in person By **Sarah Asplin**

In their article in the Winter 2015/16 issue of *Tribunals*, Upper Tribunal Judge Paula Gray and Tribunal Judge Melanie Lewis describe the work that I was asked to undertake by the Master of the Rolls early in 2015, with the broad aim of considering litigants in person (LIPs) from a judicial perspective. My approach to this task has been to work with a small group of judges on a number of initiatives intended to assist judges, court staff and LIPs in ensuring proper access to justice in a case where an LIP is involved. I remain very grateful to Mr Justice Knowles and District Judge Chris Lethem, the other two core members of the group, for their continuing help in attempting to coordinate some of the judicial initiatives taking place across England and Wales in relation to LIPs. We have covered a broad range of topics over the past two years while retaining a flexible approach to our programme of work. This article is intended to give you a flavour of that work.

## Annual forum

The immediate impetus behind the Master of the Rolls's request and the creation of the group came from the Civil Justice Council's (CJC's) third annual forum on LIPs in December 2014. That event takes place at the end of each year and has become the centrepiece of the CJC's work in the area. It brings together people from the very wide range of bodies – judges, civil servants, lawyers, advice and *pro bono* sectors, academics – with an interest in ensuring access to justice for those parties without legal representation. That year, it had become clear that there was a great deal of good work being done in centres across England and Wales, but that the time had come to try and harmonise and

promote those initiatives across the country. Its purpose therefore is to coordinate and streamline judicial efforts in relation to LIPs across the country.

### Professional guidance

The work of the group has included encouraging the Law Society, Bar Council and CILEX to produce joint guidance to lawyers facing LIPs in the civil courts and tribunals – including a discussion of the relationship between the client's interest and the interests of the administration of justice, and the tricky question of the extent to which a lawyer can properly provide assistance to a litigant in person.[1]

### McKenzie Friends

It is perhaps also worth mentioning one concurrent piece of work that I was asked to undertake by the Judicial Executive Board at around the same time in relation to McKenzie Friends. Here, I had the benefit of considerable additional and expert help from Mr Justice Cobb, Judge Karen Walden-Smith and Judge Rachel Karp in starting to consider the vexed question of 'professional' McKenzie Friends. The anecdotal evidence available to us had given a clear indication that judges felt a great deal of concern about the vulnerability of LIPs to a number of McKenzie Friends who were either charging over the odds for their services, or had their own agenda to push. The outline research conducted by that group, and the discussions that it held were reflected in the recommendations it made to the Judicial Executive Board, and which helped that body put together last year's consultation on the subject.

### Judicial training

Turning back to the work of the group, another project, and the focus of this short article, has been the series of training modules that the group has produced in conjunction with the Judicial College on managing a hearing when one or more parties are unrepresented, work that has been ably and energetically taken forward by Judge Graham Robinson. The need for the training stemmed from the coming into force of a new Rule 3.1A of the Civil Procedure Rules for the civil courts in October 2015 – itself as the result of the group's encouragement. That Rule emphasises the court's duty to adopt such procedure as it considers appropriate to further the overriding objective when one or more LIPs is involved in a case, and that this might include 'ascertaining from an unrepresented party the matters about which the witness may be able to give evidence or on which the witness ought to be cross-examined' and 'putting, or causing to be put, to the witness such questions as may appear to the court to be proper'.

*Many judges are confident when it comes to managing a hearing involving an LIP; others feel uncertain and shy of stepping 'too far' into the arena.*

At the same time, and in our informal research and conversations with colleagues, we were hearing of different approaches to the question of how far, and the ways in which, a judge should intervene in court when hearing a case involving one or more LIPs. In that light, we thought it was important to explore the real ramifications of CPR 3.1A and to encourage debate among judges.

Many judges are confident when it comes to managing a hearing involving an LIP; others feel uncertain and shy of stepping 'too far' into the arena. There are, of course, a huge range of different sets of circumstances where a question of law or asking questions of witnesses arise. It occurred to us that some of the (again, informal) discussions that we had had in this way with the judges we met and worked with might be usefully prompted and repeated in small groups in courtrooms and tribunals across the country by a short series of e-learning films designed to present a set of circumstances – those most commonly encountered by judges in the civil and family jurisdictions – and followed by a short list of questions around which that discussion might be based.

