Last printed issue

JUDICIAL COLLEGE

TRIBUNALS

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Our new Board MEMBERS

In this, our last printed copy of *Tribunals* (see panel below), I am pleased to welcome four new members to our Editorial Board. I would also like to thank Mary Stacey who has retired from the Board after a long and productive period of service, and Ian Anderson who resigned from the Board in December 2014.

The new Board members are:

Stephen Hardy

Stephen has been an academic for over 20 years, lecturing, researching and widely published in commercial, European and employment laws. He was a practising barrister, specialising in employment (particularly trade unions) and public law. Since 2011 he sits as a judge of the Social Entitlement Chamber and was appointed a judicial mentor in 2014.

Adrian V Stokes

Adrian has been member of a Disability Appeal Tribunal (First-tier Tribunal (Social Entitlement)) since their inception. He has been a member of various government committees, including the Social Security Advisory Committee and the Council on Tribunals/Administrative Justice and Tribunals Council. His 'day job' is as an independent IT consultant, specialising in health informatics and computer communication networks. He has written 13 books and more than 150 professional papers.

Andrew Veitch

Andrew is a District Tribunal Judge in the First-tier Tribunal (Social Entitlement Chamber) and is a convener in the Mental Health Tribunal in Scotland. He was a mediator and mediator trainer/assessor with the Scottish community justice organisation Sacro for 10 years and has written information guides for mediators and articles on mediation. Coupled with his mediation work he was a conciliator with the Disability Conciliation Service.

Craig Robb

As private secretary to the Senior President of Tribunals, Craig joined the Editorial Board in summer 2014 replacing Leueen Fox.

Jeremy Cooper, Chairman of the Editorial Board.

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Accessing future issues of *Tribunals*

In future, the journal will be published on the public-facing judiciary website (at *www.judiciary.gov.uk/publications/tribunals-journal*) and the Judicial College Learning Management System (for judicial office-holders only). When new issues are published, an eAlert will be circulated with a summary of the edition and a direct link. If you would like an eAlert, please send your e-mail address to *jcpublications@judiciary.gsi.gov.uk*.

Guiding strength is the ability to ADAPT

Sir Michael Burton **on the changing role of the Central Arbitration Committee.**

The Central Arbitration Committee (CAC) is a tribunal, but funded and sponsored by the Department for Business Innovation and Skills rather than being part of HMCTS. Although it has a portfolio of jurisdictions across the employment relations sphere, its separation from the rest of the judiciary is attributable to historical considerations and its exclusion from the ambit of the Leggatt Report rather than to the specialised nature of its activities.

The CAC traces its roots back to the Industrial Court, established in 1919 as part of an increasing central government interest in employment relations. What became the National Industrial Relations Court was renamed the Industrial Arbitration Board in 1971 and the Central Arbitration Committee in 1976. Its functions were substantially changed in 2000 as a result of the Employment Relations Act 1999.

. . . keeping the law out of collective employment relations has always been an unfulfilled aspiration.

The structure has changed little since 1919. I have been chairman since the inception of the 'new CAC' in 2000. The committee conducts its business by way of 'tribunals' of three people despite the fact that the word tribunal has never featured in its title. I am assisted by deputy chairmen (or 'deputies'), who are either legally qualified or of relevant academic distinction, and by members with experience as representatives of workers or employers. The CAC's jurisdictions seem consciously to avoid using the word 'tribunal', preferring instead terms such as committee or panel, and I am sure this was to put some distance between the CAC and other institutions such as Employment Tribunals and the Employment Appeal Tribunal.

There are two obvious influences as to why the CAC is not part of the mainstream judicial system. The first is to preserve the voluntarist tradition in British collective employment relations. This has its foundation in the tradition that collective agreements are presumed not to be legally binding and that, for the most part, dispute resolution mechanisms are voluntary. The second influence is to allow sufficient flexibility in procedure for disputing parties to seek their own solutions. These propositions are, however, subject to the fact that the CAC does have responsibilities under jurisdictions which require legal determination and must therefore follow many of the principles that would be applicable if it were a court. In addition, keeping the law out of collective employment relations has always been an unfulfilled aspiration. For example, there has been legislation for many years relating to the organisation and conduct of industrial action and one of the CAC's current jurisdictions – trade union recognition – is a legally enforceable process.

'Hybrid'

What we are therefore left with is a body that could be best described as 'hybrid', being part adjudicator and part facilitator. This is underlined by the provision in the operative statute that the CAC is responsible for determining its own procedure. History also has a part to play, in that the CAC and its predecessors have been used as the adjudication body for a wide variety of collective jurisdictions. The CAC is now the nearest thing in this country to a labour court without being the collective equivalent of an Employment Tribunal.

So where are we today? Despite the continued presence of 'arbitration' in its title, the CAC has not conducted a voluntary arbitration since 1989. One reason for this is that the traditional hunting ground for CAC involvement – national-level collective bargaining – has all but disappeared. Another is that for many years Acas has provided arbitration, alongside its conciliation service.

Trade union recognition

The CAC does, however, act as adjudicator for a range of jurisdictions, the highest profile of which is trade union recognition. This is a detailed statute with applications that can take up to six months to complete. A panel is appointed to supervise each application and it is difficult to predict how a case will proceed. At one end of the spectrum, an application may require a series of formal decisions and at the other an application may conclude by way of the parties reaching a voluntary agreement. And there are cases in the middle whereby some issues are decided and some agreed.

Both jurisdictions are something of a departure for the CAC . . .

It is fundamental to the CAC's ethos that it will try to establish whether there is a possibility of an agreement, or perhaps guide the parties towards it, in addition to the fact that in many places in the statute the CAC has an explicit responsibility to follow that course. Needless to say, if formal decisions are necessary, due process has to be followed as there is always the availability of judicial review in the background. Our hearings are structured rather than overly legalistic but, by way of example to distinguish the CAC from courts, we cannot compel the parties to produce documents or to give evidence on oath.

The purpose of the trade union recognition procedure is to weed out those cases where there is insufficient support in the workforce for recognition, but otherwise to lead on to a decision, by ballot if the answer is not otherwise clear, as to whether the trade union should be recognised, and if so, to assist in the formulation of appropriate bargaining procedures. In terms of workload, the second highest category is complaints from trade unions that an employer has failed to disclose information for collective bargaining purposes. This jurisdiction provides a regular, but modest, contribution to the CAC's workload and the nature of the cases indicates that there are occasional problems in even the most constructive and long-standing relationships. Formal decisions here are rarely necessary. Since the legislation was introduced in 1977, more than 85 per cent of the complaints have been settled.

