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THIS YEAR the Judicial College has provided an academic programme to complement its core training. This consisted of four lectures entitled 'Being a Judge in the Modern World'. The College approached a number of universities to host the events.

In January, Lord Carnwath began with a lecture at the Law Society in London, quickly followed in February at Cardiff University by the Lord Chief Justice (LCJ). Two further lectures were in April and June, but this time the speakers were non-judicial, with Shami Chakrabarti and Joshua Rozenberg providing an outsider's view on being a judge in the modern world. Audio recordings of all four lectures have been placed on the Judicial College's learning management system.

This is the first time that the College has put on events open to every judicial office-holder, and the post-lecture receptions provided an opportunity for judiciary from all levels and backgrounds to mix as well as meet the speakers. Given that there was an element of co-hosting by the universities – and for the first instance the Law Society – it was agreed that a number of places would be available for their own people. At the first university event, at Cardiff, 20 places were also made available for law students whose attendance delighted the LCJ. Student places were subsequently made available for the Manchester and Oxford lectures.

In Cardiff, the LCJ commented on the constitutional challenges that exist between the Judiciary, Parliament and Government. The College would like to continue this debate and has approached further speakers with a view to extending the series with two more lectures.

Brian Evans, Secretary to the Judicial College's Diversity and Development Committee.

EDITORIAL

THE Administrative Justice and Tribunals Council (AJTC) was abolished on 19 August. The Editorial Board has been very fortunate to have enjoyed the services of AJTC representative Penny Letts over the past 10 years as a valued and astute Board member. Penny ensured that the wider issues of administrative law and practice remained a key focus of our publication and her much appreciated contribution will be missed. We will ensure that the wider interests of administrative justice remain central to our concern.

A new Chamber – the Property Chamber – has been established and, on page 6, its President, Siobhan McGrath, describes its scope and values.

On page 2, Professor Mike Adler examines five policy areas where the Scottish Government is being urged to provide an accessible and appropriate way of challenging administrative decisions of public bodies.

Barry Clarke, on page 8, presents his personal view of how social media may be used to produce evidence relevant to judicial decision-making.

On page 12, Jeremy Gordon examines some innovative dispute resolution processes operating in Queensland, Australia, which may be of interest to those working in tribunals in the UK.

Professor Joyce Plotnikoff and Professor Richard Woolfson, on page 16, introduce the Advocate's Gateway, launched earlier this year to provide new guidance on how to question people with communication difficulties.

Finally, on page 18, Mr Justice Charles provides an insight into the work of the Upper Tribunal (Administrative Appeals Chamber).

Professor Jeremy Cooper, Chairman of the Editorial Board.

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Devolved powers and the right to APPEAL

Michael Adler **examines five policy areas where the Scottish Government is being urged to provide an accessible and appropriate way of challenging administrative decisions.**

In 'Right to Appeal: A review of decisions made by Scottish public bodies where there is no right of appeal or where the appeal procedure is inaccessible or inappropriate', published in September 2012, the Scottish Committee of the Administrative Justice and Tribunals Council (SCAJTC) drew attention to five devolved policy areas where there is no right of appeal against an initial decision that a member of the public believes to be wrong or where the existing right of appeal is inappropriate or inaccessible.

The report adopts the following principle:

> 'Unless there are compelling reasons to the contrary, citizens should have the right to appeal against administrative decisions, and the onus should be on government to rebut that right where it considers that it is not in the public interest to assert it.'

And it asks whether something should be done in each of these five instances and, if so, what.

Background

The principle that, in the absence of very strong counter-arguments, people should be able to challenge administrative decisions has a long pedigree. It was advanced, some 50 years ago, in the Whyatt Report, which was set up by the lawyers' pressure group JUSTICE to enquire, *inter alia*, into the adequacy of existing procedures for dealing with complaints against the decisions of government departments and public bodies.

Whyatt started out from the position that it was always in the interests of the individual that there should be a court or tribunal to give an impartial adjudication on an administrative decision and concluded that individuals should be entitled to have an impartial adjudication of their disputes with a public authority unless there were overriding public-interest considerations that made it appropriate for the Minister to retain responsibility for the final decision.