### *Podcast*

Our ideas on what those modules might encompass went through various stages. While we continue to encourage judges to view the modules as part of a small group discussion, we also wanted to be able to produce something that

an individual judge could watch alone. Our 'Eureka moment' came when the suggestion was made that we might include a podcast of such a discussion with each module for that purpose, and the feedback to the training has given a strong indication that this part of the training is particularly valued by judges.

### *Contents*

The first two modules were launched on the Judicial College's LMS in May and July 2016. One looks at the role a judge might play when a legal defence is available to a defendant of which they are unaware and is therefore not pleaded – in this case relating to the Limitation Act. The other touches on the judge's role in describing to the claimant the need for specific evidence in pursuing their claim – in this case involving a dog bite, evidence of the dog's aggressive tendencies – something that even the most basic legal advice would have encompassed.

Plans are afoot for two further modules, focusing on how control of a highly emotional case where only one party has legal representation (taking a family case as the example) and when and how a judge might question a witness on behalf of an unrepresented party. We would also like to include a module giving the view of the litigant on the process they have just undergone – though ideas on the form this might take are still at a very early stage.

### *Audience*

The modules are aimed at judges at all levels who hear civil or family cases. While they might be thought to have particular relevance to the newly appointed or part-time judge, they are meant to give a rare opportunity for even the more experienced judge to consider their approach to such cases, and to have the opportunity to hear about the approach of their colleagues. There is no doubt that our best training resource as judges are our own colleagues. Readers of this journal might consider these modules to have a wider audience – for lay members of tribunals, for example, many of whom will be highly expert in their field but may not have developed these particular skills.

### Thanks!

In their insightful article touched on earlier, Melanie and Paula pointed out that it was simplistic and inaccurate to describe a tribunal judge as practised in conducting an inquisitorial hearing, and a court judge in hearing an adversarial case. They were absolutely right to point out that the approach of the judge depends far more on the nature of the case than the forum in which it is held, and that all judges need to be able to ask relevant questions of witnesses when necessary. At the end of that article they did stress, however, the importance of tribunal judges striving 'to assist in answering this complex question with useful scenarios for discussion out of which may be derived some helpful guidance . . .'

We have had the benefit of the advice of a group of tribunals judges and district judges, including Melanie and Paula, during the course of this project and remain grateful to them all for their thoughtful and expert advice.

**Sarah Asplin** sits in the Chancery Division of the High Court *Back to contents*

# Recent publications

External links By **Adrian Stokes**

This section lists recent publications of interest to readers of *Tribunals* with a very short description of each (where this is not obvious from the title) and a link to the actual document. It is not intended to be a comprehensive list but is intended to bring to the attention of readers some publications of interest but which they might have missed. It also gives a number of useful links.

*Tribunals and gender recognition certificate statistics quarterly: April to June 2015*

(Published 10 September 2015)

*Personal Independence Payment: April 2013 to July 2015*

(Published 16 September 2015)

*Court of Appeal (Criminal Division) Annual Report 2014–15*

The Court of Appeal (Criminal Division) annual report for the legal year October 2014–September 2015 (published 3 December 2015)

*HMCTS Reform: A message from the Lord Chief Justice and Senior President of Tribunals*

Detailed update following the Government's announcement of investment in the courts and tribunals system (published 11 December 2015)

*Lord Chief Justice's Statutory Delegations*

A revised (Issue 2) schedule of the delegations made by the LCJ under section 109(4) of the Constitutional Reform Act 2005 (published 17 December 2015)

*Composition of tribunals in relation to matters that fall to be decided by the Health, Education and Social Care Chamber on or after 16 December 2015*

Practice Statement (published 22 December 2015)

*Conflict advice from tribunal doctors*

Some examples of probable conflicts and where the Mental Health Chamber Tribunal doctors should not sit (published 6 May 2016)

*Delegation of functions to tribunal caseworkers*

Practice Statement in respect of the First-tier (Tax Chamber) (published 16 March 2016)

*Delegation of functions to tribunal caseworkers*

Practice Statement in respect of the First-tier (Social Entitlement Chamber) (published 22 April 2016)

*Delegation of functions to tribunal caseworkers*

Practice Statement in respect of the First-tier (Immigration and Asylum Chamber) (published 22 April 2016)

*Delegation of functions (HESC)*

Practice Statement regarding delegation of functions to registrars, tribunal case workers and authorised tribunal staff for Mental Health cases on or after 8 July 2016 (published 7 July 2016)