The CAC also has responsibilities under the legislation governing European Works Councils and on information and consultation. Both jurisdictions are something of a departure for the CAC in as much as they involve issues between employees, rather than trade unions and their employer, but the cases are still 'collective' in character. Additionally, the CAC's role is somewhat different in that we do not supervise applications or complaints through a complete process but parachute in and out of cases and leave the parties to continue their own negotiations after we have resolved the disputed issue.

Summary

In summary, from its origins as an arbitration body, the CAC has moved on to focus on adjudication under a wide-ranging but regularly changing raft of jurisdictions, all at the collective end of the employment relations spectrum. It retains the responsibility of deciding issues in accordance with various statutes, for which it has to follow judicial strictures and specific statutory duties, but remains an active facilitator in guiding the parties towards agreements. Perhaps its main strength is its ability to adapt to new challenges.

Sir Michael Burton is Chairman of the Central Arbitration Committee.

WHEN SOME HELP IS NEEDED IN THE KITCHEN

In hearings that require particularly active management, impartiality remains paramount. *Mary Stacey* discusses ways to deal with such situations with the aid of some recent case law.

IN A PERFECT WORLD, judges and tribunal panels can resemble for the most part Trappist monks, speaking only at the end of the case to deliver their judgment. They sit back, listen and enjoy the hearing, heeding the moral of the child with a hoop and a stick – the more you poke it, the less likely it is to stay up. TV's Masterchef judges do not meddle with the sauce on the hob, but watch as two delicious meals are prepared and then decide which is better.

That model, however, presumes that both the parties and the tribunal agree and understand what issues are in dispute, that the parties and/or their representatives know how to present evidence and arguments to the tribunal, and have a grasp of the applicable law and obey the rules of procedure. In an even more ideal world, the judge or tribunal need have little pre-knowledge of the law and can rely on equally well-qualified representatives on both sides to explain the law succinctly and accurately, with copies of any relevant materials – but by now you may think I have strayed into fantasy.

Tribunals have long known that our real world rarely works like that, and to extend the Masterchef analogy, our parties quite often need a bit of help with the cooking and sometimes the chefs get irascible. We are accustomed to litigants in person (LIPs), and watch as the Crown and county courts cope with their increasing numbers as a consequence of legal aid cuts. Such was the concern that, in March 2013, the Master of the Rolls issued practice guidance on LIPs, applicable to courts, and a judicial working group was established, chaired by Mr Justice Hickinbottom, which reported in July 2013.[1]

Where parties – and sometimes their representatives – are at sea in a hearing and a case requires very active management, what can we do while maintaining our independence and impartiality?

Overriding objective

The starting point in any tribunal hearing will be the overriding objective to deal with cases justly and the rules of procedure specific to the tribunal chamber. In every jurisdiction, dealing with cases justly includes, so far as is practicable, ensuring that the parties are on an equal footing, saving expense and ensuring cases are dealt with expeditiously and fairly. In some jurisdictions there are further aspects.

The phrase 'dealing with cases justly' deliberately lacks precision and is the art of judgecraft . . .

The phrase 'dealing with cases justly' deliberately lacks precision and is the art of judgecraft, for which, as set out in the invaluable aid and go-to guide, the Equal Treatment Bench Book (ETBB),[2] there is no prescriptive list – 'it encompasses everything that you will not find in a book on law, evidence and procedure'. It is not a new concept. In 1612, Francis Bacon articulated it:

> 'A judge ought to prepare his way . . . so that when appeareth on either side an high hand, violent prosecution, cunning advantages taken, combination, power, great counsel, then is the virtue of a judge seen, to make inequality equal; that he may plant his judgment as upon an even ground.'[3]

Or in the more contemporary words of the ETBB:

> 'Fair treatment does not mean treating everyone in the same way: it means treating people equally in comparable situations and a litigant in person with little grasp of law and procedure and poor articulacy is not in a comparable situation to a QC.'

Appellate courts have consistently resisted attempts to set out hard-and-fast rules, finding every appeal turns on its facts and context. While identifying that 'the all-important dividing line between, on the one hand, "robust, effective and fair case management" and, on the other, "inappropriate pressure and unfairness" cannot be a sharp one',[4] applying it in practice can be tricky. The important recent case of *Drysdale v Department of Transport (The Maritime and Coastguard Agency)*[5] has provided guidance.

Mr Drysdale had brought employment tribunal proceedings against his employer and was represented by his wife. During the hearing, Mrs Drysdale, with her husband's apparent agreement, asked that the claim be withdrawn. When asked by the tribunal, she confirmed that Mr Drysdale agreed. The tribunal then acted on the request and dismissed the claim. When the respondent then made a costs application, the Drysdales walked out after an acrimonious exchange. They subsequently appealed against the dismissal decision on the issue of whether the tribunal had taken adequate steps to ensure that the claimant had taken a properly considered decision to withdraw the claim.

General principles

Drawing on the ETBB and a review of the leading authorities, the Court of Appeal set out the following general principles which are likely to become the benchmark in future cases:

1 It is desirable for courts generally, and employment tribunals in particular, to provide appropriate assistance to litigants in the formulation and presentation of their case.

2,3 What level of assistance or intervention is 'appropriate' depends upon the circumstances of each particular case including whether the litigant is represented or not; whether any representative is legally qualified; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.

4 The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.

5 How much assistance or intervention is for the judgment of the tribunal hearing the case, and for the tribunal's assessment and 'feel' for what is fair in all the circumstances of the specific case. Rigid obligations or rules of law should be avoided.

6 There is a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/omitted to do, and which amounts to unfair treatment of a litigant.[6]

The Court of Appeal stressed that other than in exceptional cases, it would be both inappropriate and unnecessary for a court or tribunal to ask why a party is withdrawing a claim, but the tribunal does need to be confident that the party understands what he or she is doing. The tribunal had acted with scrupulous fairness and propriety. The tribunal had checked and asked for confirmation that Mr Drysdale wished to withdraw his claim and the Drysdales were clear in their intention and apparently had a good understanding of their action.

The case also makes for fascinating reading for the frank accounts of the participants about what happened at the tribunal hearing. Interestingly, the Court of Appeal makes no comment on the questionable behaviour of the Drysdales. They had secretly recorded both the Employment Tribunal and Employment Appeal tribunal hearings; they refused to sit down in the tribunal; ignored the tribunal's request to listen to what was being said; accused the respondent's counsel of telling lies and then refused to respond to his points. The inference is that such behaviour is to be managed to enable a hearing to proceed rather than take a high-handed approach.

Approach to adjournment

In another recent case, the Employment Appeal Tribunal considered a tribunal's approach to adjournment. In *U v Butler and Wilson*,[7] it was held that an employment judge had failed to exercise properly her case management powers to adjourn to permit a party the opportunity to reflect on what course he wished to pursue. Furthermore, the tribunal had been in error in not explaining to a claimant that he had an option to make a written application for a review, rather than proceed immediately with an oral application. The EAT was at pains to stress that no prescriptive guidance should be given on how to deal with litigants in person – each case is fact-specific and there is ample guidance in the ETBB.

