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An exciting time demands full steam ahead

***Sir Jeremy Sullivan*, the Senior President of Tribunals for the last three years, retires in September. The time is ripe for looking forwards, as well as backwards.**

My last article for the *Journal* appeared in the winter 2012 edition. That was shortly after I assumed office as Senior President. I started by writing that 'the time for major change and upheaval for tribunals is now over'. I have reflected on that introductory remark, as well as on the enormous activity I have since then overseen, involving countless judicial office-holders, civil servants and (to borrow from the Civil Service vernacular) 'stakeholders'. Had my crystal ball malfunctioned?

Well, probably not. My predecessor Sir Robert Carnwath had led a massive transformation, breathing life into the template set out by Andrew Leggatt some years before. That really should be described as 'major change'. By contrast, I saw my job as helping the newly unified system to bed down, mature and stabilise. And, I believe that is what I and my Chamber and Tribunal Presidents have rightly focused on since 2012. But it was certainly right not to have confused stability with stagnation. We have not sat still for three years – nor would our users have forgiven us if we had. We have consolidated, and consequently have strong foundations for that which is to come.

My successor . . . will have a rather different focus . . .

My successor as Senior President will have a rather different focus than I did when setting out three years ago. HMCTS Reform, and the ongoing debate around our devolution settlement, will undoubtedly ensure major change is back on the agenda. In my view, this is apposite and very much to be embraced. In change, there is opportunity. But beyond that which is entirely for the politicians (and the principle of devolution is just that), it is critical that we – as a judiciary – look to preserve and build on that which works well; improving and enhancing where it will add value (ultimately for our users) rather than for the sake of change itself.

As I've made reference to already, one imminent change that we all know about involves the occupancy of the office of Senior President of Tribunals. It has been both a privilege and

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pleasure to undertake that role for the last three years. And my successor will of course have views about a vision for the future. It is not my job to do the new Senior President's job. But having been involved in much of the work to plan the reforms we will see in coming years, I do value this opportunity to record a few thoughts of my own about what might (and perhaps, what should) come.

Proportionality

First and foremost, I hope that you will forgive the trite: the justice system must be about delivering justice. That does not excuse us from considering proportionality. Indeed, far from it. Proportionality is and always has been a central tenet of justice. But it does mean that 'reform' cannot be a byword for 'cut'. Justice on the cheap is not justice. Further, it is very much to be welcomed that this is recognised by all those leading the current reform initiatives with which tribunals are involved.

Coherent framework

Second, in the unified tribunals world at least, I believe we now have much that is already fit for purpose. The chambers structure, and the role of the Chamber and Tribunal Presidents, is a key strength. It provides a coherent framework for judicial leadership, and for an effective partnership between the judiciary and HMCTS. That is not to say that evolution is not possible. Only this year, to buttress the 'vertical' judicial line management and communication lines within respective chambers and pillars, we have introduced a new 'horizontal' leadership and communication strata, at a regional level. The recently established Regional Tribunals Liaison Judges (RTLJs) have been assigned to each of the seven English and Welsh HMCTS regions, with a similar arrangement for Scotland. It will be the RTLJs's task to coordinate judicial communications between colleagues in their respective regions, wherever cross-cutting localised issues affect tribunals as a whole (rather than any one particular chamber or tribunal). They will utilise existing channels and management chains where available, rather like a presiding judge would do in the courts system. This is likely to be increasingly important as work on HMCTS Reform starts to generate change on the ground. Through their own local liaisons, and via the Tribunal Judiciary Executive Board (TJEB) into which they will ultimately report, the RTLJs will link back up with the chamber structure, so ensuring that the 'horizontal' works hand in glove with the 'vertical'.

The world has changed. I fear that our adversarial justice system (. . . which has never really fitted tribunals, and now looks less relevant for the courts too) has not changed sufficiently with it.

The Internet revolution

Third, we could now benefit from reviewing what we do and how we do it. While (as we have seen) the tribunals system has transformed (structurally) in recent years, we still deliver justice through a model developed decades ago. The world has changed. I fear that our adversarial justice system (modelled on the assumption of lawyers representing both parties, which has never really fitted tribunals, and now looks less relevant for the courts too) has not changed sufficiently with it. The banking and financial sector, the wider services sector, and of course the business of retail has been revolutionised with the advent of the Internet. Even the way law firms engage with their clients has modernised and changed for the better. But our users are still required to draft and lodge paper forms (even if those forms can now be located, and sometimes even completed and submitted, online) in order to initiate proceedings. A predominantly paper-based process then follows, with the promise of attendance before a tribunal panel for an oral hearing in often outmoded accommodation as the prize for negotiating one's way through various procedural niceties.

The underlying cause of our recent evolutionary plateau (for want of a better term) has, at least among other things, been insufficient access to necessary investment. Whenever we have tried to introduce more modern ways of working, glitches (at least) have resulted, for our users, and for those of us working within the system. Systemic reform, with proper investment or user focus, has not been attempted for many years. HMCTS Reform gives us a much-needed opportunity. The former coalition government committed to funding a modernisation programme across courts and tribunals, and the manifesto pledge of the present government is to continue that work.

No one reading this will be surprised to see the emerging focus on three key, but very broad-based and interlinked areas: IT, estates and working practices.

- *On IT*, we have to be alive to the fact that some people in desperate need for our services cannot engage with us online. But the majority – probably the vast majority – can. And what's more, they want and expect to be able to. A system that is digital by design and default is overdue. (And yes, that recognition comes from the Senior President of Tribunals who has no computer on his desk. If I can see the need for change here, it must be overdue).

- *On estates*, we need a radical review to accommodate what our users really need. Buildings are expensive. If they are needed and used, then cost can be justifiable. Yet, we consistently see hearing room utilisation rates at very low levels. Those who pay fees (and, beyond fees, taxes) deserve our every effort to reduce estates overheads to sustainable and efficient levels. Again, this does not mean cutting for the sake of cutting. But it does mean striving for value based on a strategy of estates utilisation fitting in the modern age.

- *On processes and working practices*, we must remember that our canvas is not blank. As I said recently in my final annual report (see page 4), the courts have much to learn from tribunals, many of which have moved (or are moving) towards back office and hearing centre arrangements; more informal and inquisitorial processes; and various sensible delegations to get the most value out of judges and panel members. In turn, tribunals will have much to learn from the procedures adopted by ombudsmen, many of whom have explored even further how to exploit proportionality, efficiency and effectiveness. We owe it to our users to challenge the received wisdom passed on from generation to generation of judicial office-holders. Do users (or at least all users) actually *want* a 'day in court' (given the stresses and strains such an event will naturally tend to generate)? And even if they do, do they know sufficiently well what alternatives there could be, and what benefits they might bring? How can alternative (including online) dispute resolution step in? How could technology (including video conferencing) assist? What further judicial work might properly be delegated, under our supervision and oversight, to help reduce costs and increase timeliness performance? Lots of questions; but well worth asking them.

. . . tribunals will have much to learn from the procedures adopted by ombudsmen, many of whom have explored even further how to exploit proportionality, efficiency and effectiveness.