*Judicial Office Business Plan 2016–17*

(Published 15 June 2016)

*Judicial Conduct Investigations Office Annual Report 2015–16*

(Published 7 July 2016)

*Judicial Diversity Statistics 2016*

and

*First Progress Report – Judicial Diversity Committee of the Judges' Council*

(Both published 28 July 2016)

*Transforming Our Justice System*

Paper from the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals (published September 2016)

*The Historian as Judge*

Lord Sumption's speech to Administrative Appeals Chamber/Immigration and Asylum Chamber judges at the Rolls Building, London (6 October 2016)

*European judicial systems – Efficiency and quality of justice – 2014–2016 evaluation cycle*

This is a report from the Council of Europe on European Judicial Systems. It includes diversity data as well as other material such as budgets for judicial systems.

**Useful links**

*Tribunal decisions*

*Rightsnet*

*Child Poverty Action Group*

*Advocates Gateway toolkits*

**Adrian Stokes** is a Disability Qualified Member in the First-tier Tribunal (Social Entitlement)

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# This breathtaking £1bn reform project

**The following is an extract from the speech given by Sir Ernest Ryder, Senior President of Tribunals, at the Bar and Young Bar annual conference on 15 October 2016**

The next six years mark out the most ambitious period of change since the Judicature Acts of the 1870s. The aim that the Lord Chief Justice and I have agreed with the Lord Chancellor is, quite simply, to strengthen the rule of law. The court and tribunal reform programme is a breathtaking £1 billion investment project. It is the most ambitious court and tribunal modernisation programme anywhere in the world.

The programme's genesis is, of course, a response to the realities of our age. 'Austerity', perhaps a phrase that defines better than any other our current public policy zeitgeist, is not the driver of reform. That approach runs the risk of price rationing, which is the antithesis of equal or fair access to justice. What austerity has forced us to do, however, is face up to the system's limitations and be clear about what is necessary to prevent decline.

*The programme's genesis is . . . a response to the realities of our age.*

Do not get me wrong. I do not accept that the soothsayers, the harbingers of doom or the commentators with interests to protect are right when they doubt that we have and will continue to have the best justice system in the world. Our aim is to take the best of our existing system and transform it into something that will stand the test of time. Our intention is to reform our process to make it clearer than it has ever been, to make it fit for the 21st century – an environment where paper-based processes are to digital processes and cloud-based systems what the horse-drawn carriage is to space travel. New processes will inevitably lead to new rules and practices which need to be designed before we digitise them. We must strive to make those processes as intelligible to the user as possible.

In tribunals, we have a ground-breaking project to create end-to-end online hearings for benefits appeals where we will replace case management hearings with continuous messaging and determinations with an appropriate mix of online questioning and virtual hearings. The process of online dispute resolution will become the norm for much of the less complex work in civil, family and tribunals jurisdictions.

*The process of online dispute resolution will become the norm for much of the less complex work in civil, family and tribunals jurisdictions.*

In order for online dispute resolution to work, we will need sophisticated document and case management systems in which judges, lawyers and the parties will be assisted by trained registrars and case officers to prepare materials for the online environment. Preparation and presentation of materials for face-to-face hearings on tablets and screens has already begun in the Crown Court. The quality of the common platform and case management systems there can already be seen. Police forces can serve evidence collected electronically at the scene, the Crown Prosecution Service can advise on the same and the judge, jury and advocates have an electronic case file that does not need to be printed but can be used in any way that paper, the pen and the human desire to analyse might wish.

### Vulnerable citizens

We are only too aware that in every jurisdiction there will be some who have neither the ability nor the will to take part in a digital dispute resolution system. They may well be some of our most vulnerable citizens. We must not damage or restrict their access to justice. The design of our digital systems will be fully compliant with our longstanding commitment to the principles of procedural justice.

For some, digital access will itself be an improvement. It will make the justice system something that is more closely associated with the way they already live. It will remove the barrier that unfamiliarity and fear of formal process can

pose for some. For others, we are designing a whole programme of assisted digital access. The challenge for us is to continue to provide a first-class service for all forms of litigation, simple or complex.

