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# Pleasure and privilege

Welcome to the Spring 2016 issue of the *Tribunals* journal. This issue carries the usual mix of articles covering a wide range of topical issues that we hope will be of interest to our readers. We also hope that you find the new format works better with new technology.

On page 25, the Senior President of Tribunals, Sir Ernest Ryder, continues his series of articles discussing the developing agenda for the judicial change and reform programme, which he leads. On page 23, Simon Carr complements this with a summary of the Senior President's Annual Report 2016.

This issue has a special focus on decision-making bodies that are not part of the core HMCTS-run tribunal system. On page 2, David Pearl reviews the work of the Medical Practitioners Tribunal Service. On page 6, Aileen Devanny reviews a pilot scheme covering mediation in Scotland's Homeowners Housing Panel. And on page 9, Judith Lea completes this brief review with a report on the themes and content of the recent Disciplinary Conference.

*'This is the last edition of the Tribunals journal that I will oversee'*

On page 11, an overview of the 2015 Judicial Office Diversity statistics is provided by *Tribunals* journal editor Orla Kilgannon-Avant. Mark Butler, on page 12, follows this with an article examining in greater depth the themes and implications of these figures.

David Bleiman and Stephen Hardy, on page 16, look at the duty of tribunals to make reasonable adjustments, by way of a case note on *Rackham v NHS Professionals Ltd*.

On page 21, Michael Duncan provides an update to his previous *Tribunals* article (Summer 2012) giving more insight into the workings of the Judicial Press Office.

This is the last edition of the *Tribunals* journal that I will oversee as Chairman of the Editorial Board, as I step aside for my successor, Employment Judge Christa Christensen, to take over. It has been a real pleasure and privilege to work with a Board of such energetic, committed and imaginative individuals who have

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made light work of the complex decisions that boards of this nature often have to make, while never failing to apply the most rigorous professional standards.

The *Journal* has been previously blessed with a series of exceptional chairs –Dame Hazel Genn, Godfrey Cole and Kenny Mullan – who have been served by a series of equally exceptional editors in Andrea Dowsett, Mark Dibben, Samantha Livsey and Orla Kilgannon-Avant. But, in my view, the *Journal* has never been stronger or richer than it is now in both the range and the quality of its contributions, and is an exemplar of the high quality of the work that the Judicial College manages to produce at every level of its operation. I look forward to reading future editions of the *Journal*, as it no doubt will continue to go from strength to strength.

**Jeremy Cooper**, Chairman of the Editorial Board
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# A unique regulatory model for doctors

THE MPTS By **David Pearl**

The history of the Medical Practitioners Tribunal Service (MPTS) goes back to recommendations contained in the fifth report of the Shipman Inquiry[1] which was published in December 2004. Dame Janet Smith's recommendation number 51 states that the adjudication of allegations concerning a registered doctor's fitness to practise should be undertaken by a body independent of the General Medical Council (GMC), the statutory regulator for registered doctors. The government of the day took forward Dame Janet's recommendations, and indeed went further, and established the Office of the Health Professions Adjudicator (Health and Social Care Act 2008).

The Office was set up to take over, initially, fitness to practise hearings from the GMC as from April 2011. The coalition government at that time, however, decided that the costs of setting up OHPA were disproportionate to the benefits, and, in consequence, the Office was abolished by the Health and Social Care Act 2012. The government at that time, however, sought proposals from the GMC as to how it would ensure independent adjudication of allegations relating to the fitness to practise of its registrants, and the separation of investigation from adjudication. The response from the GMC was the creation of the MPTS. I was appointed in February 2012 as its first Chair.

The MPTS existed initially as a 'shadow' committee, but, by an amendment to the Medical Act 1983, on 31 December 2015, the MPTS has now become a statutory committee with detailed governance procedures set out in the Order.[2]

The model which has been created for the adjudication of fitness to practise is a unique one in the regulation of healthcare professionals both in the UK and abroad. Although the MPTS is still part of the wider family of the GMC, the management and operational arrangements ensure that there is a very real 'Chinese wall' between the investigation of complaints, and presenting the results of the investigation before a tribunal (a matter for the GMC) and the adjudication decisions, involving findings of fact, decisions on whether there has or has not been impairment on the part of the doctor both in the past and at the time of the hearing, and, if necessary, the appropriate sanction.

The Law Commissions, in their consultation paper on health regulation,[3] had argued strongly that there are substantial benefits to be gained from the separation of investigation and adjudication, not least of which is enhancing public and professional confidence. The Commissions, in their report,[4] stated their view that:

'. . . the establishment of the MPTS is a major step towards achieving separation. Although the service is not fully separate from the GMC, we consider that this reform has introduced a high degree of independence into fitness to practise adjudication.'

## The MPTS today

The MPTS has a dedicated hearing centre in central Manchester, with 16 hearing rooms. It heard 208 new fitness to practise cases in 2012, 229 cases in 2013, 237 cases in 2014, and 239 cases in 2015. It also considers interim orders, where, pending the conclusion of the investigation by the GMC, the GMC believes that the risk to public safety of the doctor continuing in unrestricted practice is too great and accordingly it is necessary to restrict the doctor's registration in some way. The Interim Orders Tribunals heard 784 new interim applications in 2012. The number of interim order applications has fallen over the last few years, and, in 2015, the tribunals heard 522 new applications. The drop in such interim applications is almost certainly because of the approach of the High Court that the test for granting the interim order is a high one. In addition to new cases, the tribunals review most of the interim and the substantive orders prior to their expiry.

All of these statistics must be seen against a total of some 270,000 registrants in the UK, and an average number of complaints over the last four years as approximately 10,000 a year. The average length of the hearings has been reduced in the last four years, although it still remains at around 7.9 days for a new substantive hearing. Most doctors are represented by counsel, although the number of self-represented doctors remains high, running at 15% in 2015 in the case of the substantive hearings, and 10% in 2015 for interim applications. The outcomes of the hearings remain fairly constant, as illustrated by the tables below.

**Outcome of medical practitioner tribunals in 2011–15***

| | 2011 | 2012 | 2013 | 2014 | 2015 |
|---|---|---|---|---|---|
| Erasure | 65 | 55 | 55 | 71 | 72 (30%) |
| Suspension | 93 | 64 | 86 | 86 | 95 (39%) |
| Conditions | 24 | 20 | 32 | 22 | 24 (10%) |
| Undertakings | 1 | 1 | 0 | 3 | 1 (0.5%) |
| Warning | 23 | 12 | 13 | 10 | 6 (2.5%) |
| Impairment – no further action | 2 | 6 | 1 | 4 | 2 (1%) |
| No impairment | 33 | 48 | 38 | 37 | 38 (16%) |
| Voluntary erasure | 1 | 2 | 4 | 4 | 1 (0.5%) |
| Total | **242** | **208** | **229** | **237** | **239** |

**Outcome of interim orders tribunals in 2011–15***

| | 2011 | 2012 | 2013 | 2014 | 2015 |
|---|---|---|---|---|---|
| Suspension | 158 | 207 | 125 | 102 | 49 (9%) |
| Conditions | 236 | 336 | 375 | 350 | 359 (69%) |
| No order made | 95 | 241 | 134 | 119 | 114 (22%) |
| Total | **489** | **784** | **634** | **571** | **522** |

* MPTS took over running of hearings from 11 June 2012

The tribunals sit as a panel of three, at least one of whom must be a medical practitioner with a licence to practise, and one must be a lay member. Traditionally, the tribunals have been assisted by legal assessors who provide advice to the tribunal, but one of the important amendments to the Medical Act 1983 introduced in December 2015 is that the mandatory requirement for legal assessors to be appointed for every hearing has now disappeared. The MPTS has now acquired a 'mixed model'. By paragraph 7(1B) Schedule 4, Medical Act 1983, the MPTS must appoint a person as an assessor to an MPT or an IOT for the purpose of advising the tribunal on questions of law arising in proceedings before them a) if the chair of the tribunal is not a legally qualified person, or b) in any other case where they consider it appropriate to do so.

The MPTS is at present trialling the use of legally qualified chairs, using them for interim orders tribunals, and for substantive review hearings, in particular for reviews on the papers. The MPTS at the present time has a pool of 218 members who sit on the substantive medical practitioner tribunals and 61 members who sit on interim orders tribunals. This is made up of 146 medical members, 113 lay members and 20 legally qualified chairs. In addition, there are some 69 legal assessors who are appointed, under paragraph 7(2) of Schedule 4, Medical Act 1983, for particular proceedings.

### Important changes

Two other changes to the procedures introduced by the 2015 amendments are of substantial importance. First, case management has been given a statutory presence which it had not previously enjoyed, and it is hoped that robust proactive case management will reduce further the length of hearings. Case management decisions will be binding on the parties and indeed, barring changes in the circumstances, binding on the tribunals as well. There is a new power in certain circumstances to make a costs award against a party, either the doctor or the GMC, who has behaved unreasonably in the conduct of the proceedings and, in particular, against a party who has failed to comply with case management directions or failed to comply with the fitness to practise rules.