I can appreciate that many reading this will be sceptical – or even, dare I say it, cynical – about the extent to which we can deliver a brave new world. Experience of reform in recent times has not been universally smooth or positive. It would be pointless to try to suggest otherwise. But it would be wrong to allow cynicism to derail the

opportunity which investment now promises. One thing is abundantly clear to me: HMCTS Reform will not deliver what is required unless judicial office-holders 'buy in' to the process. As a cadre we need to be open-minded about reform's potential. And we need to shape that potential so that we end up with tangible and beneficial results, developed and deployed sensibly.

Judges' involvement

My fourth and final point is straightforward. Reform must be intended to deliver benefits for users. But judicial office-holders stand to benefit too. It is impossible to seek the detailed input of each and every judicial office-holder on matters of intricate design detail. But as the comprehensive and clear governance arrangements on the HMCTS Reform section of the judicial intranet record, judges at all levels are involved in all aspects of the HMCTS Reform design and implementation work. Never before have judges been involved in so much, so early on, so eagerly by our partners in HMCTS.

Because of that, and due to the investment now being applied, the reform agenda should succeed. In parallel, the flexible assignment and deployment mechanisms being developed – within the tribunals system under my own policy statement, and across the piece under the new Crime and Courts Act 2013 provisions – will mean significant further opportunities for those pursuing judicial careers.

Now is an exciting time to be sitting within the tribunals judiciary. I might myself be approaching the final stop of my judicial career path train. But it's full steam ahead for colleagues. And it is on the subject of colleagues that I wish to end. I have already described my time as Senior President as being both a privilege and a pleasure. Beyond all else, it is the people who have made it so. To those on TJEB, past and present, and to the judges, members and staff up and down the land who service the needs of our users with so much pride and professionalism, I say thank you – thank you and good luck.

Structures 'fit for purpose'

Craig Robb **summarises an authoritative account of the 'State of the (Tribunals) Nation' – Sir Jeremy Sullivans's final annual report as Senior President of Tribunals.**

The unified tribunals structure is probably not yet old enough to have traditions. But if it were, the structure and worth of the Senior President's annual reports would likely now be among them. In his final report (see here) before retiring from the judiciary in September, Lord Justice Sullivan, together with his Chamber and Tribunal Presidents, provides the authoritative 'State of the (Tribunals) Nation' account.

Over 110 pages, the report includes Sir Jeremy's own thoughts on his time as Senior President, as well as on what the future may hold; updates from Chamber and Tribunal Presidents on the status of their respective jurisdictions, and on the year just gone; and position statements on cross-border (Welsh, Scottish and Northern Irish) issues as well as on discrete areas overseen by the various judicial committees, working groups and organisations within the tribunals structure.

The headlines

Introducing the report, Sir Jeremy looks forward to the spectre of change (including HMCTS Reform and Devolution), but leads with a firm message: the judicial structures across tribunals as they stand today are 'fit for purpose'. The meaning is clear, and has to do with babies and bathwater. The Chamber and Pillar framework is described as one of critical importance, both because it helps to assure appropriate judicial

expertise in respective jurisdictions as well as provide the mechanism to marshal resource and communicate effectively – up and down the judicial chain of command – in order to link effectually to HMCTS, with which the tribunals judiciary must operate in partnership to serve the interests of users. Of course, these are points that Sir Jeremy has pressed ever since becoming Senior President in 2012. But the report covers much more ground than this.

For anyone wanting to grasp 'the bigger picture' – be they an aspiring/incoming Senior President or otherwise – the report's commentary on workload trends and key issues across chambers and pillars makes for useful reading. It is now almost trite to say that tribunals' workloads are influenced significantly by factors beyond their control – ranging from policy initiatives from the government of the day, to the prevailing conditions of the nation's economy. Reading the summaries from Sir Jeremy and respective Presidents, this received wisdom is translated and applied in a very tangible way. And even though the report is now a few months old, that does little to detract from the general points made (so long as any references to data in the report are read with appropriate caveats now).

The executive summary might go something like this: overall, the live caseload before tribunals is at a historic low. Behind that headline is a lot of detail…

Workload volatility

Chapters one, two and three (dealing respectively with the chambers and jurisdictions of the Upper Tribunal, First-tier Tribunal and the Employment 'separate pillar'), summarise, among other things, workload status. The executive summary might go something like this: overall, the live caseload before tribunals is at a historic low. Behind that headline is a lot of detail:

- After a sustained period as the stand-out volume jurisdiction, in the **First-tier Tribunal Social Entitlement Chamber**, social security appeals are now in decline.

  While root causes are complex, essentially (as a direct result of ministerial decisions) the number of assessments as to entitlement to benefits has diminished. Accordingly, the number of appeals against decisions has reduced. At the same time, there is likely to be a direct impact flowing from the new Mandatory Reconsideration process, through which the Department for Work and Pensions (DWP) is required to review its decisions in-house, before the tribunal's jurisdiction can be engaged. So too is there likely to be a link to the Summary Reasons scheme, whereby tribunals provide direct and specific feedback to DWP on each appeal where the benefits decision was overturned. The theory is that such feedback will help DWP to get more decisions 'right first time' (or at least via the Mandatory Reconsideration process). But given the Mandatory Reconsideration and Summary Reasons initiatives are relatively recent, management information to demonstrate conclusively the causes and effects on workload volumes is only just starting to emerge.

  Whatever the causes, the fact is that work has fallen, temporarily or otherwise. As the Chamber President, Judge John Aitken, notes, as and when the forecast future upturn in work materialises, the Chamber will be in a good position to increase capacity to the levels previously achieved: the tribunal is fixing the roof while the sun is shining.

- The **Employment Tribunals** system has also seen a substantial fall in the volume of new cases and appeals being received. Here, the root causes are much more likely to be linked

to MoJ's introduction of fee-charging in July 2013, as well as to the new Early Conciliation scheme established by the Department for Business and run by Acas (the Advisory, Conciliation and Arbitration Service). Again, as with the impact of government policy on social security appeals, conclusive management information is relatively embryonic. But the trend is clear: significantly fewer cases now coming to the tribunal system, and a live caseload that is rapidly diminishing.

- Bucking that downward trend is **Immigration and Asylum** work, at both the First-Tier and Upper Tribunal levels. The effects of taking on the vast majority of immigration and asylum-related judicial review work from the Administrative Court have added substantially to the caseload at Upper Tribunal level. Moreover, the ramifications of the Immigration Act 2014, together with the parasitic suite of procedural rule changes which came into force in October 2014, are also starting to be felt, particularly at First-tier level. Many now may be sitting towards the edges of their seats as the new government's legislative agenda in this area crystallises.

- A jurisdiction also likely to be experiencing an upturn in workload is the **First-tier Tribunal Tax Chamber**. The Treasury's revitalised focus on tax avoidance, and in particular the provisions in the Finance Act 2014 enabling HMRC to serve 'accelerated payment notices' on taxpayers they believe have entered into tax-avoidance schemes (essentially a 'pay now, argue later' measure), are forecast to increase the Tax Chamber's work substantially.