Although the principle of impartial adjudication fell on deaf ears when the report was published in 1961, and contemporary critics commented that it would erode the proper responsibility of Ministers for political decisions, many of the administrative decisions that were reviewed by Whyatt have been made subject to appeal in the intervening period. The outstanding example of this is administrative decisions concerned with asylum and immigration, where there were no rights of appeal until 1967. However, as 'Right to Appeal' demonstrates, there are still a number of important administrative decisions that are not readily appealable and, although the report deals exclusively with Scotland, the situation in England and Wales is much the same.

According to Article 6 of the European Convention on Human Rights:

> 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

In relation to civil rights and obligations, Article 6 applies not only to private law disputes but also to a wide variety of public law disputes whose outcome directly affects the rights of the individuals concerned. However, it does not apply to public law disputes where the rights are not absolute, e.g. because the decision of the

public body is subject to resource limitations, or because it involves the exercise of discretion. Article 6 does not require that an independent and impartial tribunal established by law must be established to deal with challenges to every administrative decision in the UK and there is therefore no general right to appeal against an administrative decision taken by a government department or public body. It was against this background that the SCAJTC decided to launch its investigation.

Methods

Initial identification of the five policy areas which the 'Right to Appeal' report focuses on followed from an analysis of decisions of the Scottish Public Services Ombudsman (SPSO), of judicial review cases in the Court of Session and informal 'fact-finding' interviews. A discussion paper was circulated to stakeholders and those consulted were invited to comment on policy areas they were familiar with. They were asked whether they regarded the *status quo* as satisfactory and, if not, what should be done about it, specifically whether a right of appeal to a court or tribunal should be introduced, an independent review procedure should be established, or the powers of the SPSO should be extended to enable the ombudsman to deal with appeals as well as complaints.

The five policy areas were community care, higher education, housing, legal aid and planning.

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Responses to consultation

Thirty-eight responses to the consultation exercise were received from a wide range of stakeholders. Twenty-five respondents commented on one policy area and 13 on two or more. This generated 65 comments on the five policy areas. All the respondents who commented on the general principle that informed the report agreed with it. As far as the existing redress mechanisms were concerned, in each policy area, the *status quo* was defended by those organisations that were responsible for operating the procedures, who asserted that it was not in the public interest to establish a right of appeal to an independent body. In four of the five policy areas – the exception was legal aid – large majorities of the respondents took the opposite view.

Recommendations

In light of the responses, SCAJTC considered whether, in each policy area, there were 'compelling reasons' for denying citizens the right to appeal against an administrative decision.

In the case of community care, the report concluded that there were no such 'compelling reasons' and recommended a new tribunal jurisdiction to deal with appeals against all community care decisions. In so doing, it rejected the case for bringing dispute resolution procedures in social care into line with those in medical care where, after exhausting the relevant NHS complaints procedure, patients can take their complaint to the SPSO. Although consistency is undoubtedly a virtue, SCAJTC was not persuaded that a complaints procedure was the most appropriate way of dealing with substantive appeals or that a separate complaints procedure in each of the 29 local social work authorities in Scotland would result in consistent interpretation of the relevant legislation.

In the case of higher education, the report likewise concluded that there were no 'compelling reasons' for denying students the right to appeal and recommended the establishment of a new tribunal jurisdiction to deal with appeals against the determination of fee status or the assessment of student awards. SCAJTC concluded that this was not only the most appropriate way of dealing with substantive appeals against decision-making by

higher education institutions and the Students' Awards Agency for Scotland but, as far as the determination of fee status is concerned, the only way of achieving a consistent interpretation of the legislation in question.

In the case of housing, the report concluded that current appeal procedures were not 'fit for purpose' and recommended the establishment of a new tribunal jurisdiction to deal with a wide range of housing disputes, some of which are currently dealt with in the sheriff court. It should be noted that this recommendation has implications for the implementation of the proposals in the Scottish Civil Courts Review, chaired by Lord Gill, which suggested that housing disputes should come under the jurisdiction of a new judicial tier within the sheriff court, which would deal with summary criminal cases and civil actions with a monetary value less than £5,000. The Scottish Government accepted most of the key recommendations in the Gill Review, including the creation of a third tier of judges, and has now formulated proposals for implementing them. The Cabinet Secretary for Justice recently published a consultation paper on his proposals.