*Now, as a result of the 2015 reforms, the GMC also has a power to appeal to the High Court . . . if it considers that the decision is not sufficient . . . for the protection of the public.*

Decisions made by a tribunal can be appealed to the High Court by the doctor. Now, as a result of the 2015 reforms, the GMC also has a power to appeal to the High Court under s40A Medical Act 1983 if it considers that the decision is not sufficient (whether as to a finding or a sanction or both) for the protection of the public. The GMC can consider an appeal if it is of the view that the decision of a tribunal has failed to comply with the over-arching objectives in s1B Medical Act 1983, namely a) to protect, promote and maintain the health, safety and well-being of the public; b) to promote and maintain public confidence in the medical profession, and c) to promote and maintain proper professional standards and conduct for members of that profession. Providing the GMC with a right of appeal underlines, of course, the separation of the adjudicatory process from the investigation of any concern about fitness to practise, and emphasises the autonomous status of the MPTS.

An interesting jurisprudence has been established by the High Court and the Court of Appeal on how disciplinary tribunals such as the MPTS should go about their task. The burden of proof remains on the GMC to prove its case on a balance of probabilities. In misconduct and performance cases, the tribunal, having made findings on the facts, must decide whether the misconduct or failure in performance, is sufficiently serious to warrant a finding that this constitutes, at the time of the event in question, impairment on his or her practise. If the answer is in the affirmative, the tribunal must then go on to consider whether the doctor remains impaired at the time of the hearing. The tribunal will have to consider whether the doctor has or has not developed sufficient insight into the issues that brought him or her before the tribunal, and whether he or she has engaged in any remediation, such as undergoing further courses and so on. But if there is a finding of continued impairment, the tribunal then has to consider what sanction to impose.

The MPTS, together with the fitness to practise directorate of the GMC, has produced a Sanctions Guidance (March 2016 edition) which outlines the purpose of sanctions and the factors to be considered. The document provides, in effect, a crucial link between the two key regulatory roles of the GMC: setting standards for the medical profession, and taking action when a doctor's fitness to practise is called into question because he or she has not met those standards.

The fully reasoned decisions taken by the tribunal are communicated to the parties at the conclusion of each stage of the proceedings; namely after the deliberation on the facts, on whether there is impairment, and on the appropriate sanction. Copies of the tribunals' decisions held in public are also available on the MPTS website for 12 months after the end of the hearing. All hearings are in public unless there are health issues or other exceptional reasons for the tribunal to hear evidence in private. All restrictions or requirements placed on doctors (except those relating solely to a doctor's health) are published online on the medical register (see here).

## The future

I anticipate that there is little appetite on the part of the Government to introduce any major reforms in the field of regulation in the health sector during the course of the present Parliament. The Law Commissions' draft Bill[5] which provides the health care regulators with the power to make their own rules, is not likely to be introduced. Any suggestion that the adjudication of fitness to practise be assimilated into the First-tier Tribunal, once mooted by some, is remote speculation. Likewise, appeals are almost certain to remain to the respective High Courts of England and Wales, Scotland and Northern Ireland, and not be transferred to the Upper Tribunal.

*Any suggestion that the adjudication of fitness to practise be assimilated into the First-tier Tribunal, once mooted by some, is remote speculation.*

Much work will continue to be done to reduce the time it takes for a case to be heard (both prior to the hearing and the hearing time itself), through robust case management in particular. Legal assessors will continue to be used, but perhaps primarily in the category of case where they add value, in particular where the doctor is self-represented in lengthy and complex hearings. In many of these hearings, the tribunal needs to adopt a more inquisitorial approach in order to test the evidence produced both by the doctor and the GMC. The presence of an appropriately trained Legal assessor may ensure that these hearings are conducted fairly and justly.

The categories of sanctions may be increased to add warnings (as recommended by Dame Janet in her report) which at present can only be made by a tribunal when it concludes that the doctor's fitness to practise is not impaired. And work must be done, as in all courts and tribunals, on finding ways to reduce the burdens and pressures on self-represented doctors. There will be major work on developing more use of technology, through VDU evidence, and less reliance on paper documentation.

The MPTS will be seeking applicants during 2016 for medical members, legally qualified chairs and legal assessors, and anyone interested in applying is encouraged to visit the website (*www.mpts-uk.org*) for further information.

**David Pearl** is National Chair of the Medical Practitioners Tribunal Service *Back to contents*

[1] 'Safeguarding Patients: Lessons from the past – proposals for the future' (Dame Janet Smith) (2004) Cm 6394.

[2] General Medical Council (Constitution of the Medical Practitioners Tribunal Service) Rules Order of Council 2015 (2015 No 1967).

[3] Joint consultation paper LCCP 202 / SLCDP 153 / NILC 12 (2012).

[4] Law Com 245 / Scot Law Com No 237 / NILC 18 (2014).

[5] Law Com No 345 / Scot Law Com 237 / NILC 18 (2014).

# Mediation for Scottish homeowners

DISPUTE RESOLUTION By **Aileen Devanny**

The Private Rented Housing Panel (PRHP) and the Homeowner Housing Panel (HOHP) are devolved Scottish tribunals set up under statutes passed by the Scottish Parliament. The role of the PRHP is to determine applications made by tenants in the private rented sector complaining that the house which they rent does not meet a minimum standard of repair called the repairing standard. In contrast, the HOHP determines applications made by homeowners complaining that a property factor (i.e. a property manager of shared buildings or land) has not complied with minimum standards of practice with regard to management of property or open spaces in which the homeowner has an interest. The PRHP was the first tribunal to introduce an in-house mediation service as an alternative dispute resolution (ADR) scheme.

This new ADR service has been available since 2007 and there are 30 trained mediators within the panel's judicial membership. However, the take-up of mediation in the PRHP jurisdiction has been disappointing and in some repairing standard complaint cases mediation is inappropriate – for example, where there is to be imminent termination of a tenancy either of choice by the tenant or on receipt of a notice to quit. However, the President recognized that the nature and background of HOHP applications are different to PRHP cases.

*In the HOHP jurisdiction, the parties are in a continuing relationship which is not easily terminated . . .*

## Annual figures

In the HOHP jurisdiction, the parties are in a continuing relationship which is not easily terminated; the cases involve homeowners and property factors in an agency arrangement; and any settlement agreement entered into can be easily monitored for compliance. In addition, the nature of complaints coming to the HOHP jurisdiction suggest that encouraging communication between parties may result in resolution of complaints and an improvement in ongoing relationships which may avoid future applications to the HOHP. This was borne out by the findings in the HOHP annual report for 2014 where a breakdown of the figures shows that 28% of the findings of failure to comply with the statutory Property Factor Code of Conduct relate to communication and consultation issues, and 20% of the findings of failure with the code relate to complaint resolution issues. Therefore, it seemed to the President that mediation may be a useful tool to allow parties to exchange information and views in an informal way and to explore ways of resolving the dispute to their mutual satisfaction without the need for a hearing. As a consequence, a decision was taken in January 2014 to initiate a mediation pilot in the HOHP jurisdiction to test success.

*. . . a breakdown of the figures shows that 28% . . . relate to communication and consultation issues*

The mediation pilot was not restricted to communication complaints and the President, in conjunction with tribunals administration staff, designed a process by which applications could be identified as suitable for mediation. Preparation for this included: a communication strategy to ensure all relevant stakeholders were aware of the mediation pilot, the design of a process flow to handle HOHP mediation cases based on the existing PRHP mediation process, preparing revised written guidance for users of both PRHP and HOHP, preparing guidelines for mediators, and providing training for the PRHP-accredited mediators in different approaches to mediation to expand their skills and allow the mediators more scope to decide the mediation approach best suited to resolving the disputes before PRHP or HOHP.

At the end of the pilot scheme, a decision has been taken to continue to offer mediation where the nature of the application makes it appropriate.

### How do the housing mediation services work?

In both PRHP and HOHP, the application proceeds through a sifting process to identify if it should be rejected on grounds such as the application is frivolous or vexatious. During the sifting process, parties are encouraged to engage in further communication between themselves to try to resolve the dispute. The offer of HOHP mediation is only made after the sifting process is completed and at the point that the case is ready for referral to a committee for determination. Some cases are better suited to mediation than others and the circumstances of the case are considered in deciding if an offer of mediation should be made to the parties.

Where a case is identified as suitable for mediation, it is offered first to the homeowner applicant. If they agree to mediation, it is then offered to the other party who in the HOHP jurisdiction is a property factor. If the property factor agrees to it, the parties sign an agreement to mediate and the mediation is arranged. The HOHP mediation service is free of charge, flexible and confidential. The panel mediators are trained judicial members familiar with the panel jurisdictions who have all undertaken an accredited mediation course. Generally, two mediators deal with each case and the mediators can be lawyers, housing members or surveyors.

*The HOHP mediation service is free of charge, flexible and confidential . . . Generally, two mediators deal with each case and the mediators can be lawyers, housing members or surveyors.*

If mediation is successful, the parties will sign a settlement agreement which ends the panel's involvement in the case, unless either party complains that the agreement has been breached. If no agreement is reached, or a complaint is made by a party that the mediation agreement is not adhered to, the application is then referred to a committee for determination. The committee which deals with the case will not include panel members who acted as mediators in relation to that application.

At the point mediation is offered, parties are provided with a written mediation guide outlining the process and stating the potential benefits of ADR.

### The HOHP mediation pilot scheme

Following on from the introduction of the pilot mediation scheme, in 2014 some 204 HOHP applications were received. Of these, 70 were rejected at the sifting stage and 53 offers of mediation were made in relation to 65 sifted applications.