Given workload volatility, the benefits of flexibility when it comes to deploying judicial office-holders is becoming increasingly evident. Judicial capacity in Social Entitlement and Employment to deal with historic highs, built over recent years because of rising workloads, is now the envy of jurisdictions like Immigration and Asylum, given their immediate workload priorities.

In their respective sections of the annual report, both the Senior President and the First-tier Tribunal Immigration and Asylum Chamber President, Judge Michael Clements, flag the expressions-of-interest exercise which saw around 200 judges assigned into the IAC from Social Entitlement and Employment. Sir Jeremy also points to the further flexibility now provided by the Crime and Courts Act 2013 which can see cross-assignment and re-deployment between the courts and tribunals systems.

[The next] report looks certain to be reviewing another year of a great many challenges . . . the mantra of the current Senior President is demonstrably apt: we do live in interesting times.

The future

The seventh annual report will be delivered by Sir Jeremy's successor, the third Senior President of Tribunals, in early 2016. That report looks certain to be reviewing another year of a great many challenges. HMCTS Reform, the Scotland Bill recently introduced with all it entails for reserved tribunals operating in Scotland, and the daily demands of delivering 'business as usual' against the backdrop of ever-changing government policy and other wider contextual factors, will all need to be met head on. In so many ways, the mantra of the current Senior President is demonstrably apt: we do live in interesting times. But through the stewardship of Sir Jeremy and his Presidents, the system is primed and ready to take up the new challenges ahead.

Craig Robb is Private Secretary to the Senior President of Tribunals.

Why lay voices should be heard and seen

Stephen Hardy **surveys current practices on the involvement of non-legal members of tribunals in advocating an enhanced use of such members in the process of drafting judgments.**

According to the latest statistical data from the Senior President of Tribunals' annual report for 2015, non-legal members account for 66% of judicial office-holders in the tribunal constitutional landscape. Without doubt, these valued individuals come with their own expertise and experiential wealth which assists tribunals with their day-to-day business.

However, the Court of Appeal in *Eyitene v Wirral Metropolitan Borough Council* [2014] EWCA Civ 1243 highlights that some tribunal practices do not involve the non-legal members in the process of judgment-writing (at para 4). Arguably, the absence of lay voices in the judgment could be purported to be an error in law, as alleged Eyitene. Most notably, in *Eyitene*, the Employment Judge had included a comment about 'brinkmanship' which the claimant alleged to be evidence of bias. The Employment Tribunal's non-legal members, while party to the substantive decision, had not seen a draft including the offending words which caused offence. But at the Employment Appeal Tribunal (EAT), Judge Richardson robustly defended the process in the first instance appeal (at para 5 of the Court of Appeal judgment):

> 'The practice is for the Employment Judge [in the Employment Tribunal] to consult the [lay] members and agree findings, conclusions and reasons before the judgment and reasons are given. Based on the results of that consultation, the Employment Judge will then give reasons orally or in writing.'

Yet Rimer LJ, granting permission for appeal before the Court of Appeal, raised concern, observing that such practice gave rise to 'arguable concern' (at para 6 of the Court of Appeal judgment). However, in its full judgment the Court of Appeal recognised what the EAT described as 'the practice and arrangements' of the Employment Tribunal as 'standard practice' (at para 11) about the drafting of written reasons. Such 'confirmed practice' is when at the conclusion of the hearing all members of the tribunal have a full discussion. Such discussions culminate in the deliberation of decisions and reasons are agreed. If the matter is 'straightforward' and time permits, the reasons of the tribunal are given orally (*The Partners of Haxby Practice v Collen*[2012] UKEAT 0120_12_2911).

Where the matter is complex and/or the decision is reserved (i.e. later promulgated in writing), the judge drafts the reasons on the basis of the notes taken and the substance agreed, in the discussion with the lay members and the lay members are entitled thereafter to request to see the draft text, but the draft is not routinely circulated to them. Consequently, it is reaffirmed by the Court of Appeal that the detailed expression of the reasons is a matter for the judge only. The exception to this strict practice arises where there is dissenting judgment, when the lay members, in recognition of the differing views, will see the text of the reasons prior to promulgation, as established in *Anglian Home Improvements Ltd v Kelly* [2005] ICR 242 (per Mummery LJ at para 12).

So the key issue for tribunal practice is: whether written reasons represent the reasons of all the members of the tribunal, where lay members have not seen and approved the form in which they are finally promulgated? For tribunals members and users alike – is this practice problematical or pragmatic?

Problematical practices

What emerges from this pertinent question is variant tribunal practices and the vexed question of: how involved lay members should be in the writing of tribunal reasons? Incontrovertibly, all members of the tribunal are involved in the decision-making, but to what extent should they be involved in the actual judgment-drafting? A brief survey of current practices shows where we currently stand:

Criminal Injuries Compensation Authority

Under the 2012 criminal injuries compensation scheme, the CICA applies the SEC Rules 2008 (set out below) and its practice is to give a decision at the hearing and thereafter, upon request of either party, provide detailed reasons in writing. The judicial member (its Chairman) is therefore under a duty to provide these reasons and the customary practice is to provide reasons without consultation with the non-legal members.

Employment Tribunals the EAT

In Employment Tribunals (ET), the non-legal (specialist) members only sit on discrimination cases and in 'complex cases' where they are deemed required or in other cases where the parties have requested them. However, where Employment Judges sit with non-legal members, as governed by Rule 55 in Schedule 1 of the ET (Constitution and Rules of Procedure) Regulations 2013 [SI 2013 No 1237], they, as described and accepted in *Eyitene*, are involved in the decision-making, but unless they request to see the judge's reasons, they are not routinely circulated to members before promulgation. In fact, Rule 62 assigns the sole responsibility for the written reasons to the Employment Judge. Furthermore, Rule 49 grants a second or casting vote to the Employment Judge, where the Employment Judge sits as a two-person panel, in order to ensure majority decisions where possible. The latter is a well-established practice since 2005. In contrast, the customary practice in the EAT is for all members to approve a written decision in draft before it is finally promulgated (at para 13 in *Eyitene*). Yet, such is unwritten practice and one not found in the Employment Appeal Tribunal Rules (as amended) 2013 [SI 2013 No 1693].

Health, Education and Social Care Tribunal

In the HESC Chamber, the tribunal must provide to each party as soon as reasonably practicable after making a decision a decision notice, written reasons and notification of any right of appeal, pursuant to Rule 41 of the Tribunal Procedure (First-tier Tribunal) (HESC) Rules 2008, [SI 2008 No 2699]. The practice being that the judge drafts the reasons on the basis of the decision-making of the whole tribunal, the draft having been sent to the specialist members who are expected to give comments and such input as requested by the judge. Ultimately the HESC judge will decide the final content.