It is the court or tribunal's duty to ensure that litigants have every reasonable opportunity to present their case . . .

However, a number of observations have wider resonance. It was an important factor that the tribunal knew that the claimant was disabled with post-traumatic stress disorder and episodic psychosis, which should have been taken into account when making case management decisions. It is trite law that the right to a fair hearing may require a judge to adjourn a hearing, even without an application from a party. The tribunal judge noticed the claimant's considerable signs of disquiet and he had told the tribunal that he was having a psychotic episode. The EAT held:

> 'Anyone conducting a judicial or quasi-judicial hearing confronted with a person who is plainly unwell would necessarily and obviously adjourn the hearing for a brief time to enable them to recover sufficiently to present their case, or their evidence, if possible during the course of the hearing.'

Furthermore, once the judge had chosen to inform the claimant that he could apply for a review of a decision it was necessary to explain that the application did not need to be made on the spot. By explaining only one, of several, ways in which a review could be applied for she had misled the claimant in respect of his entitlements.[8]

The difference between the two cases is that in *U v Butler and Wilson* the claimant was not participating effectively[9] in his hearing and was not receiving justice. He wanted time to collect his papers from the nearby printing shop and challenge the dismissal of his case in his absence when he arrived late, which could have been reasonably accommodated. He was then given only a partial explanation of what to do next. In *Drysdale,* there had been no such injustice or lack of understanding.

In 1995, the Woolf Report[10] noted:

> 'All too often the litigant in person is regarded as a problem for judges and for the court system rather than a person for whom the system of civil justice exists.'

Depressingly, the Hickinbottom Report needed to make the identical point 18 years later. It is the court or tribunal's duty to ensure that litigants have every reasonable opportunity to present their case, without assisting them with it. It is clear

from *Drysdale* that we have considerable freedom to achieve that objective, provided we keep the principles of equality and justice at the fore.

Sometimes basic case management and communication skills are sufficient: such as explaining the rules and the representative's role and why, for example, a particular line of questioning is not relevant. Lack of confidence and nerves can manifest itself in aggression – if the representative can be reassured of the fairness of the process, difficult behaviour may disappear.

Serious inadequacies

But in other cases the problem can be far more fundamental. In the case of *AD v Conduct and Competence Committee of the Nursing and Midwifery Council (NMC)*,[11] the issue on appeal concerned what, if any, steps the quasi-judicial body of the NMC should have taken to address serious inadequacies in a nurse's representation before her regulatory body. The appellant nurse's lawyer had neither mastered nor understood the NMC's case – which was all based on circumstantial evidence, and had consequently overlooked the potential weaknesses, and had not prepared the defence. He had not identified witnesses, or sought evidence and nor had he considered the disclosed evidence. The lawyer then withdrew four days before the start of the two-week hearing, leaving the nurse to represent herself.

In acknowledgement of the difficulties, AD was permitted to lodge documents at the start of the hearing and the case was adjourned for one day while she did so. The appeal court found those limited steps were inadequate and that competent legal representation was essential if the nurse's defence was to be presented properly. The NMC's decision to strike AD off the roll for serious misconduct and dishonesty was overturned. No competent lawyer could behave in such a manner and the conduct led to identifiable errors in the hearing which rendered the process unfair and the conclusion unsafe.[12] The Court of Session Inner House readily saw the weaknesses in the NMC case and the injustice caused to the nurse, as did an Employment Tribunal when she brought separate proceedings for unfair dismissal. She could not effectively participate because her lawyer had not prepared and did not understand the case, and when she was left to represent herself at the last moment, it was not possible for her to remedy his failings. A real injustice had occurred and the decision was quashed.

In all three cases the acid test was whether the parties, represented or not, had effectively participated in their case and understood what was happening. Tribunals have the power and should assist to level the playing field for the parties where we can. We will generally have the support of the appellate courts who will see that we have done our best to exercise our powers fairly and be reluctant to interfere, leaving tribunals to get on with the spade work.

Mary Stacey is a Circuit Judge, Employment Judge and Deputy Chair of the Central Arbitration Committee.

[1] The Judicial Working Group on Litigants in Person: Report. Available at *www.judiciary.gov.uk*.

[2] Re-issued and updated 2013. Available at *www.judiciary.gov.uk*.

[3] 'The Essays or Counsels, Civil and Moral', Of Judicature, Francis Bacon, Viscount St Albans 1612.

[4] *Gee v Shell UK Ltd* [2002] EWCA Civ 1479.

[5] [2014] EWCA Civ 1083.

[6] Paragraph 49, abridged.

[7] UKEAT/0354/13, 2.09.2014.

[8] Under Employment Tribunal rules of procedure, an application for a review may be made in writing within 14 days of receiving the written decision sought to be reviewed, or orally at the hearing itself.

[9] The ETBB stresses that justice requires effective participation in any legal process – whether as a litigant in person, witness, or representative – based on an understanding of what is going on and what is expected of you.

[10] Lord Woolf, Access to Justice Report, 1995.

[11] [2014]CSIH 90, the Inner House, Court of Session, 4 November 2014.

[12] Applying the test in *R (Aston) v Nursing and Midwifery Council* [2004] EWHC 2368 (Admin).

Europe shows innovation on best practice

Despite budgetary restraints, the training of judges throughout the European Union is in a healthy state, according to a recent study. *Jeremy Cooper* summarises its main findings.

In 2012, the European Commission opened an invitation to tender for a project designed to investigate best practices in the training of judges across the European Union.[1] The proposal originated in the European Parliament. Following a competitive tendering process the European Judicial Training Network was given the contract to carry out the study. I was a member of the team of seven trainers who carried out the study.

Aim of the project

The broad aim of the project was to identify by means of an empirical survey examples of best, good and promising practices in the training of judges across the European Union, thereby promoting a dialogue and further cooperation between judges on issues arising from the project.

The main work was carried out by a group of seven senior experts, overseen by an external EU Commission steering committee composed of members of various European institutions and an internal EJTN steering committee. The experts were appointed by the EJTN steering committee following an 'expressions of interest' exercise. They brought to the project a wide range of experiences including many years of involvement in judicial training and research, the design and delivery of adult education programmes and high-level judicial activity. The working language of the experts' group was English.

The work of the project was time-limited and had to be completed over a 12-month period from inception to delivery. The final report was published in July 2014.

Methodology

The principal methodology adopted by the experts was to draft and circulate a detailed questionnaire inviting all judicial training institutions across the European Union to identify up to 10 examples of training practices they considered to be examples of practices that were best, good or promising and that were also capable of transfer to other national jurisdictions. Thereafter the experts set about providing an analysis of the responses in order to assess the relative merits of each proposal.