Consequently, of the 53 offers of mediation made, 16 offers were accepted by the homeowner. The remaining 37 mediation offers (for 48 applications) were declined by the homeowners. However, mediation could not proceed for a group case involving two applications for logistical reasons as the homeowner was abroad. Accordingly, a total of 14 mediations took place each involving a single application.

Of the 14 mediations undertaken, nine written settlement agreements were reached with a further case being resolved without the need for any written agreement, and in two cases, a partial written agreement was reached. In terms of the nine applications, where written settlement agreements were reached, seven agreements were fully complied with and the applications subsequently withdrawn, and the remaining two mediation agreements were not complied with and the applications were referred to a committee for determination. The statistics show that 57% of mediations resulted in resolution of all issues in dispute, with a further 14% resulting in some issues being resolved. Benefits of mediation were therefore recorded in over 70% of cases.

### Progress and benefits

Plainly from the Pilot scheme, the deployment of ADR within these contexts has marked progress and demonstrates that the potential/anticipated benefits of this utilization of judicial mediation are:

- *Cost savings for HOHP.* During 2014 costs savings were made due to the high level of successful mediations and high number of settlement agreements which were complied with removed cases from the committee hearing system. It is difficult to estimate the exact figure of the cost savings as there is no standard cost of a HOHP hearing with enforcement proceedings as the route of each case varies depending on the circumstances, but it is estimated to be around £4400 over the sample caseload.

- *Reductions in casework lifecycle.* HOHP cases are inherently lengthy if a finding is made against the property factor due to the involvement of enforcement action and compliance checks. Of the cases that reached full mediation settlement in 2014, there is no doubt that all of these resulted in a shorter turnaround time than reaching a standard HOHP panel decision. The time scale for arranging a mediation once both parties are in agreement to that process is approximately four weeks and thereafter the time period to final resolution depends on the timescales set by the parties in the settlement agreement. By comparison there are some cases where mediation has not resolved the dispute; this results in an extension of the time to reach a decision through a conventional hearing following the unsuccessful mediation.

- *Improvements in customer satisfaction.* Throughout the pilot HOHP staff sought feedback from both the parties involved in mediation, and also the judicial members acting as mediators. Little written feedback was provided from users with few returning mediation feedback forms. However, property factors and homeowners have broadly given positive oral feedback towards mediation with many giving thanks to the mediators after the sessions.

- *Improvements in the relationship between parties involved in mediation.* The feedback, in combination with cases where full or partial resolution was achieved through mediation suggests it would be fair to say this objective has been achieved. Even in cases where no agreement is reached, mediation helps the parties to have better understanding of the alternative position which is helpful at the committee hearing stage.

- *Quicker dispute resolution.* For those mediations which are successful this is achieved. However, if mediations are unsuccessful it does add a stage to the process which extends the timescale for dispute resolution.

- *Opportunities to inform the wider tribunal service about the benefits of alternate dispute resolution.* The piloting of mediation within HOHP has generated a wider interest outside of the jurisdiction, showcasing it as a successful experiment in alternate dispute resolution.

## Conclusions

While it is perhaps too early to draw any firm conclusions from the statistical data after less than two years of operation, the take-up rate in favour of mediation and those successfully mediated outcomes are encouraging. Of those applications which did go to mediation, the majority resulted in a full or partial agreement. The take-up of mediation by homeowners was at a rate of just under a third of mediation invitations issued. There are signs that some homeowners may be reluctant to engage in mediation for a variety of reasons such as reluctance to agree to confidentiality and a wish for a public hearing, frustrations with the complaint handling procedure or delays.

Ways of improving the take-up rate are being considered by changing the wording of the initial invitation to asking homeowners if they would be willing to attend a meeting to try to resolve the dispute rather than focusing on the term ‘mediation’ which some may have preconceived ideas about.

With the increased jurisdictions coming to a housing tribunal in 2017, the role of ADR is being considered as part of the new case management procedures. Signs are that property factors may also be changing their practices having seen the benefits of improved communication and complaint handling through mediation as there has been a reduction in applications to HOHP in 2015 of 20%.

**Aileen Devanny** is President of the Homeowner Housing Panel Back to contents

# A process under the spotlight

DISCIPLINARY CONFERENCE **By Judith Lea**

The Disciplinary Conference started at the tail end of the last century, the first being held in the Honourable Society of Gray's Inn in February 1999. Since then the conference has been held in London annually in February. The conference is aimed primarily at the professional bodies and those who appear at them and their tribunals, targeting areas where it is believed that discussion would provoke more efficient and effective proceedings, especially as a result of the professionals from different disciplines having a safe environment in which to discuss their experiences.

From day one, the conference has attracted top-class speakers drawn from across the professions. Each has brought another perspective to the disciplinary process. The annual theme has been yet another changing focal point, each giving the opportunity for those involved in disciplinary matters to informally exchange views and experiences with others in different organisations.

## Keynote address

The theme for the 2016 conference was 'The disciplinary process under the spotlight' and included looking at the problems that the tribunal part of the process encounters. The keynote address was by Professor Terence Stephenson, Chair of the General Medical Council. Prof Stephenson referred to their independent tribunal service being the Medical Practitioners Tribunal Service, which is independent of the GMC and was established in 2012. The tribunal is accountable to the GMC Council, reports annually to Parliament, and is headed by Judge David Pearl (see article, page 2).

Tony Child, solicitor advocate from Browne Jacobson LLP, presented his annual update, summarising the important case law on generic matters as follows:

- A decision-maker must not consider material considered relevant without giving the respondent an opportunity to comment.
- Panel members can ask questions in an inquisitorial way but if they engage in over-frequent interventions there is a danger that they usurp the role of counsel.
- Tribunals that proceed in the defendant's absence must do so with 'utmost care and caution'.
- The test for bias is still that as set out in *Porter v Magill* [2002].
- Appointment as a judge is no licence to be gratuitously rude.
- Tribunals should not attempt to obtain evidence through their own research (by consulting the Internet or otherwise).
- Tribunal reasons should be intelligible and adequate but there is no need for them to be elaborate or explain reasons for reasons.
- Never mind the length, feel the quality.
- A tribunal has professional expertise that the High Court lacks.

The next two speakers were concerned with the screening and investigation process. Kirsty MacDonald, from the Institution of Structural Engineers, talked about the updating of processes. The Institution has an optional screening stage which follows the initial investigation of the complaint, when the case papers may be sent to preliminary assessors who are senior members of the Institution and are experienced in the disciplinary processes but are not

members of the professional conduct committee. It is, however, rare for a complaint not to be referred to the professional conduct committee. Jonathan Green, from the General Dental Council, set out the procedures followed by their investigating committees, interim order committees and practice committees.

Aidan Christie QC outlined the procedures involved in the regulation of barristers in England. Since 2007 there has been a Bar Tribunals and Adjudication Service which is conducted in accordance with the Disciplinary Tribunal Regulations and deals with cases of misconduct by barristers. In disciplinary proceedings, it is considered whether there is a realistic prospect of a finding of professional misconduct and whether it is in the public interest to pursue proceedings. Ciaran Rankin, from Deans Court Chambers, outlined the new regulatory regime for barristers.

Marion Smith QC hosted a very interesting interactive session on the roles and interaction of panel chairs and the legal assessor. The points that came out of this were that the legal assessor is generally there to advise on questions of law as to evidence or procedure arising in the proceedings and is often also involved, in the regulatory context, in drafting of decisions. The legal assessor should intervene if it is possible that a mistake of law is being made or if there is irregularity in the proceedings.

### Witnesses' demeanour

There was discussion on demeanour not being a reliable indicator of whether a witness is telling the truth and the necessity of focusing on the issues and the importance of chronology and contemporaneous documents, the witness's motives and the inherent probabilities and improbabilities of the account.

*The fundamental distinction between regulatory sanctions and criminal sanctions [is that] regulatory sanctions are not intended to be punitive.*

There was then a talk by Richard Farrant, lay chairman of the investigation committee of the Institute of Chartered Accountants of England and Wales. Their tribunal has a majority of lay members and has had a lay chairman since 2016. His view was that this was working well but there were challenges in lay members deciding on breaches of rules made by the profession itself.

The last part of the day dealt with sanctions. Timothy Dutton QC, of Fountain Court Chambers, pointed out the fundamental distinction between regulatory sanctions and criminal sanctions (regulatory sanctions are not intended to be punitive). He suggested that any sanctions guidance should be transparent in the way it applied and imposed penalties and should explain the range of options and the criteria including aggravating and mitigating factors. In a regulatory context it should be based on four key principles – maintaining the reputation of the profession, correcting and deterring misconduct, upholding proper standards of conduct in the profession and protecting the public. He referred to the principle of open justice and the public having a right to attend.

### E-trials equipment

The final presentation was a very interesting demonstration from a supplier of equipment for conducting e-trials. This involves having a stenographer and an editor provided by the supplier in court each day and each participant has a laptop, a real-time transcription screen and an evidence display. The transcript comes up in real time with the words being said by the witness contemporaneously appearing on screen. It is possible for the parties to add their own notes which would then appear on their laptop or the laptops of their team. The equipment is also able to access a number of different documents and display them at one time, the transcripts come with synchronised audio, the documentation can be exported and printed out and it is a way of conducting a trial without any paper documentation. It sounds extremely interesting but it is probably also very costly.