Immigration and Asylum Tribunal

Rule 29 of the Tribunal Procedure (First-tier Tribunal) (IAT) Rules 2014, [SI 2014 No 2604] reinforces the role of the judge-member to provide written reasons, particularly in an asylum appeal, or where requested. For example, where there is a decision relating to deportation and the tribunal consists of a legal member and a non-legal member, the non-legal member will consider the draft decision before it is issued. To that end, the practice of the IAT judiciary is to write up the decision and reasons as soon after the hearing as possible.

Mental Health Tribunal

Established practice within the MHT has historically been that the oral hearing is undertaken and thereafter, the decision is written up. In fact, statutorily, under the Mental Health Act 1983, the role of the 'legal member' (i.e. the judge) is to ensure observance of all legal requirements. To that end, Rule 28 of the Tribunal Procedure (MHRT) Rules 2008, [SI 2008 No 2699], ensures that the legal member

consults with the specialist (usually mental health practitioners) and medical (typically consultants) members prior to writing up the decision. Usually, the decision is written on the day when all of the members are present. However, the decision is typically written after the verbal decision has been given. It is drafted by the judge and the other non-legal members then check and approve or suggest changes. This practice is adopted since often the MHT judge is asked not just to correct typographical errors, but to provide clarification.

Residential Property Tribunal

The First-tier Tribunal (Property Chamber) requires all members of the tribunal to participate in the decision-making process. Yet, Rule 36 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) 2013, [SI 2013 No 1169] reaffirms that the legal member shall provide the written reasons for the tribunal's decision. Typically, the legal member drafts the decision but it is approved by the other specialist, non-legal members (housing and surveyor members) before it is issued. Normally, the RPT hears one case per day, the decision is not issued on the day, and the reasons are usually longer and more detailed.

Social Entitlement Chamber

The First-tier Tribunal (Social Entitlement Chamber) requires the judge, where they have sat with members, upon receipt of a request for a statement of reasons, to consult the file, including the decision notice and record of proceedings, and their notes, where a record of discussion, deliberations and/or reasons were agreed by all members of the tribunal. Rule 34 of the Tribunal Procedures (First-tier Tribunal) (SEC) Rules (as amended) 2008 [SI 2008 No 2685] states that 'the tribunal' shall provide a written statement of reasons on request. Interestingly, the Rule does not expressly specify the judge, although it is always the judge who drafts the statement of reasons, usually without input from the non-legal members.

Upper Tribunal

Rule 40 of the Tribunal Procedure (UT) Rules 2008 [SI 2008 No 2698] provides for decisions to be given orally at a hearing and/or in writing. Where the Upper Tribunal sits as a panel of three judges, all the judges are consulted prior to promulgation. However, where the UT sits with non-legal members, its practice is to empower the judge to provide the reasons based upon the agreed grounds for the decision. The different practice reflects the different position where a three-judge panel sits in a truly appellate capacity to decide points of law, and where a UT judge sits with non-legal members as a first instance appeal tribunal.

Pragmatism prevails

As this survey of the tribunals landscape attests, different practices are not necessarily anomalous if they arise from differences inherent to the particular jurisdictions. Yet, is it appropriate practice, even if it is lawfully justifiable?

In view of the variant practices, it is clear that where tribunals comprise of non-legal members their input into decision-making is crucial. But that does not mean it is necessary for them to contribute to the drafting of the judgment. The statutory rules for each jurisdiction themselves do not expressly state the mechanisms by which the expert/specialist laity are involved in the judgment-writing, save for affirming that the judicial (legal) member has the sole statutory responsibility for providing them.

As clearly reasoned in *Eyitene* (at para 13), it is not necessary for all members of the tribunal to approve a written decision in draft prior to its promulgation, as they were fully involved in the decision and reasons. Thereafter, what is more important is that the reasons as promulgated truly record the tribunal's conclusion with such conclusions representing all of the members of the tribunal. Yet, how can such be assured, when the non-legal members are absent, if not silent, at the final stage?

In terms of practice and procedure, each tribunal appears to have different expectations and/or differing shades of opacity on the need for lay/specialist involvement in the final statement of reasons. More significantly, nowhere is the rationale for such variations explained. What becomes more problematical is the long-standing concern surrounding minority decisions, where the tribunal, sitting as three, deliberate and conclude 2:1. Are such dissenting voices then to provide a 'minority judgment'?

As guided in *Anglian*, Mummery LJ stated:

> '. . . in relation to decisions in which the members of the tribunal are not unanimous. It is the responsibility of the [judge]. . . to write up the decision. In my view, where the members are unable to agree, at the conclusion of the hearing, on what the result of the complaint should be, it is preferable, in general, for the [judge] to reserve the decision so that he can write it up and circulate it to the other members of the tribunal. If, as happened in this case, it is the two lay members who are in the majority and are disagreeing with the [judge], it is preferable to give the two lay members not only an opportunity to see that their views are correctly expressed in the decision document drafted by the [judge], but also an opportunity to reflect on the grounds on which they are disagreeing with the [judge] about the outcome of the hearing.'

Plainly, such advice ensures that the lay members can be fully engaged in the judgment-writing process. For example, in *Smith v Safeway* [2004] IRLR 456, when the lay members of the EAT who were in the majority and Pill LJ in the minority, the judge drafted the whole judgment explaining both majority and minority views.

However, to date no provision exists for separate reasons for majority and minority decisions to be given where the decision is non-unanimous.

As observed by Mullan (*Tribunals* autumn 2009), the 'remarkable variance in the composition of appeal tribunals . . . the background and qualifications of the members ' makes for 'constructive and professional' decision-making, be it by agreement and/or disagreement. While such valuable expertise in composition has been preserved under the Tribunal Courts and Enforcement Act 2007, in both the First-tier and Upper Tribunals, the variant Rules have yet to specify how divergent views are incorporated into judgments and how all members' voices are heard in the final judgment.

. . . the various statutory procedural rules for tribunals remain ambivalent on the need for all members of the tribunal to review and approve the final judgment.

Accordingly, the various statutory procedural rules for tribunals remain ambivalent on the need for all members of the tribunal to review and approve the final judgment. This review of practices of the various jurisdictions within the tribunals landscape reiterates the perennial question: do non-legal members need to see the draft of a reserved judgment? Plainly, the Court of Appeal in *Eyitene* vigorously replies in the negative and requires no such need. Nevertheless, the residual management of the long-standing problem of non-unanimous decisions remains to be resolved. Where there is disagreement there can be no doubt that the whole tribunal ought to be engaged in agreeing the final judgment.

The perilous legacy of the provision that the presiding (legal) member has a casting vote, if votes are divided when only two members are sitting, devalues the decision-making of that outvoted member (maybe for good reason), yet it remains lamentable that the judgment might not reflect this. However, the Court of Appeal in *Eyitene* reminds all tribunal judges

that they are duty bound to draft reasons which satisfy the requirement that they truly record the conclusions of all members of the tribunal. Therefore, as Underhill LJ guides in *Eyitene* '. . . it is entirely legitimate for the (lay) members to leave the detailed expression of the reasons to the judge' (at para 14).