The questionnaire

The study questionnaire divided training practices into five topics:

- Training needs' assessment.
- Innovative curricula or training plans.
- Innovative training methodology.
- Training tools to favour the correct application of EU law and international judicial cooperation.
- Assessment of participants' performance in training/effect of the training activities.

The questionnaire was sent to the judicial training institutions of all 28 EU member states, and to three European training institutions, the Academy of European Law, the European Institute of Public Administration and to EJTN itself. A total of 157 separate practices were submitted to the project by 22 separate European judicial training bodies.

The general conclusion of the study was that notwithstanding the severe financial crises and

budgetary restraints currently affecting all the judicial training institutions operating in the European Union judicial training is generally in a healthy state.

Examples widespread

Although there are pockets of the EU where (for whatever reason) no particular examples of best practice were offered, best, good and promising practices are widespread and are almost all capable of transfer, with adaptation across national frontiers to other jurisdictions. And there is a great deal of training innovation across member states. Below are a few examples.

- In Italy and France, when judges first become judges they can spend time in seminars with prison governors, senior police officers, and time in organisations like the national bank and big industries, to help them to understand how society operates at a high level. In France, on a voluntary basis training judges can spend time in a prison.
- A particularly interesting example of the use of role play is jointly undertaken by the German and Turkish judiciary (there is a large Turkish population in Germany), to assist in the understanding of cultural differences and thereby develop a more effective approach to domestic violence cases.
- In Hungary, trainee judges undertake a role play lasting five days, with every trainee judge playing every role in the hearing, from defence to judge to prosecutor, to help them understand every aspect of the courtroom.
- Judges in Portugal are given training on how to improve their voice projection and 'courtroom presence' by spending time with the singers and actors of the Opera House in Lisbon.
- In Spain, trainee judges work with a serving judge on a live case, shadowing the judge, studying the papers, the prosecution documents and so on. While the judge delivers his or her live decision in court, the trainee judge delivers their own decision in the training college in front of fellow trainees after which a seminar is organised involving all the case professionals (including the judge) to dissect the trainee's performance and give feedback.
- In France, family judges are trained in working with children including filmed sessions involving a senior judge and a psychologist on how to ask questions, how to know when the child has had enough etc.
- The Romanian judicial training institute has developed online systems to enable the judiciary to be trained quickly on the implications of new pieces of legislation. In particular they have invested in a sophisticated e-learning network as part of a holistic approach to training in new legislation which includes sending out written materials via the intranets, followed by lectures streamed live over the web and closed intranet discussions.
- Bulgaria's investment in a range of forms of e-learning was prompted by the country's inaccessible terrain, and by limited resources, but has proved popular in its own right – 20 per cent of judicial training in Bulgaria is now delivered exclusively by e-learning.
- In France, senior judges with leadership and management responsibilities follow a series of training modules covering budget management, personnel work, change management, and cooperation with other public bodies.

Conclusions and recommendations

Mixed professional training

The study concluded that most of the best contemporary judicial training practices are eclectic in the range of professional inputs they include in their training delivery. This reinforces the fact that judging does not take place in a vacuum within the ivory towers of the court or hearing room. The best judicial training systems are run by judges who understand the economic, social and moral complexities of the world in

which their adjudications take place. The best training practices provide judges with the oxygen of engagement with the wider society through trainers, placements and so forth, in order to fuel this understanding.

The study therefore recommended that judicial training programmes should include sufficient opportunities for common activities to take place between judges and prosecutors and a range of other professionals, both as trainers and participants. At the same time it was accepted that training of judges, prosecutors and lawyers together may be controversial in some countries in relation to some topics.

Active participation of trainees

The study was clear that the most effective training is that which engages the participants directly in the process. The best training is interactive. Judges generally learn best by doing. The report highlighted a wide range of inspiring and creative methods that have been devised and constantly refreshed by resourceful training design and delivery, including face-to-face and distance-learning techniques. Judicial training is increasingly oriented to the practicalities of judging by the use of case studies, mock trials and simulations as a central part of training activities. But there is also an increasing focus on personalised training and learning by doing, including the use of video to film the performance of judges and prosecutors and to provide feedback.

In light of this conclusion, the study recommended that judicial training programmes should ensure the active participation of judges and prosecutors in the bulk of their training activities. It also stressed that the environment in which participative training for judges and prosecutors takes place should be made sufficiently safe and secure to enable participants to exchange views and experiences through free expression and to learn from one another, without external monitoring or interference.

Importance of judicial skills training

The emergence across Europe of a greater interest in training in judicial skills and judgecraft (as compared to substantive laws and procedures) is significant and likely to become of greater importance in the coming years. This area of training is particularly well suited to crossing national boundaries.

The study therefore recommended that in recognition of the developing importance of this topic the European Commission should support transnational training in judicial skills and judgecraft as much as possible in line with its competences.[2]

Mixed media training

The study found that the use of multi-faceted training methods that seek to integrate a wide variety of training tools into one programme is on the increase, and concluded that this mixed methodology provides the best long-term framework for training judges in the modern world. In the multi-faceted approach, electronic media and information technology play an important role. The Internet, the 'Moodle' learning management platform and e-learning are used in a number of best, good and promising practices. These tools seem to be particularly effective in transnational training activities. By the use of these tools, it is possible rapidly to tap into a wide range of sources that also provide a cost-effective way of organising and using cross-border contacts to disseminate and provide access to materials and information.

The study therefore recommended that judicial training institutions should prioritise the optimum use of new technologies, taking particular note of the best practice examples that emerge from the study. They also urged judicial training institutions to take maximum advantage of the opportunities for cross-border collaboration in the development of these new methodologies.

Needs assessment and post-training evaluation

The study identified the need for a closer interrelationship between the assessment of training needs and the evaluation of training activities. Most judicial training institutions use standard feedback forms after each training event to test the satisfaction and new knowledge/know-how of participants. However, very few judicial training institutions have introduced, or are planning to introduce, evaluation systems and methods that aim to assess how much of the new knowledge/know-how acquired throughout the training is used by judges in the longer term, or how it affects the performance of the judicial system more generally. Some good practices were, however, identified.

The report concluded that the process of introducing long-term evaluation by judicial training institutions should be encouraged and supported, together with mechanisms for the exchange of best, good and promising practices and for cross-border exchange of information on practices.

The study found much merit and value in approaching judicial training on some issues via consortia that cross national boundaries.

Integrated training in EU law and procedure

As the joint sponsors of the study, the European Parliament and European Commission were particularly interested in the state of training of judges in European law and procedure. The study revealed that more and more judicial training institutions are integrating training in EU law into their core national programme, and noted that judicial training in EU law and procedure is most effective when it is practice-oriented. Also, cooperation between judicial training institutions in this sphere appears to be on the increase.