I have been attending this conference on a yearly basis since 2001. I find it a very worthwhile experience, not just for the information acquired but also for the opportunity to share good practice and experiences.

**Judith Lea** is Clerk to the Scottish Solicitors' Discipline Tribunal Back to contents

# Office-holders – some emerging trends

JUDICIAL DIVERSITY By **Orla Kilgannon-Avant**

At the end of July 2015, the Judicial Office (JO) published its *2015 Diversity Statistics*.[1] The report is limited to four main characteristics – gender, ethnicity, professional background and payment type.[2] This article comprises a brief summary of the report, with reference to wider judicial office-holder (JOH) statistics within tribunals where appropriate.[3]

Data collection on these areas was started by the JO in 1991. Since December 2011, the Judicial Appointments Commission has shared data on selected candidates (where the individual has consented) with the JO.

Overall, there has been a decline in the number of JOHs since 2014, in both courts and tribunals. The tribunals have a larger overall number of JOHs, although the courts have a larger number of judges. The number of judges recorded in tribunals has seen a smaller drop, with 2,091 in 2014 decreasing to 2,004 in 2015 – whereas in the courts in 2014 a total of 3,694 judges declined to 3,238 in 2015. The largest reduction of JOHs in tribunals has been in 'non-legal tribunal members', whose numbers have decreased from 4,031 to 3,651.

Significantly, 46% of the total number of tribunals JOHs are classified in this report as 'non-legal tribunal members', but there is little information on how data is broken down within this group. Due to the focus of the report, the overview below primarily covers judges within the tribunals (unless otherwise stated). Where a JOH sits in multiple jurisdictions, statistics have been gathered on the JOH's primary appointment.

## Trends

In general terms, this reported statistical data highlights a growing trend over the last four years of an increase in the percentage of female JOHs, both in the courts and tribunals. The JO suggests that this indicates the overall percentage of female judges will increase over time in both areas.[4] A significantly larger percentage of the judges in tribunals are female; 43% of judges in 2015 (45% across all tribunals JOH), which is nearly double the percentage of female judges found in the courts.

*. . . both in the courts and tribunals, the highest percentage of female judges falls in the 'under-40s' range.*

Another emerging trend is that more than half of the judges in courts and tribunals under the age of 50 are female (55%). Further, both in the courts and tribunals, the highest percentage of female judges falls in the 'under-40s' range. Within tribunal jurisdictions, the highest percentage of female JOHs are employed in the First-tier Tribunal (Social Entitlement Chamber), some 51%, with the lowest percentage in the Upper Tribunal (Lands Chamber) (20%). However, between 2014 and 2015 there has been a larger percentage increase of female judges in the courts (2.3%) than in tribunals (0.8%).

Much of the statistical data regarding ethnic origin of the judiciary remains incomplete as the information provided is voluntary.[5] However, the 2015 report does show that 10.2% more of the judges within tribunals declare their ethnicity – an impressive 93.2% – of which 9.5% declare their ethnicity as BME.[6] This rises to 13% when looking at the wider range of tribunals JOHs who have declared their ethnicity as BME. Comparatively, only 83% of the courts judges' ethnicity data is declared, of which 5.9% declare as BME. The percentage of JOHs (in both courts and tribunals) who have declared their ethnicity in 2015 as BME has remained relatively constant over the last four years.

Within professional background, 67% of judges in tribunals identify their background as 'not a barrister'. However, 99% of non-legal tribunals members also fall into this bracket. There is no further detail published by the JO of what

proportion and criteria constitute 'other' backgrounds – as this is a significant proportion of tribunals JOHs, further work would be required for meaningful interpretation of this data.

### Towards greater diversity?

Given these trends reported by the JO, the statistical evidence records that, in 2015, tribunals appear to be more diverse than the courts in the areas of gender, ethnicity, age ranges and professional backgrounds. The report indicates that, compared with the courts, the tribunals service has a higher percentage of female JOHs, a higher percentage of judges declaring their ethnicity as BME, a higher percentage of judges declaring their ethnicity and higher percentage of JOHs declaring their professional background as 'not a barrister'.

In conclusion, however, the information within this report does not make it clear why tribunals appear to attract a more diverse workforce in the mentioned areas. The correlation may be between the number of fee-paid JOHs in tribunals but, as yet, there is little readily available information on the percentage of courts judges who are fee-paid to explore this idea further.

**Orla Kilgannon-Avant** is an Evaluation and Publications Assistant at the Judicial College *Back to contents*

[1] Most of the information for this article is taken directly from the JO Statistics Report 2015.

[2] The JO does not collect data on sexual orientation, religion or belief, and is not in a position to publish data on disability due to existing data being collected *ad hoc*. The JO is working to improve the systematic collection of data on the latter area. Further information on some of these areas can be found, external to the JO, in reports prepared by the *Judicial Appointments Commission*.

[3] Within this article, the term JOH comprises both judges and wider tribunals members. The JO Statistics Report 2015 focuses specifically on data for judges, so further information has been taken from Tables 2.1–2.5 of JO *Diversity Tables*.

[4] Graphs in the 2015 Diversity Statistics Report document the trends from 2011 and 2012 to the present day.

[5] The diversity survey that JO undertook in 2007 collected further ethnicity data from JOHs in post. From May 2009, the JO has collected ethnicity data from all new judicial appointees.

[6] BME stands for 'Black and Minority Ethnic' and the category 'Chinese' is now included within 'Asian or Asian British'.

# Pathways to enhancing appointments

JUDICIAL DIVERSITY By **Mark Butler**

Judicial diversity is an issue that has long been identified as one that needs to be addressed in a number of modern societies, including in the USA, Canada and Australia. For example, there is much media coverage on the US judicial appointments statistics under the Obama administration, which identifies greater diversification in the US judicial system.[1]

There are many arguments in favour of judicial diversification, including the idea that a diverse judiciary has a greater capacity to be sensitive to the needs and experiences of the diverse users of the legal system, that it ensures that selection is made from the widest talent pool available and thus enhances the quality of the system as a whole, and that having a judiciary that is representative of society heightens public confidence in the system. Interestingly, many academics, including Moran,[2] identify that when judicial diversification is considered then:

> '. . . two strands of diversity, gender and ethnicity have dominated these debates. More recently the diversity agenda has been expanding to include disability and faith. One dimension of diversity notable by its absence is sexuality.'

In this respect, the UK's judicial diversity statistics follow the trend but have yet to include disability and faith statistics. To that end, this article will evaluate where the UK judiciary currently finds itself from a diversity perspective, as represented by the Judicial Diversity Statistics 2015, while also analysing the initiatives being introduced that have the intention of enhancing diversification.

## Judicial Diversity Statistics 2015

The 2015 diversity statistics make for some interesting reading, not only from what they do indicate, but also from what they do not, which raises questions concerning whether the statistics could be enriched in order to give a more precise picture on whether there is a trend toward judicial diversification.

Orla Kilgannon-Avant (see above, page 11) recently considered the statistics and reports that an improved situation from a judicial diversity perspective prevails. In particular, it is observed that the participation of females in both tribunals and courts across the previous four years, with a majority (55%) of tribunal judges under the age of 50 being female, has the potential to have a positive impact on female participation in higher judicial offices if suitable career progression comes to fruition. Orla also notes that the percentage of BME judges has remained fairly constant in both the tribunal and court system, there being 9.5% declaring as BME within tribunals, and 5.9% within courts, although the voluntary nature of the declaring is highlighted as a potential limitation on the accuracy of these statistics.

So, putting these findings in context, who are our current judicial office-holders?

### *Courts*

**Table 1: Comparing the court office-holder diversity statistics of 2013/14 with the 2014/15 statistics**

| | Total in post 2013/14–2014/15 | Female 2013/14–2014/15 | BME 2013/14–2014/15 |
|---|---|---|---|
| Heads of Division | 5 → 5 = 0 | 0 → 0 = 0<br>0% → 0% = 0% | 0 → 0 = 0<br>0% → 0% = 0% |
| Lord Justices of Appeal | 38 → 38 = 0 | 7 → 8 = +1<br>18.4% → 21.1% = +2.7% | 0 → 0 = 0<br>0% → 0% = 0% |
| High Court Judges | 106 → 106 = 0 | 19 → 21 = +2<br>17.9% → 19.8% = +1.9% | 3 → 3 = 0<br>3.3% → 3.3% = 0% |
| Judge Advocates, Deputy Judge Advocates | 12 → 12 = 0 | 2 → 2 = 0<br>16.7% → 16.7% = 0% | 0 → 0 = 0<br>0% → 0% = 0% |
| Masters, Registrars, Costs Judges and District Judges (Principal Registry of the Family Division) | 39 → 35 = -4 | 11 → 9 = -2<br>28.2% → 25.7% = - 2.7% | 0 → 0 = 0<br>0% → 0% = 0 |
| Deputy Masters, Deputy Registrars, Deputy Costs Judges and Deputy District Judges (PRFD) | 60 → 55 = -5 | 23 → 22 = -1<br>38.3% → 40% = +1.7% | 2 → 1 = -1<br>6.1% → 3.3% = -2.8% |
| Circuit Judges | 640 → 640 = 0 | 131 → 146 = +15<br>20.5% → 22.8% = +2.3% | 14 → 17 = +3<br>2.4% → 3.0% |
| Recorders | 1126 → 1031 = -95 | 186 → 164 = -22<br>16.5% → 15.9% = -0.6% | 66 → 60 = -6<br>7.5% → 7.5% = 0% |