Such a judicial responsibility is reinforced in the requirement across all tribunals that the judge is singularly required to sign the reasons for authentication. Yet, to that end, the reasons as promulgated remain those of the tribunal, as a whole. Such clarity though fails to expressly address the situation of the dissenting/minority view, save for such dissent or minority view, even disagreement, be specifically disclosed and addressed in the reasons. Further, in such exceptional circumstances, the 'healthy practice' to be adopted ought to be that all the tribunal members peruse the draft reasons before promulgation.

Ultimately, it is particularly important that tribunal judges do whatever is necessary having regard to the Rules and practice within their own tribunal, as well as ensure that the non-legal members are fully signed up to the judgment and its substantive rationale – whether or not they see a draft. If reasons are given orally, care will be needed to ensure that at least the substance of the reasons has been approved by the whole tribunal. Consequently, it may be worthwhile for the Tribunal Procedure Committee to examine this issue and provide some welcome guidance for lay members and judges alike. This might include Underhill LJ's remarks about feeling no inhibition about asking to see a draft before promulgation if they wish to do so in a particular case. Even so, the Tribunal Procedure Committee could, alternatively, reaffirm the sole legal responsibility of the judge for the reasons and provide a guiding rationale for excluding the other tribunal members from perusing, commenting, amending and even approving the draft statement of reasons.

One of the key observations of the Court of Appeal in *Eyitene* was in relation to the use of language in judgments:

> '. . . the comment about brinkmanship to which the appellant takes exception was specifically included in the notes agreed in discussion or was part of the passages dictated in the members' presence. But even if there were some doubt about that, the comment was simply an observation in the course of the narrative section of the reasons and had no conceivable bearing on the dispositive reasoning.'

Perhaps Eyitene, above all, is itself a timely reminder of best practice which should pervade the whole tribunals system . . .

While that settled the matter in *Eyitene*, it appears obvious that judges would do well to avoid unnecessarily colourful expressions, which may give rise to offence, especially if these come to mind during the lone writing up rather than in conference with the non-legal members.

Conclusion

Perhaps *Eyitene*, above all, is itself a timely reminder of best practice which should pervade the whole tribunals system: that is, for the judge to consult the non-legal members and agree findings, conclusions and reasons before the judgment and reasons are given. The active participation by all tribunal members will ensure inclusive decision-making in which the judge will then give reasons orally or in writing. In any event, all members of the tribunal ought to be fully involved and responsible for the judgment, which they have reached, whether unanimously or otherwise, in order to ensure that all lay voices are equally heard in the final judgment.

Stephen Hardy sits in the First-tier Tribunal (Social Entitlement Chamber).

Made not born: learning how to lead

Once considered an innate ability, now a set of skills that can be learned. *Kay Evans* explains how the Judicial College supports modern judges in their roles as leaders and managers.

In a climate of constant change and reduced resources, judicial leaders and managers across all jurisdictions face greater challenges than ever before. To support judges in these roles, in June 2013 the Judicial College invited a number of senior judges from across all jurisdictions to attend a Leadership Forum. The purpose of the forum was to agree the skills and attributes required of judges with leadership and management responsibilities, identify the training needs of those judges, and design an outline programme that would enable them to meet those needs and achieve the goals required by the Judicial Executive Board (JEB).

As a basis for these discussions, I provided the forum members with a short history of the development of leadership and management studies.

'Leadership' is a topic that has been the focus of discussion and research for centuries and while academic studies on both leadership and management have multiplied since the 1970s no agreed single definition of either currently exists. However, it is interesting to note that in many respects the skills and attributes that have been identified for an effective leader have changed little over time (see panel below).

The theory

Until the 20th century much of leadership theory was based on a model of military characteristics and a belief that leaders were born, not made. The theoretical frameworks of the 18th and 19th centuries in particular were dominated by the notion of the 'heroic' leader. It was not until the 1950s that Professor John Adair, a renowned British academic in leadership, successfully demonstrated that leadership was a set of skills that could be trained, rather than an exclusively innate ability. His work began the move away from the 'the great man' theory of a charismatic, heroic leader who was born to rule, towards behavioural and situational leadership models.

The 'Contingency' model of leadership[1] was developed in the 1960s and is still the basis of many of the most rigorous models. It argues that while there might be a range of generic leadership skills and abilities, there should also be consideration of the situational variables with which leaders must deal. Further, the 1970s saw the introduction of the 'Servant' model of leadership[2] which emphasised the ethical responsibilities of leaders to their followers.

Moreover, a report in 2013 by the Centre for Creative Leadership on future trends identified

Xenophon (300 BC)

Leaders:

- Inspire others by encouragement.
- Remind people of the higher purpose.
- Are firm, fair and visible.
- Show humanity.

Bass BM and Riggio RE (2006)[3]

Leaders:

- Articulate a vision that is appealing and inspiring.
- Instil pride, gain respect and trust.
- Provide a role model for highly ethical behaviour.
- Provide empathy and support.

the support of more flexible, reflective and sensitive leaders as a priority in leadership development. Without this focus, they argued, leaders would remain incapable of dealing with the complexity of the modern world.

Management as an area of study separate from leadership began to be discussed in the late 19th century. Much of early management theory was reflected in the definition taken from the Latin 'manus', meaning hand. Theory focused initially on the practicalities of managing machinery and other resources, including people. Adair's 'Action-Centred Leadership model',[4] developed during his tenure at Sandhurst Military Academy, helped to raise the perception of management as a skill set and role. Adair argued that not all leaders are necessarily great managers, but the best leaders will possess good management skills.

Defining leadership

There is such a wide range of definitions for both leadership and management that to list them all would be self-defeating, overwhelming and possibly a waste of our time. However, it is interesting to consider some of the definitions and how they relate to judicial leaders.

Leadership is often defined in one of two ways. Either, very simply, 'a leader is someone who has followers' (Drucker 1974).[5] Or, more fully, to include a list of the leader's roles and responsibilities, 'leadership defines the future of an organisation, aligns people with a vision, and inspires others to make that vision happen, despite obstacles' (Kotter 1996).[6]

Definitions of management often follow the same formula. Either, very simply, 'the art of getting things done through people' (Parker-Follett 1926)[7] or, more fully, 'management ensures that organisations run smoothly, keeps things in order, and deals effectively and efficiently with problems as they occur' (Kotter 1996).

There are valuable elements of management not always found in leadership, e.g. administration and managing physical resources. Leadership also contains elements not necessarily found in management, e.g. inspiring others through personal enthusiasm and commitment. Miller *et al* (1996)[8] make the following distinction between leadership and management, reflecting the words of Rear-Admiral Grace Hopper, US Navy (1987):[9]

> 'Management involves using human, equipment and information resources to achieve various objectives. On the other hand, leadership focuses on getting things done through others: *Thus you manage things but you lead people*.'

. . . judicial roles will include both leadership and management in varying proportions – a continuum of leadership and management.