There was clear evidence that training in EU law can be made more effective when embedded in a multi-faceted approach consisting of training activities, access to information and networking opportunities, both locally (through EU contact points), nationally (using colleagues with expertise in EU law) and at European level. Training activities on EU law should wherever possible be integrated into training activities related to national law, rather than via separate events. EU law-based training activities should ideally be offered as part of comprehensive programmes, not as one-off events, and should be made relevant to the daily work practices of judges. Practice-oriented and active forms of training, using real and fictitious cases, are the most effective. Combining foreign (legal) language training and training on EU law has also proven to be an effective approach to improve the required language skills.

The study duly recommended that in recognition of the ever-increasing amount and importance of EU law, judicial training institutions should continue to adapt their training programmes, activities and methodologies to the European environment. It also urged that exchanges between members of the judiciary and between those involved in the design and delivery of EU law training should be encouraged as an important source of information and inspiration and should be actively facilitated; that when judicial training institutions plan their training programmes in EU law, they should take particular account of the need for programmes to be integrated in national law training and practice-oriented, and that in recognition of its central importance, the European Commission should encourage transnational training in EU law as a core priority.

Training that crosses national boundaries

The study found much merit and value in approaching judicial training on some issues via consortia that cross national boundaries. Consequently it recommended that judicial

training institutions should make maximum use of the benefits of structures and mechanisms in place to design and deliver cross-border training programmes and other initiatives.

How did we do?

Readers familiar with the ethos, content and style of judicial training in the United Kingdom can take comfort in the extent to which almost all the best practice recommendations of the study are already fully embedded in our approach to training in this country. We can also be proud of the fact that the study identified more examples of best training practices in the United Kingdom than in any other member state. The identified UK best practices were as follows:

- The Judicial College policy of requiring that all training must include three components: law and procedure, judicial skills, and the social context of judging.
- The recent development of the new training programme for coroners – identifying trainers, assessing training needs and reaching 1,300 coroners and their assistants, all within a few months.
- Three judicial college courses were rated as examples of best practice: the cross-jurisdictional 'Business of Judging' course and two tribunal courses, the first in the Social Security programme, where judges and accountants train together to better understand their different perspectives, and the second in the Property Chamber, in which participants conduct and role-play a hearing over two days, giving delegates a chance to ask questions, discuss aspects of the case and deliver their own verdicts.
- The 'Snowball Technique' (developed by our Educational Development Training Team) was considered an exciting example of an innovative and effective training methodology designed to enable large groups to distil complex thinking or to collaborate to identify a common set of options or ideas.

Two other College training activities were identified as promising practices. The first was the Mental Health Tribunal's whole-programme assessment process in which all members of the tribunal evaluated its entire training programme to make sure it was covering the right areas, was delivered at the right pace and level with appropriate content. The second activity was the new Leadership and Management Development Programme for senior judges that has just completed its second cycle to much positive acclaim.

Conclusions

The report was launched by the European Commission in July 2014 at a major two-day workshop in Brussels where three of our trainers gave presentations on our work.[3] Since its launch the report has provoked considerable interest and it is already beginning to shape the future direction of some of the EJTN training programmes. The Commission has made available up to five million euros in action grants to enable European training institutions to build upon these practices.[4] The report provides a wide range of examples of imaginative and innovative approaches to judicial training across the European Union. There is much in this report that will be of interest to judicial office-holders in the United Kingdom.

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[1] The study also included prosecutors where the function of the job was deemed to be judicial or quasi-judicial, as is the case in most continental civil law systems. The full report is available at *https://e-justice.europa.eu/content_good_training_practices-311-en.do?clang=en*.

[2] The Commission's competence in relation to judicial training is necessarily limited to providing 'support' and does not extend to the provision of actual training (Articles 81 II h, 82 I c TFEU).

[3] Michelle Austin, Jeremy Cooper, Paula Gray.

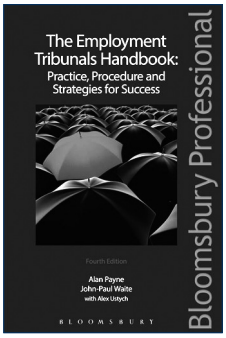
[4] Ironically, the United Kingdom is not allowed to access any of this money as a result of the Government decision to opt out of the 2014–20 Justice Programme in which this money is located.

The art of PERSUASION

Vivienne Gay **has praise (and a caveat) for a valuable tool for anyone stepping into the employment field.**

This handbook, by three employment law barristers from 5 Essex Court, is in many respects exemplary. It beautifully demonstrates the techniques it aims to impart, namely clarity, succinctness, thoroughness at all stages and the overwhelming value of keeping your eye on the ball. The prose is easy and clear. The summary of Dos and Don'ts at the end of each chapter and the pithy case examples, for both sides to the dispute, are as helpful and proportionate as the authors encourage practitioners to be.

The explanations about how to make a well-targeted request for specific disclosure and avoid time-wasting, potentially expensive demands for irrelevant or excessive documents could profitably be posted in large print on the wall of every employment tribunal waiting room. Representatives are, usefully, told how to address the judge, a source of confusion to many.



The Employment Tribunals Handbook: Practice, Procedure and Strategies for Success (Bloomsbury, Fourth edition), John-Paul Waite and Alan Payne with Alex Ustych, £65.

The titular emphasis on practice and procedure may risk understating the content. Although the reader will still benefit from Butterworths or equivalent for the source legislation, this volume is packed with useful legal summaries on substantive issues (for example, the *Burchell* test; the shifting burden of proof in discrimination claims) and covers the relevant basic case law. The role of EU treaties and directives is treated soundly but with a light touch and so too, despite its complexity, the red-top's favourite villain, the European Convention on Human Rights. There are sensible references, with full online links, to the Presidential Guidance issued in late 2013, early 2014.

Unfortunately, employment law, particularly in the procedural area, has continued to move fast and one problem is the inability to establish how up-to-date the book claims to be. Published in 2014, that is clear, but no month is identified. The ('new', as we say) Employment Tribunal Rules 2013 take centre stage, despite a misplaced reference to the previous rules at paragraph 9.17; the need to pay fees or obtain remissions is fully explained, with detail on the October 2013 changes to include capital as well as income; there is discussion of the revocation of the discrimination Questionnaire process with effect from April 2014. *But* there is no mention of the ACAS early conciliation process which was introduced on a voluntary basis on 6 April and has been a compulsory prerequisite to the presentation of almost every employment tribunal claim since 6 May 2014.