| | | | |
|---|---|---|---|
| **District Judges (County Courts)** | 438 → 441 = +3 | 122 → 136 = +14<br>27.9% → 30.8% = +2.9% | 29 → 32 = +3<br>7.0% → 7.7% = +0.7% |
| **Deputy District Judges (County Courts)** | 721 → 622 = -99 | 261 → 230 = -31<br>36.2% → 37% = +0.8% | 36 → 32 = -4<br>6.1% → 6.3% = +0.2% |
| **District Judges (Magistrates' Courts)** | 142 → 138 = -4 | 44 → 43 = -1<br>31% → 31.1% = +0.1% | 4 → 5 = +1<br>3.5% → 4.4% = +0.9% |
| **Deputy District Judges (Magistrates' Courts)** | 125 → 115 = -10 | 39 → 36 = -3<br>31.2% → 31.3% = +0.1% | 10 → 9 = -1<br>10.9% → 10.7% = -0.2% |
| **Total** | 3,452 → 3,238 = -214 | 845 → 817 = -28<br>24.5% → 25.2% = +0.7% | 164 → 159 = -5<br>5.8% → 5.9% = +0.1% |

The headline percentage contained within the Judicial Office Statistics Bulletin is that there has been an increase in female judicial office-holders in the courts, rising from 24.5% to 25.2%. However, if one digs further down into the statistics there are other signals of judicial diversification from a gender perspective worth highlighting, including an increase in female judges:

- District Judges (County Courts): +2.9% (+14 persons, despite only a +3 increase).
- Lord Justice of Appeals: +2.7% (+1 person).
- Circuit Judges: +2.3% (+15 persons).

There are also some negative results in relation to gender diversity. In the categories of Masters, Registrars, Costs judges and District judges (Principal Registry of the Family Division) and Recorders there were percentage drops of -2.7% (reduction of 2) -0.6% (reduction of 22) respectively, although these must be measured against the drops in judicial office-holder numbers as a whole.

Similarly, there are some positives and negatives that can be derived from the court statistics relating to BME office-holders. Most notably is the increase in BMEs holding office as a District Judge (Magistrates' Courts), which saw a numerical increase despite a decrease in overall numbers (+1, which equated to 0.9% increase). There was also success in relation to the office of Circuit Judge, where there was a numerical increase (+3) and percentage increase (3%) of BME judges.

The most stark highlights, giving rise to concern, from these statistics is that there remains no female or BME Heads of Division, and only one female judge, but no BMEs, sitting in the Supreme Court. Table 1 also paints a very poor picture in terms of BME representation in the higher courts as a whole, with only three BME judicial office-holders over the first five headings.

These statistics show that there are some successes and that diversification, at least from an office-holder perspective, is improving, but there are still problems at the upper end of the judicial career ladder.

## *Tribunals*

**Table 2: Comparing the tribunal office-holder diversity statistics of 2013/14 with the 2014/15 statistics**

| | Total in post 2013/14–2014/15 | Female 2013/14–2014/15 | BME 2013/14–2014/15 |
|---|---|---|---|
| **First-tier Tribunal** | 4,215 → 3,969 = -246 | 1,873 → 1,795 = -78<br>44.4% → 45.2% = +0.7% | 581 → 537 = -44<br>15.1% → 15.2% = +0.1% |

| | | | |
|---|---|---|---|
| **Upper Tribunal** | 134 → 151 = +17 | 38 → 48 = +10<br>28.4% → 31.8% = +3.4% | 14 → 15 = +1<br>10.9% → 10.4% = -0.5% |
| **Employment Tribunal England and Wales** | 1,498 → 1,200 = -298 | 701 → 624 = -125<br>46.8% → 48.0% = +1.2% | 138 → 119 = -19<br>9.8% → 10.6% = +0.8% |
| **Employment Tribunal Scotland** | 209 → 200 = -9 | 96 → 95 = -1<br>45.9% → 47.5% = +1.6% | 3 → 2 = -1<br>1.6% → 1.1% = -0.5% |
| **Employment Appeal Tribunal** | 28 → 23 = -5 | 9 → 8 = -1<br>32.1% → 34.8% = +2.7% | 4 → 4 = 0<br>14.3% → 17.4% = +3.1% |
| **Total** | 6,084 → 5,543 = -541 | 2,717 → 2,522 = -195<br>44.7% → 45.5% = +0.8% | 740 → 677 = -63<br>13.2% → 13.5% = +0.3% |

Despite the Judicial Office Statistics Bulletin's headline that the percentage of female judges increased in tribunals from 1 April 2014 to 1 April 2015 from 43.0% to 43.8%, the statistics are actually better than this, with there being an increase from 44.7% to 45.5%.

In terms of gender diversity, the tribunal figures are positive. Each of the headings recorded a positive percentage increase, the most notable of which was the increase in the Upper Tribunal, where there was a 3.4% increase.

The percentage of BME judges in tribunals remained fairly static, with one exception, that being in the Employment Appeal Tribunal, which recorded an increase of 3.1%; however, this is due to the number of BME judges remaining static against an overall decrease of five.

When one compares the tribunal statistics with the court statistics there is a marked difference in diversification from a gender and BME perspective, with both gender and BME percentage representation in tribunals being close to double that of the courts, suggesting that the court system as whole lags behind on this front.

### Judicial diversity: which way next?

From the statistical analysis given, judicial diversity appears to be an ongoing priority, with both the Judicial Diversity Taskforce[3] and the Judicial Diversity Forum having been created with a view to enhancing and implementing measures that would further diversify the body of office-holders. Although these bodies have now been amalgamated, the final annual report of the Judicial Diversity Taskforce, published in June 2015, was of interest, primarily for the recommendations that it suggested, including:[4]

- Systematic and consistent monitoring and evaluation of what works and what does not. It is important that initiatives are introduced and maintained for a purpose, otherwise much-needed resources will be wasted on initiatives that do not serve their purpose. This links back to a suggestion made above in relation to a need to be consistent between the tables, but also to ensure that data is collected on leaving the judicial system, as this could potentially identify a blockage in the system.
- Engagement with schools and colleges to ensure that students in under-represented groups are aware of a judicial career. Career aspirations are developed within an individual from an early age. Without such engagement it is easy to appreciate that those from under-represented groups may be dissuaded from such a career, whether this is based on statistical evidence or anecdotal evidence suggested that a career in the judiciary is a closed group.
- Putting in place a supportive system for suitable and talented candidates from under-represented groups. This has great potential to firstly engage with candidates who would not ordinarily consider a judicial career, but also have potential to remove some of the perceived barriers to progression.
- Making judicial posts available through flexible working arrangements. This is an interesting suggestion, and one that appears to have had success in the general workforce. Opening up judicial posts for flexible working arrangements could further remove barriers to participation, and one, that if implemented, has huge potential.

In total, the taskforce produced 53 recommendations. Although the success of the initiatives remain to be tested, and this is likely to be a focus on research in the coming years, by producing such recommendations, and showing a commitment toward implementation, at least shows the driving impetus behind the diversification agenda.

### Concluding thoughts . . . where the pathway ends

There are some positive trends that come out of the 2015 Judicial Diversity Statistics, although there are limitations, especially given that statistics in relation to leaving office as well as appointments (at least on the court side) are not available. The statistics that are available paint a positive picture at least in terms of upward trends in percentage participation by female and BME judges; however, much of this good work is done in the lower courts, with a barrier to progression to the higher courts seemingly existing.

There are a number of initiatives being introduced with a view toward further diversification of the judiciary, which will take time to see whether theirs aims come to fruition in terms of results.

In conclusion, there is potential for the judiciary to continue on this upward trend towards diversification, the concept of diversity used is somewhat limited; it is unclear why the idea of diversification is limited to gender and BMEs, which brings this paper full circle. Furthermore, there is a clear need for expansion of the data collected to identify other characteristics, including those with disabilities and sexual orientation. As this data may identify other barriers that the current data will never identify.

**Mark Butler** is a Lecturer in Law at Lancaster University *Back to contents*

[1] For example, in the USA under the Obama administration it has been highlighted that seven states and 17 district courts now have their first female judges, it is the first time in history that the Supreme Court has had three women sitting, as well as further successes in the appointment of minorities, including African Americans and Hispanics.

[2] Moran LJ, 'Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings' (2006) Sydney Law Review 565.

[3] The taskforce comprised members of the Ministry of Justice, senior members of the judiciary, the Judicial Appointments Commission, the Bar Council, the Law Society and the Chartered Institute of Legal Executives.

[4] Due to the length of this paper it was only possible to highlight a limited number of the recommendations; a full version of the report can be accessed *here*.