However, for judicial purposes the line between leadership and management is often even more blurred. There will always be differences dependent upon the jurisdiction in which the judge sits, the structure of the jurisdiction, the level of the role and the scope of the judge's responsibilities. The agreement reached by the forum was that judicial roles will include both leadership and management in varying proportions – a continuum of leadership and management. At any one time a judge may carry out their role in different proportions, often moving up and down the continuum as necessary. It is important to remember that judges also have a judicial role on which their leadership and management role is overlaid; they do not have the luxury of a pure leadership and management role.

The conversation among the forum members was aided by the statement on judicial leadership

and management skills, prepared by the Judicial Office HR in collaboration with senior judges. The framework describes the skills which can promote successful judicial leadership and management.

Developing a new approach and programme

The forum identified the following priority areas of development:

- Understanding the organisation.
- Communicating and working with others.
- People management.
- Managing yourself as a leader.

Following the forum, the JEB asked the Judicial College to design a cross-jurisdictional Leadership and Management Development (LMD) programme to address these priorities. The College, in collaboration with senior judicial leaders and with Judicial HR, developed the new programme based on training that had already been successfully delivered to Supreme Court Judges, Family Division Liaison Judges and Designated Family Judges, Resident Judges, Civil High Court Judges and Residential Judges within the Immigration and Asylum Tribunal.

'To have an entire day exploring our leadership roles and responsibilities in the context of the wider environment was fantastic.'

Furthermore, the Judicial College drew on the expertise of others whose leadership and management approach reflects in some ways that of the judiciary. These included bishops of the Church of England, medical consultants and the Army.

Experience of the first programme

The first LMD programme was launched in March 2014 and was specifically designed to be cross-jurisdictional to promote the sharing of experiences and expertise among courts judges, tribunal judges and coroners alike. The programme is designed for all newly appointed judges with leadership and/or management responsibilities and to be relevant to all levels of seniority. Existing judges with leadership and/or management responsibilities (LMJs) are also encouraged to attend any of the modules as appropriate for their learning needs.

The programme consists of three modules, the content of which has been designed with the support and involvement of a cross-jurisdictional working group of senior judges. Each module begins with a face-to-face workshop and is followed by a number of work-based activities linked to the role of judicial leader and manager. There are some important themes that run through all of the modules, including leading and managing change and developing effective relationships.

The workshops are held for between 20 and 30 participants and emphasis is placed on learning from each other and from senior leaders. The activities include input from experienced judicial leaders, including Employment Tribunal President Judge Brian Doyle and Lord Justice Ryder, as well as opportunities for discussion with colleagues and peers. The focus is very much on skills and behaviour, and time is built in for discussion and reflection about how these will be applied in the judges' specific context.

Newly appointed LMJs also have the option to select a leadership mentor from a group of specially trained mentors nominated by Chamber or Pillar Presidents, Presiding Judges and the Chief Coroner. The programme takes up to four months to complete; however, the mentoring element is available for up to 12 months.

The future of the programme

Since the first run in March 2014, the overall response to the LMD programme has been very

positive. Participants have appreciated having the time to explore their leadership roles and responsibilities in conversation with other judges: 'To have an entire day exploring our leadership roles and responsibilities in the context of the wider environment was fantastic.'

In their feedback, many of the participants expressed how much they had gained from the workshops. For example: 'I take the view that you should leave every training course with at least one useful new piece of information or practice for every day that you attend – and I certainly gained that from this course. Thank you.' And: 'It re-affirms the fact that we have a leadership role. Suddenly you realise the job is important and, significantly, it is recognised as such.'

The programme has also received acclaim internationally and was accorded a 'promising practice' by the European Commission's Survey of Judicial Training in 2014, shortly after it was launched. Since then I have been invited to speak at the European Judicial Training Network's Conference on Leadership in July 2015 to update them on the development of the programme.

As a follow-up to the three LMD modules, a new workshop is being developed to provide opportunities for reflection, sharing of leadership and management experiences and further learning, one year on. The first of these events will take place in December 2015.

For those judges who already have experience and expertise in their roles as leaders and managers, as well as those who have completed the programme, the college is currently developing a series of half-day masterclasses on key topics, such as 'Leading and Managing Change' and 'Managing Stress and Developing Resilience'. These masterclasses will be available from the autumn of 2015.

And finally . . .

At its most basic, leadership can be defined as influencing others to achieve the organisation's goals and deliver its vision. Many writers have observed that in order to inspire and motivate people to achieve these goals, the goals themselves need to be viewed as worthwhile or for some greater purpose. Delivering the organisation's goals needs in turn to deliver a benefit to others, the community or to society. Leadership and management in the judiciary will always be deeply challenging and in many respects more complex than other in environments. However, the fundamental worth of judicial goals will always be self-evident to those you lead.

Kay Evans is an Education and Development Adviser, Judicial College.

For judges who are interested in participating in the Leadership and Management Development programme or who would like information about the forthcoming masterclass series, please contact me on *kay.evans@judiciary.gsi.gov.uk*.

[1] Fiedler FE (1964) 'A Theory of Leadership Effectiveness'.
[2] Greenleaf RK (1998) 'The Power of Servant Leadership'.
[3] Bass BM and Riggio RE (2006) 'Transformational Leadership'.
[4] Adair JE (1973) 'Action-Centred Leadership'.
[5] Drucker P (1974) 'Management: Tasks, Responsibilities, Practices'.
[6] Kotter J (1996) 'Leading Change: The 8-Step Process'.
[7] Parker-Follett M (1926) 'The Giving of Orders'.
[8] Miller D, Catt S & Carlson J (1996) 'Fundamentals of Management: A Framework for Excellence'.
[9] Schieber P (1987) 'The Wit and Wisdom of Grace Hopper'.

Threefold benefits of an ONLINE design

Jeremy Cooper **(left) and** ***John Phillips*** **announce a stimulating new course that locates newly appointed judges firmly in the world of digital communication.**

The College is launching a new project designed to instruct every newly appointed judge on a range of interlinked topics. The significance of this course cannot be overstated as it has many of the cutting-edge features of the College's pioneering approach to the delivery of judicial training. In particular the course is:

- Interactive and available only online via the College's Learning Management System.
- Cross-jurisdictional in that it is designed as a series of generic training tools of equal relevance to all judges whatever their jurisdiction or rank.
- Multimedia in design including lectures, video clips of training events, voiceover commentary, interviews, film and access to a wide range of external Internet links.

The benefits of this particular approach to training are threefold. First, it locates the judge firmly in the world of digital communication which is rapidly becoming the primary mode of communication on all College matters apart from face-to-face training events and the Academic Lectures. Secondly, it has the capacity for immediate and regular updating in response to changes and developments in the wider judicial and legal world. Thirdly, the programme can thereafter be delivered to large numbers of judges at no cost to the College – a factor not without significance in these straitened times.

The programme begins with a short video welcome to the new judge from the Lord Chief Justice and the Senior President of Tribunals. The introduction is followed by a series of modules covering a range of areas that will be of importance to new judges whatever the level at which they will be operating.