So the jurisdictional importance of this necessary first step is not signalled; the blank ET1 included in an appendix is not up to date; the ET1 prescribed in April 2014 is not provided; the section on limitation makes no mention of the complex extension of time effects related to early conciliation. Worse still, litigants who present their complaint on the claim form provided or as suggested (after direct, informal attempts to resolve matters) will find that their fee is taken by the Central Processing Facility, but the claim form is automatically rejected by the tribunal clerks when sent on to the appropriate region. Rejection would occur for failure to include the prescribed mandatory information, namely an early conciliation certificate number or a statement that the claims are exempt from early conciliation.

I sympathise with the authors' predicament: with so much new procedure, how long could they wait before going to print? However, we knew

Continued on page 19

Duty calls in search of the 'five VIRTUES'

Simon Ward **explores the specific qualities that indicate a doctor's suitability as a medically qualified member – along with the likelihood of job satisfaction and potential excellence.**

Reflecting back over my second year in post reminds me of the two weeks I sat in a windowless London room interviewing candidates who wished to become new medically qualified members (MQMs) of the Social Entitlement Chamber of the First-tier Tribunal. This pause from my routine of sitting and appraising allowed me time to mull over what facets I was attempting to assess in doctors that would make them suitable to take on a judicial role. How could I tell which of the very varied candidates would make an excellent MQM? How did the interview process allow me to make recommendations on suitability?

Understandably, I had undertaken some preparation to help me start to answer these two questions. For example, I read up on what the law stipulates when appointing MQMs. Thus not unexpectedly, prospective members need to be appropriately qualified, although not necessarily in active practice. In addition, the Senior President, when carrying out his functions, has to have regard to the need for tribunal members to be 'experts in the subject matter of, or the law to be applied in, cases in which they decide matters'.[1]

> *. . . these pronouncements are formulated and written as long lists of duties which 'must' or 'should' be undertaken.*

Also, regulations require MQMs to be fully registered under the Medical Act 1983 but not necessarily holders of a licence to practise.[2] Further homework led me to read the available documentation of the Judicial Appointments Commission (JAC). This states that MQM candidates need to have unconditional registration with the professional regulator, the General Medical Council (GMC), which I took to mean authorisation to practise without restrictions. The JAC documents also specifically indicate that suitable candidates need 'experience of clinical practice and must be able to demonstrate relevant up-to-date knowledge'.[3]

Recognising potential

So far so good; but how did I recognise potentially excellent MQMs among the candidates? From a medical perspective, I knew that the GMC had published explicit statements on good medical practice and what this entails.[4] However, these pronouncements are formulated and written as long lists of duties which 'must' or 'should' be undertaken. For example, good doctors 'must be competent in all aspects' of their work; 'must' keep their knowledge and skills up to date; 'must' take part in activities that maintain and develop their competence and performance, and so on. Philosophers would characterise this type of professional ethics as deontological because an individual's choices and actions are based on what 'ought' to be done, as duties or obligations. This ethical approach frames medical practice in terms of what is required, prohibited or permitted of doctors and is the format used in all current GMC publications on ethics.

In contrast, contemporary domestic judicial ethics appears to be formulated more in terms of desirable or valuable character traits or virtues, which guide action. Philosophers would call this approach virtue ethics, where virtues are seen as the fundamental primary ingredients

for explaining and justifying action.[5] Indeed, this virtue ethics is easily visible in the judicial world and its literature. For example, key virtues recommended, albeit now framed as 'personal qualities', include a 'commitment to fairness, promoting perceptions of fairness, tolerance, sensitivity to difference and particular needs'.[6] In fact, there are a number of similar overlapping lists of desirable judicial virtues;[7] and one of the most commonly cited is the Bangalore group containing the virtues of independence, integrity, propriety, equality, competence and diligence, along with the 'supreme judicial virtue'[8] of impartiality. Importantly, however, this construction of judicial ethics is offered only as assistance to judges on issues and is explicitly stated not to be a prescribed code of practice or similar potentially fettering framework.

Virtue ethics is also used in many other aspects of the law. For example, it is enshrined in all levels of legislation from the Human Rights Act 1998 down to local tribunal procedures, ready for daily interpretation by the judiciary. It also forms a core part of traditional theories of legal adjudication and is visible in socio-legal research as well. So perhaps unsurprisingly judicial virtues, again called 'personal qualities', are prominent in the JAC documents for prospective MQMs. Thus, for example, medical candidates need 'integrity and independence of mind, sound judgement, fairness and objectivity, decisiveness' as well as their medical expertise and 'willingness to keep up to date'.

Style of questioning

Overall, it was clear from my homework that I was expected to look for these judicial virtues in the medical candidates. Nevertheless I was not totally sure that these same virtues were sufficiently specific for my task of identifying potentially excellent MQMs from among the very varied candidates. This was particularly pertinent when I reflected on the differing roles of doctors in day-to-day medical practice as compared with when acting as an MQM.

Fortunately, I believe this was where situational questioning, as the chosen methodology for the JAC interviews, was important. This was because this style of questioning helped differentiate the candidates along a spectrum, so that the best performers could be identified. Indeed, it was a specific set of traits that was revealed by this questioning methodology, traits that I refer to as MQM virtues, that seemed likely to be predictive of those who would be better MQMs. In fact, the JAC describes this questioning style in the following way:

> 'Situational questioning focuses on what a candidate would do in a specific situation. This technique involves questions concerning a hypothetical situation based on challenging, real-life, job-related occurrences and asks the candidate how they would handle the problem. You will be given material related to the hypothetical situation before the interview starts so you will have time to think and prepare your responses.'

Each candidate was asked the same scripted questions about the same scenario, with the questions written in such a way as to help illuminate the candidates' thinking and reasoning . . .

Therefore, the interview plan was that this questioning format would allow candidates to demonstrate the desired personal qualities. Each candidate was asked the same scripted questions about the same scenario, with the questions written in such a way as to help illuminate the candidates' thinking and reasoning, as well as potentially some of their underlying values, assumptions and prejudices. There was also an occasional supplementary question if an issue needed expanding or was unclear.

Five MQM virtues

Of note, this was my first experience of this interview method and I was initially not at all clear how well it would work. However, during the interviews it was soon apparent that this format was performing well and in particular highlighted important aspects of the inner persona of the candidates. In fact, from the candidates' answers a number of common themes started to emerge which seemed to correlate with overall performance. After some reflection and rumination, these themes for me coalesced and crystallised into five MQM virtues.