# Duty to make reasonable adjustments

PRINCIPLES IN PRACTICE

By **David Bleiman** (left) and **Stephen Hardy**

Are tribunals under a duty to make reasonable adjustments to facilitate the effective participation of disabled persons in proceedings? How should this duty be carried out? What is the correct approach to deciding whether any act or omission by the tribunal amounts to an error of law? These were the key issues considered by the Employment Appeal Tribunal (EAT) in the recent case of *Rackham*.[1]

The EAT's findings and guidance, arising in the context of an Employment Tribunal (ET) which, in this case, was commended for its approach and the adjustments made, appear to be of wider significance. That is because the starting point of the judgment is that an ET, as an organ of the state, as a public body, has an undisputed duty to make reasonable adjustments to accommodate the disabilities of claimants. Plainly, as Langstaff J acutely put it:

> 'We do not think it could sensibly be disputed that a tribunal has a duty as an organ of the state, as a public body, to make reasonable adjustments . . . (para 32 of the judgment in *Rackham*).'

Albeit, as recently highlighted in the Upper Tribunal (in *L'Ol v SSWP* [2016] UKUT, paras 8–10) and recognised in *Rackham*, that judicial proceedings were arguably exempt from s29 of the Equality Act (cf. schedule 3). To that end, tribunals and courts alike ought to tread carefully and consider the nature of the specific circumstances of the case and the nature and procedural rules of the particular tribunal/court, as well as observe the duties embracing the overriding objective.

## Landmark case

Mr Rackham, who has Asperger's syndrome, brought a claim before an ET against NHS Professionals Ltd. There was considerable case management in relation to what adjustments it would be reasonable to make to enable his participation. At the second of three preliminary hearings, a judge thought that there should be an expert medical report, however the parties could, or would, not fund it. Accordingly, the judge thought it proportionate, as a first step, to obtain the claimant's medical records. They were provided. Subsequently, the parties then agreed between themselves what adjustments would be needed for the third preliminary hearing.

At that hearing, as an additional adjustment prompted by the Equal Treatment Bench Book,[2] counsel for the respondent offered a written list of the questions she intended to ask in cross-examination. The claimant then applied to answer the questions in writing, at home, and sought a postponement to obtain an expert report on appropriate adjustments. His application was refused.

The error of law asserted by the claimant before the EAT was that the ET judge had failed to consider that the correct course at the hearing was that the tribunal, having earlier identified the need for an expert medical report, should adjourn and instruct an expert medical report on the way in which the duties arising under Article 13(1) of the United Nations Convention on the Rights of Persons with Disabilities[3] should be satisfied. In circumstances where the claimant, as here, could not afford it, the judge should request that HMCTS pay for the report out of public funds. If the claimant needed reasonable accommodation, what should it be? Without making such enquiry, the tribunal was unsighted and proceedings were conducted unfairly so far as the claimant was concerned.

*Courts and tribunals are exempt from the duty in s29 of the Equality Act 2010 not to discriminate, which is ordinarily imposed on those exercising a public function.*

## An undisputed duty?

Courts and tribunals are exempt from the duty in s29 of the Equality Act 2010 not to discriminate, which is ordinarily imposed on those exercising a public function. There can be no claim under the Equality Act against a tribunal for not having made a reasonable adjustment in order to accommodate a disability. However, a tribunal does have a duty to ensure the effective participation of disabled persons in its proceedings so that failure to do so may be an error of law – as was alleged in this case.

Both parties at the EAT accepted that there was a duty to make reasonable adjustments. The EAT summed up the position as follows:

> '[32] We do not think it could sensibly be disputed that a tribunal has a duty as an organ of the state, as a public body, to make reasonable adjustments to accommodate the disabilities of claimants. Miss Joffe accepts, and indeed submits, that the particular route by which the obligation rests upon the tribunal is unimportant, though it might be one of a number, because there can be no dispute there is such an obligation. It may be, as Mr Horan submits, through the operation of the United Nations Convention by the route he suggests. It may be by operation of the Equal Treatment Directive[4] or it may arise simply as an expression of common-law fairness.
>
> [33] As to the purpose for which the adjustment is made, since it seems to us that what is reasonable has to be seen in context. The Convention, at Article 13(1) and (2) dealing with access to justice, provides:

"1. States parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, states parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff."

[34] That is the right secured for the purpose set out in Article 1:

"The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."

[35] It is well known that those who have disabilities may suffer from social, attitudinal or environmental difficulties. There may be barriers to their achieving the rights to which as human beings they ought to be entitled. We therefore take the purpose of making an adjustment as being to overcome such barriers so far as access to court is concerned, in particular to enable a party to give the full and proper account that they would wish to give to the tribunal, as best they can be helped to give it. We accept that practical guidance as to the way in which the court upon whom the duty to make adjustments for those purposes is placed should achieve this is given by the Equal Treatment Bench Book.'

*'It is well known that those who have disabilities may suffer from social, attitudinal or environmental difficulties.'*

### When is a duty not a duty?

So, having confirmed an undisputed duty to make reasonable adjustments, the question before the EAT was as to the adequacy of the steps the tribunal took either in making such adjustments or in considering whether to seek further information (the expert report) in respect of their making. The question was not whether the EAT would have taken the same steps as did the tribunal, but whether the ET judge had erred in law.

The EAT considered in some depth the alternative approaches as to the test to be applied by an appellate body. But in the end, their approach was a fairly simple one:

'It seems to us we have to ask here whether there was any substantial unfairness to the claimant in the event. We have to consider the whole picture, and we have to consider fairness not in isolation, viewing his case alone, but as one in which there were two parties.'

Overall, the EAT emphasised the importance of giving people with disabilities proper respect for their autonomy as human beings:

'In many cases, if not most, a person suffering from a disability will be the person best able to describe to a court or to others the effects of that disability on them and what might be done in a particular situation to alleviate it. This may not apply, of course, to those who are challenged in such a way that they may lack capacity or perhaps be very close to lacking it.'

In this case, the claimant appeared to have capacity and he having agreed to certain adjustments proposed by the respondent, the judge was entitled to regard his agreement as evidence that those adjustments were appropriate. The Equal Treatment Bench Book had indeed been taken into account. Whereas in many cases a tribunal may have to seek expert evidence, this was a case in which there was already a substantial amount of evidence including that

given by the agreement of the parties themselves and evidence that the claimant had, with similar adjustments, negotiated a hearing before the First-tier Tribunal.

The EAT summarised its reasons for dismissing the appeal as follows:

> '[55] The conclusion that we have reached is that in this particular case, given that there was a considerable amount of evidence, given the central submission of Miss Joffe that the adjustment has to be one that is reasonable, given the balance that it was necessary to make between the parties to ensure fairness to both of them, and accepting that on the material before the tribunal at the time there were ample grounds for concluding that with the adjustments that were being made, and had been offered and accepted the claimant could have the reasonable access to justice and the reasonable opportunity to put his case as he would wish it to be put before the tribunal to which Article 6, the Convention, common-law fairness and the law entitled him. It is on that basis therefore that we do not consider that there has been an error of law in the approach of the judge below.
>
> [56] We would observe in passing that the Employment Tribunal here is to be commended for its proactive approach at an early stage in seeking to know what reasonable adjustments it might make. This is not to say that being proactive immunises a tribunal from later criticisms might not be made of the adjustments eventually adopted, or to the effect that the procedure might not be improved, but it is to recognise that it is exactly the right place from which to start. It is not always easy for a tribunal; there are many different circumstances in which people with different disabilities come before tribunals on very different cases. It is difficult to generalise from one case to another. A considerable respect must be given to the decision of the judge below, who has seen the parties and who is best placed to judge the fairness of what happens provided in a case such as this that he then keeps the matter under review.'

*. . . there are many different circumstances in which people with different disabilities come before tribunals on very different cases.*

### Guidance on fair hearings for all

The EAT offered some guidance for tribunals in future cases. This was done with some caution, in particular because there is already very detailed guidance available in the Equal Treatment Bench Book.

First, every case is different and concerns an individual:

> 'A decision as to what it is reasonable to have to do which is then made by a tribunal must be tailored not to some general idea of what a person with that disability, or it may be disabilities generally, needs but what the individual before the tribunal requires.'

Second, as already noted as a significant factor in this case, the autonomy of the individual is emphasised:

> 'If a person entitled to make a decision affecting the conduct of their case makes that decision, it is not in general for any court to second guess their decision and to make it in a manner which patronises that person. As we have said earlier in this judgment, there may be exceptions to that, though they may be rare. Generally, we would wish to emphasise the very considerable importance of recognising that those who have disabilities are fully entitled to have their voice listened to, whatever it is they may be saying.'

Third, tribunals should consider holding ground rules hearings, which are described in the Equal Treatment Bench Book in relation to criminal cases:

> 'The suggestion in the tribunal context is that there might in an appropriate case be a preliminary consideration of the procedure that the tribunal should adopt in order best to establish the rights of the parties

before it. It may for instance consider the ground rules that it is appropriate to lay down for the hearing and the adjustments that it might be necessary to make. This may not be possible if the question of disability is seriously in dispute between the parties, but where it is not it is very often likely to be of advantage. It should not, however, be seen as a step that once taken is set in stone, since in the way of the world the condition or position of the parties may change, but . . . it provides something of a baseline from which other applications and decisions may be considered. We should add that although the tribunal in this case did not call what it did a preliminary ground rules hearing, it effectively held one.'

Finally, the EAT emphasised how, particularly in the best interests of those who suffer from disabilities, these steps should be taken quickly.