Social awareness and context

In this module, judges will be able to test their level of knowledge across a wide range of social and economic issues concerning life in Britain today. The format is a series of multiple choice questions. The judge can self-test until they finally get every answer correct! The questions cover issues including poverty, ethnicity, criminology, demography, and it is likely that many will find the questions quite challenging. The self-testing process is anonymous so judges need have no fear that 'big brother' will be monitoring the current state of their knowledge!

Independence and ethics

This module invites the judge to ponder the complex issue of judicial independence from both a constitutional and a personal point of view. The format is a mixture of presentations with voiceover accompanied by an invitation to consider what the judge might do in a number of ethically challenging situations by reference to the Code of Judicial Conduct. The module also introduces the judge to the Bangalore Principles of Judicial Conduct that underpin most conduct codes the world over.

Judging in a European context

This module provides a 45-minute introductory talk by an eminent law professor on the European Union and the various ways in which UK membership of the EU has an impact on a judge's adjudicatory functions. In addition to a clear and scholarly exposition of the relevant European treaties and the pillar structures, the talk provides practical advice on the function of

the European Charter on Fundamental Rights. At the end, judges receive further information on European-based training activities organised by the European Judicial Training Network (of which the College is an active member) in which they might consider participating during their judicial careers. They can also access a free-standing piece of e-learning on how to make a reference to the European Court of Justice.

Human resources support

This module introduces the support services that are available to the new judges through Judicial HR based in the Judicial Office. There is an outline voiceover commentary from the head of Judicial HR on such matters as judicial terms and conditions, pay scales, health support, pensions and welfare, with contact details of the relevant heads of unit in the HR Team.

Public and private security

This module provides useful advice about the security of judges. It is divided into three sections: judges and the media, judges and the social media, and judges' physical security. New judges are asked to consider and give their views on several scenarios. One is about dealing with the press and the misreporting of cases. A second focuses on the risks of using social networking sites. It proceeds on the basis 'if it's online, it's public'. In a third scenario, a judge receives an anonymous letter questioning a decision he has made. In each case the 'right answer' is suggested and new judges are referred to the sources of help and advice available to them.

Judicial College

All new judges become members of the Judicial College and this module provides an overview of it. They hear about the College's ethos and principles, how it works and the training it offers. There is a brief introduction to the Learning Management System, the main way in which the College now communicates with all judicial office-holders and the vehicle for its growing number of e-learning programmes.

Of course, most important of all are the people who work for the College: in short video clips, the Directors of Training, the Executive Director, a Course Tutor, a Course Organiser and an Education and Development Adviser introduce themselves and their role within the College. There is also a short promotional video showcasing one of the College's most successful courses, the cross-jurisdictional Business of Judging.

Communication and authority

This module invites new judges to think about their communication skills and how to maintain their authority in the court or tribunal. Three filmed scenarios are presented, each lasting five minutes or so. The first is an appeal against conviction to the Crown Court, the second a small claim in the county court and the third a tribunal hearing. Judges are invited to use their judicial skills to deal with the problems that unfold before them. Possible answers are suggested, with which they may agree or disagree. There are no real complications of law, so they can try all three, whatever their field of expertise.

In summary, this course provides an exciting and stimulating addition to the range of training tools already used by the College in the process of induction for new judges, and one that we hope will soon be replicated in a number of other areas within the College's developing portfolio.

Although the course is aimed initially at newly appointed judges (whether salaried or fee-paid) we hope to be able to make it available on a voluntary basis to any judge who may be interested in its contents. We are also giving thought to how we might devise a similar course for newly appointed tribunal members.

Jeremy Cooper is the Judicial College's Tribunals Director of Training.
John Phillips is the Judicial College's Director of Training for Courts.

KIRKPATRICK'S LEVEL 4 PLUS BRAINSTORMING

Paula Gray **(left) and** ***Melanie Lewis*** **report on a conference where Snowballs, Moodle tools and 'happy sheets' allowed judges to promote new ideas.**

AN ENTHUSIASTIC GROUP gathered in Daventry, Northamptonshire, to discuss training issues that are fundamental to the ethos and approach of the Judicial College. We were assembled from those judges who regularly train the High Court in its various divisions, the Circuit and District Benches, tribunal judges from a wide range of jurisdictions in the First-tier, in Employment and the Upper Tribunal and coroners. Of real practical assistance was the cohort of magistrates whose experience of training large numbers in a wide discipline proved to be of immense value. The specialist trainers also contributed to great effect, as did the Judicial College staff who brought their specific expertise to bear, and perhaps to curb our wilder excesses.

Our chairman, Lady Justice Rafferty, set out the task in hand in her address and contributed to our initial exercise, based upon the 'Snowball' technique, an aspect of College training which attained a 'best practice' award in a recent evaluation by the European Judicial Training Network. The Snowball concept was to loom large in this conference for rather different reasons.

The conference aim was to set some key tasks for the College. The Snowball technique easily distilled a myriad of ideas from all delegates into a manageable 'top tips' formula. These were to:

- Strengthen the Judicial College 'brand' in the absence of physical premises, for example by creating an online 'home' with walk-in rooms to promote the work of the College.
- Increase the level of cross-College initiatives, sharing of information and ideas through a central coordinated repository of materials.
- Develop a more flexible approach to individual training requirements.

Over lunch we realised that the Snowball technique had diversified somewhat, and was in fact engulfing the car park. We wondered if the College's aim to reduce nights spent on residential conferences to one only would need to be reconsidered due to *force majeure*.

The Snowball technique easily distilled a myriad of ideas from all delegates into a manageable 'top tips' formula.

Social context

Watching the snow fall, our small groups discussed the social context of judging in a number of specific instances, including the problems faced by those subject to domestic violence, social exclusion, learning disability, physical disability, racism, personality disorder, dyslexia, dyspraxia and dementia.

The different judicial jurisdictions represented allowed for discussion of the social context issue from a variety of perspectives. As ever we found that the matters we had in common outweighed any necessary jurisdictional differences in approach, and those differences that were apparent invigorated the debate. The reports back from these groups will inform the way in which this critical issue is incorporated into all judicial training, including e-learning, the extension of which is anticipated – we discovered from our guest speakers that in the right hands it is an impressive and highly adaptable training format.

Jos De Vos, the Acting Deputy Director of the Judicial Training Institute in Belgium, took us through approaches to evaluation as did Kay Evans, a Judicial College Education and Development Adviser. We are all familiar with what were termed 'happy sheets' which we now complete online. They are basically a measure of satisfaction about the training programme and sufficient to satisfy an auditing process. But should we look more deeply? And how might we do it?

We were reminded that the late American training expert Donald Kirkpatrick set out the distinctions between four levels on which to measure training course efficiency: Level 1 (reaction), Level 2 (learning level) – so what did you learn? Level 3 (behaviour level) – how did you use it? And finally, Level 4 (results level) – did behavioural changes result?

'Rapporteurs'

An idea new to many of us was the use of 'rapporteurs', appointed in the Belgium faculty in consultation with the course director. They meet the participants to evaluate the past day through a template assessing each activity on the basis of presentation, relevance and the materials given. This can be a more stringent process than quick online clicks and can result in valuable feedback, especially useful if the course is to be repeated.