Mental agility

The first virtue illuminated was mental agility. This was because the hypothetical situation used in the interview showed how the candidates evaluated and then converted the medical information provided into the legal frame of a dispute requiring resolution. The patient's medical illness and functional disabilities had to be processed by the brain and translated or switched into the stepwise legal way of evaluating individuals, now renamed appellants. As a result, the candidate had to transpose the medicine into the legal framework of reviewing the evidence, determining the legal facts, applying the law to the facts and adjudicating using the balance of probabilities. The best candidates were able to transfer the inherently complex and ambiguous 'real world' of medicine into the legal perspective of rule-based categories and deliberative mind-set, with some agility. Individuals with previous regulatory or quasi-judicial experience also stood out as they were able to use the phraseology of legal matters. For instance, good candidates realised that words such as evidence and facts have different meanings and implications in law as compared with medicine. They also recognised the wiggle room in judicial decision-making provided by syntax and semantics. Other candidates were able to generate some of this legal linguistic turn when nudged with supplementary questions. A few candidates, however, stayed inflexibly within the safety of the medical mind-set and seemed much less comfortable thinking and seeing the world in a different way.

Social awareness

The second virtue that the situational questioning lit up was social awareness. This was because the scenario involved a socially unconventional appellant. This social context allowed the questioning to explore the candidates' awareness and sensitivity to other peoples' situations and adversities. Good candidates had experience and knowledge of other social contexts and cultures that helped them to be open-minded and unprejudiced in their approach. They imagined and commented on the likely views and perspective of the appellant in the particular social context of the scenario. Other candidates were able to show some social awareness by trying to adapt their comments to accommodate the appellant's unconventional perspectives. A couple of candidates, however, lacked this situation sensitivity and sounded unconvincing and distant in their explanations. Sadly, one doctor was overtly intolerant.

Self-awareness

The third virtue brought out by the scenario, in contrast to awareness of the social contexts of others, was self-awareness. The scenario used an example that required some personal inferences and value judgments to be made. The questioning allowed the candidates to reveal their own views and sensitivities by having to explain some of the competing aspects of modern medical care and how they attempt to balance these common conflicts. Good candidates demonstrated that they were able to reflect openly, show self-awareness and be comfortable with the uncertainties in the example. A small number of candidates had difficulty reflecting on and explaining their own position and so had difficulty analysing the possible outcomes for the scenario.

Practical reasoning

The fourth virtue was practical reasoning, by which I mean making timely, sensible and explainable decisions, often in the setting of incomplete or uncertain information but following rules when applicable. Such reasoning requires sensitivity to and the use of previous experience, a process that some would call common sense. The scenario tested this aspect by providing limited information within a fixed time frame using content that required some analysis and interpretation. Good candidates talked their way through the scenario easily, explaining as they went along how they balanced, prioritised and made decisions, with the best using the legal nomenclature. Other candidates struggled to come to a decision or explain openly how they had made it. A few appeared to make rapid intuitive decisions, missed important information or made potentially flawed medical assumptions.

Equipoise

The exercise of balancing conflicting or opposing information led to the fifth virtue of equipoise. This term denotes the neutral starting point for scientific research and is the initial position between competing alternatives where there is neither belief nor disbelief. It is a position that allows openness and curiosity about uncertainty, avoids prejudgement and accepts critical but open-minded scrutiny of the evidence, including any contradictory information or counterfactuals.

Equipoise was visible in the candidates because the scenario involved a potentially marginalised and disempowered individual. Good candidates presented and explained the available information in a neutral, even-handed and non-aligned manner. They were not obviously swayed by negative stereotypes or preconceptions. Indeed, many candidates seemed comfortable presenting and balancing the issues, perhaps because this objective approach is a familiar exercise within medical training. Nonetheless, a couple of good candidates were able to comment explicitly that they needed to put the appellant on an equal footing for reasons of fairness. On the other hand, one senior candidate was overtly pejorative and unbelieving, which was both surprising, considering the job description, and worrying in many wider senses.

So overall, I believe that the situational questioning was very successful at opening up the inner workings of the candidates. In particular, the interview process allowed the identification of five important MQM virtues which the better performing candidates displayed fully. These candidates demonstrated these virtues 'in action', albeit within an imaginary scenario, which I believe highlighted these candidates' potential for future excellence as MQMs.

My own journey of learning the MQM roles and virtues is still not complete.

Thus I would propose that MQM excellence includes: mental agility to allow MQMs to be translators of the medicine into the legal framework; social awareness to help MQMs connect with and understand the appellant's social context, as enablers; self-awareness so MQMs can be sensitive to and reflect on the issues at hand, as evaluators; practical reasoning so MQMs can make sound and evidence-based determinations as decision-makers; and equipoise so MQMs can balance and level the relationship between the parties, as moderators. In fact, you can see these five virtues within the Social Entitlement Chamber's recently published competency standards for MQMs (see table on page 18), which suggests that these virtues are also important for the day-to-day work of sitting.

My own journey of learning the MQM roles and virtues is still not complete. I came to this post with some decision-making experience. Sitting on tribunals has shown me how much of my previous medical practice was based on

MQM virtue	Role	Competency standards
Mental agility	Translator	'Is adaptable and able to respond to appellants from diverse circumstances.'
Social awareness	Enabler	'Is focused to enable appellant to give evidence on medical problems.'
Self-awareness	Evaluator	'Is sensitive to and adapts to the needs of individual appellants.'
Practical reasoning	Decision-maker	'Will critically evaluate and interpret evidence leading to well-founded advice.'
Equipoise	Moderator	'Treats appellants from all backgrounds courteously, equally and fairly.'

not-so-logical, experience-based reasoning, using rules of thumb, pattern recognition and intuition. Consequently, I have tightened up my rule-based decision-making so that I can justify my conclusions better than I had to in the NHS.

As a clinician I was experienced in helping individuals understand their medical issues. But as an MQM I have had to learn how to ensure that appellants' difficulties are illuminated, understood and translated appropriately into the legal framework. This task usually involves some quick thinking, as I explain and make sense of the issues for my colleagues as they arise during hearings. My generalist background helps, but I am still developing my creativity in this area.

I was also familiar with treating underprivileged and vulnerable patients and felt I had some awareness and insight into people's lives and their context. Looking back, I can see that my early legal skills did not enable appellants to highlight these aspects fully. Thankfully, numerous colleagues have helped me, perhaps unknowingly, by demonstrating how to improve and in particular how to ask appellants better questions. Consequently, I own up to borrowing many questions and strategies from these experts and thank them for this.

Overall, there are some caveats to the ideas I have put forward. First, the five MQM virtues identified are not exclusive or exhaustive and I am sure readers may have their own personal favourites to add. Nonetheless, this group of five are concordant with other published work from a similar jurisdiction in Australia.[9] Secondly, I have described the MQM virtues as separate entities for ease of explanation but I accept that they overlap to some extent as do 'personal qualities'. Nonetheless, along with medical knowledge and 'expertise', they do cover the key areas of the MQM mind-set, as I see it. Thirdly, it is clear from the published literature that virtues are not nowadays viewed as fixed or 'hardwired' but are seen as learnable and amenable to change.[10] This adaption has important implications not only for induction training of new appointees but also for ongoing training of experienced members – for example, when considering explicit ethics content on these courses. Lastly, I have not addressed the relative weighting of each MQM virtue in specific individuals as this level of analysis was not supported by the interview information.