## Concluding thoughts

The EAT in *Rackham* gives a helpful reminder of the duty on all tribunals (and courts) to make reasonable adjustments to facilitate the effective participation of those with disabilities. It emphasises the importance of working out what adjustments are reasonable in relation to the particular circumstances, including listening to what the person with a disability actually has to say and taking into account the need for overall fairness to both parties. Clearly, this will be a highly fact-sensitive exercise in each case. As the EAT noted, the Equal Treatment Bench Book provides practical guidance and adopting such an approach lessens the opportunity to fall into error.

The EAT guidance as regards ground rules hearings is welcome and indeed potentially applicable across all courts and tribunals. However, it should not be taken as a strict requirement in all cases. It should be emphasised that this 'guidance' is carefully worded. *There might in an appropriate case* be a preliminary ground rules hearing. Notably, the tribunal in *Rackham* effectively held such a hearing – it did not matter that it did not call what it did a ground rules hearing.

*. . . consideration may be given to ensuring that alternative mechanisms are in place to consult with the parties, in advance of a hearing, as to what reasonable adjustments should be made.*

Tribunals differ in the nature of cases and the time available to deal with case management issues prior to the substantive hearing. Where a disability is indicated on a tribunal pro forma, the administration may have acted on this information in advance. ETs are familiar with the facility to hold preliminary hearings in which, as in *Rackham*, there is scope to explore what reasonable adjustments a participant requests and what is fair and reasonable to provide. Such a practice is not common across all tribunals and jurisdictions. Though the administrative process which surrounds each tribunal might have identified and already explored the need for reasonable adjustments in advance of the hearing. Nevertheless, consideration may be given to ensuring that alternative mechanisms are in place to consult with the parties, in advance of a hearing, as to what reasonable adjustments should be made. Where, for whatever reason, that has not occurred or been effective, it may be necessary to consider adjourning to ensure as well as to enable a fair hearing.

In conclusion, the most helpful aspect of the EAT's decision in *Rackham* is the simple focus on fairness. There will be no error of law if the adjustments made, and/or the consideration of what adjustments to make, do not result in *any substantial unfairness*. Above all, it is especially heartening to see guidance laid down in a case where the tribunal has been found to have made no error of law and has been commended for its approach.[5]

**David Bleiman** is a member of the Employment Appeal Tribunal
**Stephen Hardy** is a judge in the First-tier Tribunal (Social Entitlement)

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[1] *Rackham v NHS Professionals Ltd* [2015] UKEAT 0110_15_1612.

[2] Equal Treatment Bench Book (2013).

[3] United Nations Convention on the Rights of Persons with Disabilities (2006).

[4] EU Equal Treatment Directive (2006/54).

[5] For discussion of a case in which an ET judge failed to exercise properly her case management powers to adjourn when a claimant, known to be disabled, showed signs of disquiet and said that he was having a psychotic episode, see 'When some help is needed in the kitchen', Mary Stacey, *Tribunals*, Winter 2014. The case concerned is *U v Butler and Wilson Ltd* [2014] UKEAT/0354/13, 2.09.2014.

**e-Diversity Suite**

**The Judicial College has been working on the production of a suite of e-learning materials, to be called the e-Diversity Suite. The suite will provide opportunities for all judicial office-holders to improve their understanding of a range of diversity issues and communicate with a broad range of individuals appearing before them.**

**Module 1, 'Understanding Individuals who are Deaf, Deafened or Hard of Hearing', is now available. Further modules will be added to the suite in due course.**

**To access this first module in the e-Diversity Suite on the LMS, please see here.**

# Insights into help available to judges

JUDICIAL PRESS OFFICE By **Michael Duncan**

You only have to open a newspaper to see that the work of judges in courts and tribunals is of immense interest to the press and the public. Just recently, the press has featured stories about judges ruling on a secret trial, a woman who has won an employment tribunal case against coffee chain Starbucks, an immigration tribunal judgment involving the daughter of Abu Hamza, a story about the country's youngest crown court judge as well as a story about the first transgender High Court Master. This is just a snapshot of the main stories and does not include the dozens, perhaps hundreds, of decisions that are reported every week in local and specialist media.

With the level of interest in judges and their decisions where do the media go to find out information? And equally important, where do judges go when faced with press interest in a case they are dealing with or even in them personally? The answer to both questions is the Judicial Press Office. We are part of the Judicial Office based at the Royal Courts of Justice. The Judicial Office reports to the Lord Chief Justice and Senior President of Tribunals and our purpose is to provide support to all levels of the judiciary.

The Press Office is a small team of three press officers and our primary role is to respond to press queries about judges and the judiciary in general. Our function is also to proactively promote and explain the work of judges to the press, but a significant part of our job is giving advice to judges on dealing with the media.

## What does this mean in practice?

One of our priorities is to ensure that the press accurately report any court decision. This means that when a judgment is given we send a copy of the judgment to the press as soon as we can. In the case of High Court judgments where we know there is significant press interest, we often get judgments sent to us straight after they are handed down which we then publish on our website and e-mail to our lists of reporters. We also publish a link to it on Twitter so that our 30,000-plus followers can see the judgment, often at the same time as the news is breaking on television or radio. Twitter is an important channel for us as many of our followers are lawyers, legal commentators, journalists and other opinion formers.

### Important work

The reason that it is so important to get judgments out to the press quickly is to ensure that they report the judgments accurately. There have been rare occasions when one party in a case has given an interview to the press where no judgment has been published and they have given a partial view. This means they have either criticised the judge unfairly or put words into their mouths. By ensuring the reporters have a copy of the judgment they can see for themselves what the judge has said and report accordingly.

This is also important in criminal cases. You have probably seen news reports when someone, perhaps a victim, has expressed anger at the sentence given to a criminal (usually because it is deemed to be too lenient). Most often the anger has been expressed towards the judge. Again, in criminal cases with significant press interest we will normally contact the trial judge in advance and ask if they can send us written sentencing remarks for publication. As they are at pains to explain the aggravating and mitigating factors and the reason for the sentence given, it helps the press understand what may, on the face of it, appear to be a light sentence.

We do not always know which cases the press are following and sometimes they will come to us some time after judgment has been given. If, however, you are aware of any case that you may be dealing with that seems interesting, unusual or involves a celebrity, that is the kind of case the press may pick up on.

### Helpful assistance

If you know of a case that you will be dealing with that is likely to be of interest to the press, please let us know as soon as possible as it is always helpful to know in advance so we can plan how to support you and get the case covered accurately.

*If you are aware of any case that you may be dealing with that seems interesting, unusual or involves a celebrity, that is the kind of case the press may pick up on.*

This works both ways. We can let you know about press interest in any case you may be dealing with and can handle press enquiries on your behalf. We can also let you know how your high-profile cases are being reported in the press. So again, when you know a decision is coming, let us have a copy which we can use as soon as it is in the public domain.

The other significant role we provide is that of advising judges on the media and dealing with the media on judges' behalf. This includes advice on dealing with interview requests, misreporting of cases, and all other media-related issues. If you have a big trial coming up that you know will be of interest to the press or if you just want some general advice on dealing with the press we are happy to help.

Sometimes a reporter may contact you and try to draw you into a discussion that you feel uncomfortable having. If this happens, you can tell them to speak to us and we will take details and get back to them on your behalf. You should also seek advice from a senior colleague. This is particularly the case should you be approached to do an interview. There is further media guidance for all tribunal judges on the judicial intranet (see here).

### Wise counsel

Journalists sometimes want judges to explain or expand on their judgments and may try to contact you directly. We often get requests by the press to interview judges on whatever happens to be the controversy of the day. We normally decline these requests and say that judges cannot discuss their or any other judges' cases. Nor can they comment on any political matter such as controversial government policy.

You should also be aware that journalists can legitimately use any information already in the public domain. For example, this could be an entry in *Who's Who* or biographical details on an official website. But this also extends to anything on social network sites like Facebook or Twitter. It is for this reason that you should take care with any

personal information you publish on the web. In particular, photographs, personal details and comments you post online can be viewed by anyone, unless you apply the appropriate privacy settings.

While the press may not always write stories that are supportive of the judiciary, our job is to make sure whatever they write is factually correct and does not misreport anything a judge may have said. We are able to ask the press to correct any factual errors in their reporting.

**Michael Duncan** is a Senior Press Officer in the Judicial Press Office *Back to contents*

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# A dramatically changed landscape

SPT'S ANNUAL REPORT By **Simon Carr**

Sir Ernest Ryder published his first annual report as Senior President of Tribunals on 24 February 2016, reflecting on the case for change ahead. The annual report is required under section 43 of the Tribunals Courts and Enforcement Act 2007 (TCEA), and is presented to the Lord Chancellor specifically to cover matters which the Senior President wishes to bring to his attention, as well as any matters the Lord Chancellor has asked the SPT to cover.

The basic structure of the report has remained fairly consistent since the inaugural edition, produced in 2010 by Sir Robert Carnwath (as he then was). Inevitably, styles and substance will vary, as occupants of the office, and the issues they are faced with, change. The processes to plan and deliver the report are, however, becoming very much a routine for the office.
Publication undoubtedly brings a great sigh of relief in the SPT's private office, but also a great deal of pride that a major piece of work on behalf of the Senior President has been delivered. This year's report being Sir Ernest's first as Senior President brings added significance.