Dragomir Yardonov and Dorina Yordonov, from the National Institute of Justice in Bulgaria, shared their experience of e-learning from a start in 2009 when they ran just four programmes to now running 30, but still with four staff and one coordinator. Despite initial reservations about e-learning from trainers and trainees alike, it had been very successful. They had learnt how to cascade their knowledge and help plan courses. As one slide charmingly put it, they had learnt that the 'key to participants' hearts' was attractive content, a user-friendly platform, 'gentle care' to lead participants through the programme and reflective trainers who could amend the content.

Another recurring theme was that e-learning works best where there is a lot of content to be delivered to a large group, or shorter topics on specific objectives such as ethics. To justify the time and cost of preparation, it must be capable of being used on a number of occasions. Participants liked the fact that they could return to topics they found challenging.

'Blended' learning

A further theme was that e-learning is an alternative but not a substitute for face-to-face learning depending on the material to be delivered. Judith Momberg, from the Dutch Studiecentrum Rechtspleging Training, took us through their new Initial Assessment Programme for Judges, which is clearly very challenging and through which candidates must pass to be appointed. It is flexible and can last from one to four years. They use 'blended' learning with time spent on an e-learning module followed by a face-to-face training day.

[In Bulgaria] despite initial reservations about e-learning from trainers and trainees alike, it had been very successful.

Coral Hill, of the University of Law (previously the College of Law), and Dr Mark Butler, of Lancaster University, who also advise the Judicial College, showed us the range of what can now be achieved. For those of us who undertook our legal studies in the pre-Internet era, such familiar topics as statutory interpretation can now be learnt via a starting module with a podcast from the lecturer, answering questions, undertaking research and activities online. This learning was then taken into tutorials where the students work on problem solving, a model that could be transferred to training for judicial office-holders.

Dr Butler, like all the speakers on this topic, emphasised that e-learning offers flexibility but

is not a replacement for face-to-face lectures and small-group seminars which can be used to focus on areas where there is most difficulty. His lecture series on employment law is supported by an online 'Moodle tool' which can include real-time online classroom text chats, questions with responses and chat forums on new topics. The idea of being able to 'meet' in one of these ways to discuss a new burning topic seemed very attractive, not least as the participants can set their own agenda and come out of it with information that will hopefully enable them to move to Kirkpatrick's Level 4 and apply that learning to conduct effective hearings.

Judges Martin Dancey and Greg Sinfield took us through examples of e-learning programmes now running in family law and the Tax Tribunal.

Prejudices, empathies

We were all enthused by a presentation from Emma Bell, an Employment Judge from Scotland, who has devised and was soon to deliver a course concerned with practical communication skills including encouraging greater awareness among judges of their own prejudices, empathies and unconscious biases. We eagerly await the feedback from tutors and delegates as to this exciting initiative, as we do any plans made by the Judicial College in response to the points made and discussed at the conference.

Paula Gray sits in the Upper Tribunal (Administrative Appeals Chamber).
Melanie Lewis sits in the First-tier Tribunal (Health, Education and Social Care Chamber).

The LIES we tell ourselves

Leslie Cuthbert **warns of the hidden effects of prejudice and preference known as 'cognitive dissonance'**

In the spring 2014 issue of *Tribunals*, Lydia Seymour wrote about the dangers posed by a psychological term known as 'confirmation bias'. If you have not already read it, I would recommend doing so as a complementary piece to this article. Confirmation bias is just one of a number of unconscious biases everyone, including decision-makers, regularly fall foul of.

Part of the competencies which the Judicial College expects of all judicial office-holders is to be aware of our own prejudices and preferences and to take steps to ensure that they do not have an excessive impact upon our determinations. However, where we are less assisted is in relation to identifying and coping with the dissonance we feel when we are confronted with discomforting evidence, i.e. evidence which is contrary to the view that our unconscious biases may have led us to reach.

Conflicting information

Cognitive dissonance is the name given by psychologists to the mental stress or discomfort experienced by an individual when they are confronted by new information that conflicts with their existing beliefs, ideas or values.

As human beings we strive for internal consistency. When inconsistency (i.e. dissonance) is experienced, individuals tend to become uncomfortable and they are motivated to attempt to reduce this dissonance. What this means in practical terms is that when someone else puts forward a belief or evidence which causes dissonance in us we are likely either to misperceive what is being said, reject it out of hand or dispute the validity of the information. Alternatively, we may seek support from others who we consider share our beliefs or we may attempt to persuade or intimidate others to agree with our perspective.

Has this happened to you?

Has any of the following situations ever happened to you? You have read or listened to the evidence in the case and you have a preliminary view as to the potential decision you feel should be made. However, one of your fellow tribunal members expresses an entirely different opinion as to their preferred course of action. Have you ever immediately dismissed their view out of hand? Have you alternatively been told by your colleague that your opinion is 'stupid', 'flawed' or 'unsupported by the evidence'? Have they, to your mind, misquoted the evidence or sought to get another tribunal member to side with their perspective? If any of these situations has occurred it may be that cognitive dissonance was at work.

Self-awareness and challenging yourself are key to understanding when and how cognitive dissonance may be affecting your decision-making.

Research[1] has now gone so far as to use fMRI – functional magnetic resonance imaging – to investigate the neural basis of cognitive dissonance in a modified version of what is known as an induced compliance paradigm. While in the scanner, the participants 'argued' with themselves that the uncomfortable MRI environment was in actuality a very pleasant experience and the resulting neurological changes were recorded.

What can you do about minimising cognitive dissonance? Self-awareness and challenging yourself are key to understanding when and how cognitive dissonance may be affecting your

decision-making. For example, if your internal rationalisation for something is 'Well, that's the way I've always done it', challenge yourself as to whether it is right for you to undertake the decision in the same way on this occasion especially when someone suggests an alternative. For example, in the Mental Health Tribunal, members traditionally ask their questions of those attending before the patient's representative asks their questions. However, my preferred approach is for the patient's representative to ask their questions first as a means of focusing the hearing on the disputed issues and to avoid unnecessary duplication of questioning. Some representatives do not accept this approach as a method and immediately request that instead the hearing follow the 'normal' manner.

Therefore avoid immediately rejecting a different opinion to your own. Instead, be aware of your response (irritation, annoyance or whatever) and, rather than demonstrating your frustration, enquire into why another member has formed a different viewpoint. Accordingly, we have to accept that we are not infallible (a shocking prospect I know) and be willing to admit when we are wrong and apologise if needs be.

If this subject has been of interest to you and you would like to find out more you may wish to read the following book, with a wonderful title, where the entire focus is on describing practical examples of cognitive dissonance at work: 'Mistakes were made (but not by me)' by Carol Tavris and Elliot Aronson.

Leslie Cuthbert sits in the First-tier Tribunal (Health, Education and Social Care Chamber)

[1] Van Veen V, Krug MK, Schooler JW, Carter CS (2009). 'Neural activity predicts attitude change in cognitive dissonance' (PDF). Nature Neuroscience 12 (11): 1469–147.

AIMS AND SCOPE

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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