. . . virtues are not nowadays viewed as fixed or 'hardwired' but are seen as learnable and amenable to change.

On the other hand, the generic nature of these MQM virtues should allow comparisons when selecting doctors from differing backgrounds but could also be useful for appraisal and training. They may also be applicable to other specialist members and their work on panels.

Conclusion

Interviewing a group of MQM candidates gave me a valuable opportunity to consider what specific facets in doctors would indicate not only suitability for the role, but also markers of potential excellence as MQMs. I am very grateful to my interviewer colleagues for the stimulating and enjoyable discussions during the JAC stint that sparked my interest in this jurisprudential area and I hope this ethical perspective resonates with readers. It feels intuitively right to me that doctors possessing these specific virtues would have a more successful transition to the MQM role and possibly more job satisfaction. Conversely, a deficiency in the MQM virtues may be pertinent to those who struggle or find that they do not enjoy the MQM role.[11]

Dr Simon Ward is South East Regional Medical Member of the First-tier Tribunal (Social Entitlement Chamber).

[1] Tribunals, Courts and Enforcement Act 2007 s2(3)(c).

[2] The Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order 2008 SI/2692, as amended.

[3] JAC, '0790 Fee-Paid Medical Member to the First-tier Tribunal, Social Entitlement Chamber, SSCS'.

[4] GMC, Good Medical Practice (GMC, London 2013).

[5] L Solum, 'Virtue Jurisprudence: A Virtue-Centered Theory of Judging' (2003) 34 Metaphilosophy 178, 201 describes a 'virtue-centred theory' of judging where virtue is an 'ineliminable part of the explanation for and justification of the practice of judging'.

[6] Judicial Studies Board, 'Framework of judicial abilities and qualities' (JSB, London 2008) 4.

[7] For example, Judiciary of England and Wales, 'Guide to Judicial Conduct'(Judges' Council, London 2013); Judiciary of Scotland, 'Statement of Principles of Judicial Ethics for the Scottish Judiciary' (Judicial Office for Scotland, Edinburgh 2013).

[8] Hope LJ, 'Judicial Independence' (2002) 13 SLT 105, 106.

[9] A Christou, 'The "Good" Tribunal Member – An Aretaic Approach to Administrative Tribunal Practice' (2009) 28 UQLJ 339.

[10] For example, K Woollett and others, 'Talent in the taxi: a model system for exploring expertise' (2009) 364 Phil Trans R Soc B 1407.

[11] Similarly, doctors comfortable with the more prescriptive and codified deontological medical ethics framework may find the seemingly more open-ended and interpretable virtue ethics harder to adjust to and follow as an MQM, or at least wish for supplemental training.

Continued from page 13

for a year that compulsory early conciliation was coming. Even though the several sets of regulations, amending the 'new' ET rules, setting up the ACAS scheme, correcting the glitches etc, only came through in March 2014, it would surely have been better to wait a few months or, at the very least to foreshadow the inevitable in the text. I propose an urgent addendum or further appendix, physically attached to every published copy.

Leaving aside the significant omission of early conciliation, this handbook will be a valuable tool for human resources professionals, trade union advisers and representatives, employment consultants and legal professionals just stepping into the employment field. Counsel and solicitors more experienced than that could also benefit from taking on board the cardinal principles pushed by the authors and the ever-present need to remember the first words of Chapter 19: 'Advocacy is, in essence, the art of persuasion.' Yes! As this book consistently asserts, the best strategy for representatives to bear in mind at every stage is that, regardless of how much energy they spend bludgeoning the other party, they will only win if they persuade the judge or tribunal of the rightness of their cause.

Vivienne Gay is a Regional Employment Judge, London North and West.

Have your SAY on 'vow'

David Bleiman **explains the proposals for change following last year's rejection of Scottish independence.**

Devolution of most of the tribunals still reserved to Westminster is on the way. While this policy and its implementation is firmly in the political domain, judicial office-holders have been encouraged to contribute in consultations on its practicalities.

Following rejection of independence in the 2014 referendum, the five main political parties in Scotland, negotiating in the Smith Commission, agreed on proposals for further devolution to deliver the 'vow' given in the final stages of the referendum campaign. On 22 January 2015, more detailed proposals[1] including clauses of a draft Bill were published, along with an invitation to comment. The jurisdictions affected include Immigration and Asylum, Social Entitlement and Employment Tribunals together with the relevant Upper Tribunals and the Employment Appeal Tribunal.

Currently reserved tribunals will become Scottish tribunals . . .

The broad intention in relation to the reserved tribunals is to transfer to the Scottish Parliament the powers in relation to the main functions, including decisions concerning rules of procedure, membership, administration and funding. Currently reserved tribunals will become Scottish tribunals under judicial leadership of the President of the Scottish Tribunals and ultimately the Lord President. Administration will be provided by the new Scottish Courts and Tribunals Service, which is expected to come into being this year.

It is also important to note what is *not* going to be devolved. Tribunals taking decisions with implications for national security of the UK as a whole (and even relevant individual cases handled by any other tribunal) will remain reserved. The excluded tribunals are the Special Immigration, the Proscribed Organisations and the Pathogens Access Appeals Commissions and the Investigatory Powers Tribunal.

For the tribunals to be devolved, the underlying substantive law will remain reserved. As yet unspecified 'constraints and requirements' and 'appropriate procedural provisions' are to ensure that the newly devolved tribunals maintain consistency with certain features of the reserved tribunal system that are needed to support the continuing effective delivery of overarching national policy. While this is vague language, the point is made that these matters are likely to differ between tribunals.

For each specific tribunal, transfer of functions will be effected by an Order of Council (including those specific 'constraints and requirements'), which has to be approved by both UK and Scottish Parliaments. This will also 'provide a vehicle for promoting judicial cooperation to maintain consistency of tribunal practice and procedure'.

The UK Government promises 'an engagement programme' with the public and stakeholders. This will 'assist with the process of refining the draft clauses'. There is also to be 'extensive engagement with the judiciary in both Scotland and England and Wales' over the application of the changes to specific tribunals to be transferred.

Organisations and individuals have been invited to send their thoughts on the draft clauses to *draftlegislationcomments@scotlandoffice.gsi.gov.uk*.

David Bleiman is a member of the Employment Appeal Tribunal.

[1] 'Scotland in the UK: An enduring settlement', Cm 8990, January 2015. Available at *www.gov.uk/government/publications/scotland-in-the-united-kingdom-an-enduring-settlement*.

AIMS AND SCOPE

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

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