## 'State of the Nation' in 2016

Sir Ernest's report this year adopts the structure (and many of the sub-headings) of the Lord Chief Justice's annual report, which was published in January. The SPT summarises his take on the tribunals landscape, covering (non-jurisdiction specific) 'business as usual' issues, and an overview of his vision of 'reform'. In his opening remarks, he notes that less than a decade on from the translation of Leggatt into the TCEA, the tribunals landscape looks dramatically different from the one identified by Sir Andrew in 2001. The Senior President adds that he has been appointed at a time when the case for further reform is compelling – a note that very much puts in context how he sees his five-year fixed term.

Sir Ernest takes this opportunity to share – with the Lord Chancellor but to his wider audience too – his vision of 'one system, one judiciary', and 'quality-assured outcomes'. He also expresses his appreciation of the expertise,

dedication and professionalism of the tribunals judiciary, as well as his keenness to engage with them as the reform journey proceeds (something reflected in his schedule of visits since formally becoming Senior President in September). He notes that the reports of low morale among the judiciary have not been his experience from his visits across the country. Noting that tribunals reform has been a constant for over a decade, his experience has been that there is an enthusiasm for reform with judges involved in innovation and the development of good practice. His view is that every stage of the reform programme requires engagement with the judiciary and the use of judicial expertise.

### Jurisdictional issues

On the jurisdictional contributions, the first three 'annexes' contain the chamber reports. The opportunity afforded to summarise the annual report here means it is almost impossible to do justice to the contributions of all those featured in it. However, a continuing theme from last year's report in the larger jurisdictions (in terms of volume of cases) is the issue of workload volatility.

For example, after a period of declining volumes, the annual report comments on signs of an upturn in the First-tier Tribunal (Social Entitlement Chamber). Chamber President John Aitken reported that the lower levels of new appeal receipts during 2014 and 2015 afforded the opportunity to focus on clearing outstanding and older cases. The reduced workload also had an effect on judicial deployment – with fewer appeals, judges in the Chamber were encouraged to seek assignments and other deployments. During the period covered by the report, judges from the Social Entitlement Chamber were assigned to Immigration and Asylum, War Pension and to the Court of Protection.

*. . . after a period of declining volumes, the annual report comments on signs of an upturn in the First-tier Tribunal (Social Entitlement Chamber).*

In his contribution, Judge Brian Doyle notes that the period of this report covers the 50th anniversary of the Employment Tribunals (ET) as they are now called. The workload in the ET continues to be much reduced compared with earlier years. Judge Doyle notes that while it is widely felt that the reductions in workload is as a result of the introduction of fees for ET claims introduced in July 2013, other factors may have contributed: the introduction of Acas Early Conciliation, changes to substantive employment law, the economic recovery, and the decline in new claims which was happening in any event. Judge Doyle highlights a number of innovations in the ET (England and Wales) aimed at improving performance and achieving timeliness. The tribunal is promoting the concept of timeliness with the aim of ensuring that at least 75% of cases are disposed of within 26 weeks. As experience is gained by judges and administrators in achieving this measure, the tribunal will look to involve parties and practitioners in promoting timeliness – something that demonstrates the importance of the user perspective in the management of tribunals' jurisdictions.

The prevailing fiscal environment across the public sector, with the implications for judicial recruitment, has meant greater use of the SPT's Assignment Policy. The First-tier Tribunal, Immigration and Asylum Chamber, has been at the vanguard of testing the efficacy of larger-scale assignment exercises, with some positive affects. The exercise held by this Chamber was reported last year and in this year's contribution, Judge Michael Clements reports that of the 197 fee-paid judges assigned to the IAC as a result of that exercise, so far 156 have said that they would like to continue sitting when the current two-year assignment comes to an end. Judge Clements takes the opportunity of his contribution to the report to suggest that an increased facility for judges and members to be flexibly 'cross-ticketed' and assigned at relatively short notice could, in the longer term, be an important element of managing workload and performance fluctuations across tribunals in the future.

In his contribution on the Health, Education and Social Care Chamber, the President, Judge Phillip Sycamore, reports that significant procedural changes to the mental health jurisdiction over several years have now bedded in and through a reduction in the number of pre-hearing examinations, along with the introduction of paper reviews

in certain cases, have realised significant savings without adversely affecting the standard of service to user or the quality of judicial decision-making.

### Devolution impact

In his final report last year, Sir Jeremy Sullivan predicted that the issue of devolution was something his successor would need to 'keep a close eye on'. This has indeed proved to be the case and in his report, Sir Ernest acknowledges that the issue of devolution of the reserved tribunals from the UK structure raises a number of complex and sensitive issues affecting both judiciary and users including specialisms, cross-border sittings, status and terms and conditions for judicial office-holders. The issue of devolution is covered in some detail by Judge Shona Simon in her contribution on Scotland in the cross-border issues annex and in her contribution on the ET (Scotland).

Given the importance and sensitivity of devolution, Sir Ernest has created a judicial working group led by Mr Justice Langstaff and Lady Anne Smith to work with officials and both governments on the range of issues arising. As Sir Ernest notes, he expect to be able to report on progress by the time his next report falls due.

### Vision ahead and 'business as usual'

One of the key themes of the reform programme is the provision of improved IT facilities for judiciary, something Sir Ernest acknowledges is long overdue, through the roll-out of laptops, tablets and phones, including to fee-paid judges and members. His vision for the future is that services will be 'Digital by default'. He reflects that in some jurisdictions much of the end-to-end process is already delivered digitally but that there is still much more to de done in developing remote case management, listing and hearing room utilisation. His report on his visit to the Traffic Penalties Tribunal presents an example of how some jurisdictions may develop towards online dispute resolution.

In concluding, Sir Ernest reports that a period of challenge and much change lies ahead. Consistent with the annual reports of his predecessors, he acknowledges – and endorses the remarks of Sir Andrew Leggatt – that tribunals are for users, and not the other way around. To meet the challenge of providing quality-assured justice and to make the most of this opportunity for reform, judges and members must be provided with the best available tools to do their job.

**Simon Carr** is an Assistant Private Secretary in the Senior President's Office *Back to contents*

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# Shaping a vision for the future

By **Sir Ernest Ryder**, Senior President of Tribunals

To none will we sell, to none will we deny, to none will we delay right or justice. There is a beautiful poetry in that tenet of Magna Carta. It is a jealously guarded social more, and the reason that most of us are here doing what we do.

It is cynical to joke that some of our court and tribunal estate – and its supporting technical infrastructure – has the look and feel of something last upgraded in June 1215. My gist is clear, though. As ever, reform in the justice system is about preserving what works, and improving what no longer works so well.

The case for reform is not new. Successive attempts have been made over recent decades. The scale of ambition to provide a service that is fit for our users has remained broadly constant throughout. What was previously absent

was commitment backed by investment and resource. No longer is that commitment absent. Today, quite simply, we have an opportunity too good to miss.

Since becoming Senior President, through a series of speeches, articles, briefings and conversations, I have shared ideas, and listened to feedback. I have developed an agenda for change – an agenda that is now agreed with our Chamber and Tribunal Presidents. We have recently settled it in the form of an outline plan, designed:

- To safeguard our hallmark of specialist and innovative justice.
- To build upon that hallmark, helping those who work inside the system deliver better outcomes for those who rely upon its use.

The agenda should contain few if any surprises. My core themes of 'one system, one judiciary' and 'better quality outcomes' are at its centre. What the outline plan adds is a degree of detail.

For example, where previously there has been talk of a system being digital by default and design, we are now able to set out a vision for an exemplar 'Citizen v State' digital dispute resolution model. We plan to pilot this through the Social Security jurisdiction, testing the concept of an online continuous hearing. There are plans to test and evaluate the use of virtual hearings, using video and digital appeal bundles. Automated listing and scheduling tools will follow and will make life easier for fee-paid office-holders and for our users. By 2020, we plan to have digitally transformed the end-to-end service for all tribunals, so that they are not just fit for today, but for tomorrow and for decades to come.

*Reform is not just about digitising procedures . . . Central to our outline plan are measures to support more flexible deployment, assignment and utilisation of judges and members.*

Reform is not just about digitising produres, however. Central to our outline plan are measures to support more flexible deployment, assignment and utilisation of judges and members. We have already started to pilot the concept of the 'one-stop shop' in property disputes, deploying specialist judges across parallel jurisdictions so that problems can be solved and disputes resolved under a single roof. We have also started to pilot the deployment of tribunals judges into court lists.

On this we plan to build. We have developed a bold scheme for the integration of tribunals hearings into the best of the court and tribunal estate in refurbished buildings with a quality environment and support services. That will permit greater innovation including where appropriate early neutral evaluation. Our outline plan foresees a future salaried judiciary used on a cross-jurisdictional basis, and with opportunities for fee-paid appointment into an office with career progression possibilities.

Over coming weeks, our regular Judicial Bulletin – cascaded to all judicial official-holders across the unified tribunals system – will publish our outline plan. We will welcome feedback on it, and encourage you to discuss the ideas raised inside and across your respective Chambers and tribunals.

Opportunity knocks for us as a judiciary, and for our users. Proving general rules do have exceptions, I for one am happy to be living in interesting times.

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*Tribunals* is published three times a year by the Judicial College, although the views expressed are not necessarily those of the College. Queries to: tel 0113 200 5128, e-mail jcpublications@judiciary.gsi.gov.uk