The Scottish Government considered splitting the civil and criminal business of the third-tier judges, who are to be called 'summary sheriffs', but concluded that, since only 20 to 30 per cent of their workload would comprise civil actions, this would require the appointment of no more than 30 full-time summary sheriffs to deal with the entire range of civil business. Although the Gill Review considered whether certain kinds of action, in particular housing cases, might be transferred to specialist tribunals, its remit was limited to the civil courts and did not extend to a wider examination of the relationship between courts and tribunals.

In the case of legal aid, the report concluded that there were 'compelling reasons' for taking a different approach . . .

Since the Gill Review reported in 2009, a practice has emerged within the Tribunals Service in which tribunal judges are 'ticketed' to deal with different types of case and, in light of this development, the Scottish Government stated that it wished to examine whether a similar model covering full-time and part-time district judges and tribunal judges could be developed.

Although the Gill Review concluded that housing disputes should continue to be dealt with in the civil courts, the Civil Justice Advisory Group, set up to consider the proposals made by the Scottish Civil Courts Review by Consumer Focus Scotland and chaired by Lord Coulsfield, recommended that a specialist tribunal to deal with housing disputes should be set up. More recently, the Minister for Housing and Welfare issued a consultation on dispute resolution in housing which examines three options: expanding the use of mediation and other forms of ADR; introducing a new housing panel (or tribunal) which might make binding interim orders before a case comes to court; and introducing a new housing panel (or tribunal) to replace the courts as the main forum for dealing with housing disputes. Although the outcomes of the two consultations is by no means certain, they could result in the establishment of a housing tribunal as recommended in the SCAJTC report.

In the case of legal aid, the report concluded that there were 'compelling reasons' for taking a different approach and did not recommend the establishment of a new tribunal or expanding the jurisdiction of an existing tribunal to hear appeals against refusals of legal aid. Although this option was considered, the fact that, except in the case of legal advice and assistance, applications for legal aid are not made by individuals but by solicitors acting on their behalf makes the Scottish Legal Aid Board unique, and SCAJTC agreed with

SLAB that it would create problems if a tribunal were set up to deal with appeals against the refusal of legal aid since the solicitor who made the initial application would, presumably, be the appellant and would need to be paid to appeal on behalf of the client. Thus, where legal aid was not granted in the first place, a further application for legal aid would need to be made to challenge the initial refusal.

In the case of applications for legal aid, SLAB currently operates a system of internal review. If the original refusal is confirmed and the applicant's solicitor is still dissatisfied, the application may be referred to the Legal Services Cases Committee (LSCC), which includes co-opted external members as well as members of the Board. However, members of the Board, by definition, have an interest in the outcome of such reviews since they are an integral part of the body whose decision is being challenged. Thus, a strong case can be made for reviews against the refusal of legal aid being heard by external (and fully independent) members of LSCC sitting alone. In this way, the internal review process would culminate in a review by a body that was more independent than the LSCC as it is currently constituted. And, although referral to the LSCC is currently at the discretion of the first-instance reviewer, a strong case can also be made for this being a matter of right. Thus, the report recommended that, in the case of legal aid, solicitors who wish to challenge an adverse decision should have the right to 'appeal' from a first-instance reviewer to the LSCC, and that, when it acts as a second-tier review body, SLAB members should not take part.

In the case of applications for legal advice and assistance, the only recourse currently available to an applicant whose claim is turned down by one firm of solicitors is to approach another firm. However, especially in rural areas, this may be difficult and a strong case can be made for applicants in such cases having a right to appeal to SLAB.

In the case of planning, the report concluded that there was an 'appellate deficit' in relation to planning appeals in that Local Review Bodies (LRBs) are made up of councillors who must have an interest in upholding the decisions taken by planning officers under delegated powers. Their lack of independence raises doubts as to whether they are compliant with Article 6 ECHR. Notwithstanding the fact that LRBs were only set up a few years ago, SCAJTC recommended the establishment of a national tribunal that would hear appeals from routine decisions by planning authorities. LRBs would remain in existence but there would be the possibility of an appeal from their decisions to the new national environmental tribunal.

Conclusions

A number of important issues, such as the cost of implementing the recommendations set out above and the cost of setting up new tribunals, the powers of the new tribunals and whether they should consider the merits as well as the legality of administrative decisions, and the composition of the tribunals and their place within the Scottish Tribunals Service were not considered in the report and clearly need to be addressed.