From the judiciary's perspective, we can sometimes achieve change by the simplest device, e.g. the flexible deployment of judges so that they can sit in any court or tribunal jurisdiction including at the same time. The one-stop-shop being piloted by tribunal judges is an example of the future. In the property tribunal, we are trialling the concurrent hearing of tribunal and court proceedings relating to property before one specialist panel so that the litigant can avoid going to separate places to get a complete solution to their property problems. What are concurrent jurisdiction hearings today may well be a single hearing before a single specialist judicial forum tomorrow. There need be no distinction in the future between a specialist tribunal judge and a specialist courts judge. We must look forward to developing systems out of the best practice that we already have and where we propose change should be insistent that we follow empirically tested good practice.

*What are concurrent jurisdiction hearings today may well be a single hearing before a single specialist judicial forum tomorrow.*

If a dispute is justiciable in a court or tribunal, an adequate opportunity should exist for early, consensual dispute resolution. The proper delivery of justice should not be conceived in a narrow sense. Justice is not exhausted by adjudication; it has many facets, not least the impact on the citizen of the time, expense and stress of conflict. We will continue to introduce opportunities encouraging consensual resolution during case management, whether by early neutral evaluation, settlement conferences, family group conferences, mediation, conciliation or arbitration. Recent advances in each of these fields are notable and they have the strong support of the judiciary. We will also develop problem-solving methods and, where appropriate, inquisitorial solutions.

Each of these reforms is designed to concentrate our scarcest resources – judges, lawyers and other experts – on the cases that need them. The ways in which we work will change and change for the better with the consequence that disputes will be solved faster and in a more proportionate way.

I also hope that the places where we work will, as a consequence, be of a higher quality and more appropriate to the needs of the user. The court and tribunal estate is likely to be further reduced to concentrate better quality buildings in places where we need them to provide access to new ways of working. We will use alternative buildings to provide local access where that is needed: in the tribunals we have a longstanding tradition of taking the judge to the user in an appropriate case. We can provide justice at the end of the street, if that is what is efficient, fair and just.

*Brexit cannot be airbrushed from sight. For you as a profession, uncertainty brings opportunity.*

### Ethical obligations

It is my firm belief that we can achieve the transformation that the Lord Chancellor, the Lord Chief Justice and I set out in the vision statement published last month. I also believe that we have an obligation as members of a liberal profession with ethical obligations to each other and to the public to address the inevitable decline that will be experienced in the justice system if we do not act. We have an obligation in upholding the rule of law to work together to promote effective access to justice for all those who need it. In July, we welcomed a new Lord Chancellor into that historic office. She has a burgeoning ministerial red box, and some very obvious challenges inside it. As she reaches for the key to unlock that box, she undeniably has (and indeed recognises that she has) some valuable assets to call upon.

One such asset is the contribution made – which will surely continue to be made – by the legal profession to the life of this country. That is acutely relevant in a country embarking upon a journey out of the European Union (a topic around which I should tread carefully, given the proceedings currently before the Lord Chief Justice, the Master of the Rolls and Sales LJ in the Divisional Court). Brexit cannot, however, be airbrushed from sight. For you as a profession,

uncertainty brings opportunity. The innovation, integrity and proficiency of the Bar, and the value of the legal services sector to 'UK plc' in an era of globalisation, will help to ensure and secure the nation's future.

The legal professions will undoubtedly come together to show what they have to offer to the various debates and changing circumstances that are prevalent. How can you help to improve the accessibility, efficiency and intelligibility of the justice system? How can you help ensure that justice is delivered in a timely manner and at a proportionate cost? How can you thrive in an ever-increasing global market? I have no doubt you will be able to find the right answers to such questions, and find the right practices and structures to take advantage of all the opportunities that both innovation and the global market provide. A digital world may be more effective and efficient, it may even be more accessible and proportionate, it will hopefully be swifter and more intelligible, but it does not provide a substitute for the sophisticated skills of the advocate and the litigator.

Ladies and gentlemen, we are on the cusp of major reform, to try and improve the rule of law by making it more accessible to the public. I hope you will agree that is a worthwhile endeavour. I look forward to your contribution to it.

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## Aims and scope of *Tribunals* journal

1 To provide articles to help those who sit on tribunals to maintain high standards of adjudication while remaining sensitive to the needs of those appearing before them.

2 To address common concerns and to encourage and promote a sense of cohesion among tribunal members.

3 To provide a link between all those who serve on tribunals.

4 To provide readers with material in an interesting, lively and informative style.

5 To encourage readers to contribute their own thoughts and experiences that may benefit others.

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