Although these are not propitious times for setting up new institutions, SCAJTC urged the Scottish Government to give serious consideration to its recommendations and to provide an accessible and appropriate means of challenging adverse decisions in each of the five devolved policy areas discussed, with priority given to appeals against adverse community care and housing decisions because of the number of people who would be affected and the nature of the problems they face.

Michael Adler is Emeritus Professor of Socio-Legal Studies at Edinburgh University. He was a member of the Scottish Committee of the Administrative Justice and Tribunals Council until its abolition.

Last piece of the PUZZLE

With the launch of the Property Chamber, the First-tier Tribunal is now complete. *Siobhan McGrath* explains its development, its aim and the values underpinning it.

On 1 July, the Property Chamber was launched. It will be the last piece in the jigsaw making up the First-tier Tribunal, and will bring together the Residential Property Tribunal (RPT), the Agricultural Land Tribunals (ALT) and HM Adjudicator to the Land Registry. The vast majority of its work will be party v party, giving it a slightly different flavour to most of the other Chambers.

The Chamber will cover all the property work undertaken by tribunals, with the exception of the Valuation Tribunal for England, which may join us at a later date. The lead judges – Edward Cousins, Nigel Thomas and myself – have been working together for 18 months already, assisted by George Bartlett, President of the Upper Tribunal (Lands Chamber) until his retirement last December, and his successor, Keith Lindblom.

Sub-committees

A management board was formed last year to drive forward the development of the Chamber and to look at areas of common interest. Three sub-committees have been set up – on procedure, membership and training – to cover the main subjects where we see room for better coordination and integration between our three divisions. We have also agreed an aim and a set of underpinning values to express our common purpose and the sort of organisation that we want to be, together with a published Service Standard Statement setting out what parties can expect from us.

The Chamber comprises nearly 500 members and will handle more than 11,500 cases a year. The largest component will be Residential Property, successor to the former Residential Property Tribunal Service (RPTS), which came under the aegis of the Department of Communities and Local Government. They have more than 300 members and deal with a range of disputes in the private rented and leasehold sectors in England, with a workload of some 10,000 cases a year – and rising. RPTS was an early pioneer of *pro bono* and mediation work, and in a happier economic climate also took a number of outreach and publicity initiatives to make our work better known.

The Agricultural Land and Drainage (AL&D) division better describes the work undertaken by the former ALTs. As its name implies it has a number of jurisdictions in the farming sector, varying from succession rights to cases of bad husbandry. It also handles a number of land drainage cases. It has more than 100 members and deals with some 300 cases a year.

The creation of the Property Chamber has been accompanied by a consolidated set of procedural rules . . .

Finally, the Land Registration division (formerly the Adjudicator to HM Land Registry) deals with disputes about registered land in England and Wales, most of which are referred by the Land Registry. They have 32 deputy adjudicators and an annual workload of about 1,300 cases.

Challenging

The creation of the Property Chamber has been accompanied by a consolidated set of procedural rules, the production of which had been challenging, bringing together as they do the best of the rules in force until then – some of them for many decades and most with subsequent amendments and alterations that have often made their use difficult. In RPT alone we had eight different sets of regulations governing our proceedings, so the prospect of having a single set governing all our work was very welcome. The

Chamber's Procedures Committee, which I will be chairing, will be monitoring the way the new regulations work and suggesting modifications where necessary.

The new regulations will not only have to be the subject of training for our members but will also need to be reflected in staff training and in modifications to our administrative systems. The latter work has been supervised by the Chamber's Business User Group (the rather inelegantly titled BUG). We are fortunate in RPT to have a well-established case management system on which HMCTS staff can administer most types of case from application stage to the final determination. That has made the work of the BUG easier. For HM Adjudicator's work, there will be changes to the Ministry of Justice's GAPS2 system, and this is also well advanced. The BUG is also concerned with amendments to guidance and forms and ensuring these appear on the Justice website.

Structures retained

For most members, the launch of the Chamber will have had little immediate effect. We have retained the existing regional structures for RPT and AL&D, although these will no longer have statutory force (HM Adjudicator's work does not operate through a regional split). We thought this was important both in terms of administering cases and in managing our two largest divisional groups of members under a structure of regional judges and their deputies. Nevertheless we will, with the Senior President of Tribunals, be reviewing this structure in time to see how it is working out as the Chamber – and indeed HMCTS – develops.

One of the issues our Membership Committee will want to examine is the scope for cross-ticketing across divisions. Many of the issues examined by our tribunals concern similar legal and expert land considerations, and there may be some efficiencies to be gained if we can do more to deploy members across divisions.

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Finally, our Training Committee will want with the Judicial College to look at the training programmes for each of our three divisions to see what scope there is for co-training members with the aim of making the best use of resources and promoting integration within the Chamber. I hope we will be able to negotiate a consolidated training programme each year with the College.

National launch

The Property Chamber held its national launch on 1 July in London, at which the Senior President of Tribunals welcomed the establishment of the Chamber. This will be followed at the beginning of September by training for Chamber judges in the new procedural regulations and a series of regional launches. These events will allow me to introduce the Chamber and set our vision for the next few years. It will, too, be a chance to reflect and ask questions about the scope the new arrangements offer us. After that we will be bedding in the Chamber and seeing how best practice might be introduced across its divisions – the increased use of alternative dispute resolution is likely to be an early target. We will also be talking to colleagues in the Ministry of Justice about the sort of work we do, and examining those areas where this overlaps with the courts, or where their work might conceivably be shared with us.

Like all good jigsaws, the construction of the First-tier Tribunal has not been without its difficulties – and has perhaps taken more time than first imagined. But I hope as the last piece of the puzzle slips into place, the Property Chamber will reveal, as a good jigsaw should, an attractive picture.

Siobhan McGrath is President of the First-tier Tribunal (Property Chamber).

Revealed: the stuff of life on SCREEN now

In the previous edition of Tribunals, *Barry Clarke* discussed the increasing prominence of social media in daily lives. In this follow-up, he considers how such sites can produce evidence relevant to judgments.

In preparing this article, I have assumed that the reader does not use social media. The focus will be on Facebook and, to a lesser extent, on Twitter, because these are the two most popular social media sites in the UK. I will be drawing on my experience of the sorts of dispute typically heard by the Employment Tribunal, although my observations should be relevant to other members of the tribunals family. I will also adopt the device of an imaginary person called John.

Signing up

Neither Facebook nor Twitter charges a joining or membership fee. Facebook users must be aged 13 or over (although no proof of age or identity is demanded). John is 40 years old – the average age of a Facebook user – so this presents no problem. John only needs to supply a user name (real or a pseudonym), an e-mail address, date of birth and gender. Of these, only the e-mail address is subject to any process of verification. He also sets an account password. Signing up to Twitter is just as straightforward: he provides his name and e-mail address, chooses a user name, agrees to certain terms and conditions, and selects a password. Twitter does not stipulate a minimum age.

Creating a profile

Now that he has signed up for a digital life, John may choose to create a profile, which he presents to the world at large or, if he is shrewd enough to modify the default privacy settings, to a smaller group of friends. Like many engaging in social media, John is not very guarded about his privacy, perhaps because he wants to be easily located by friends or because he is just not technically savvy. On both sites, he therefore uses his real name and a real picture of himself. As John works as a firefighter and is proud of the job he does, he chooses a picture of himself in uniform. John also provides autobiographical information. Being a compliant sort of fellow, he answers without hesitation questions about his date of birth, his home town, his marital status, the school and college he attended, his political and religious views, his favourite books, films, television programmes and sports.

One day, academics may explain why people are willing to impart to the world at large the sort of information they would hesitate to reveal to a stranger in the street. This 'oversharing', a uniquely social media phenomenon, raises many concerns about privacy but, on the plus side, it enhances John's social media experience as it allows him to connect with those who have similar interests and to benefit from highly targeted marketing. He does not change his Facebook default settings, so all of this information is visible to the world at large. On his Twitter biography, also available to the public, John writes that he is a '40-year-old male, fire-fighter, proud Yorkshireman, interested in women, rugby, football, beer and having a laugh'.

Making connections

John starts connecting with people, an easy process as both Facebook and Twitter use software that searches existing contacts stored on John's phone or computer to identify friends, family members and colleagues already using social media. By the end of his first day, John has 'befriended' 50 people on Facebook. (There is a reciprocal element to this process: John's proposed friends must accept his 'friend requests' or he must accept theirs.) Facebook identifies further associations between those John has befriended – and their onward friends – and

suggests others with whom he can connect: former colleagues, acquaintances at his local sports club, old school friends and more distant family members. The list goes on. As he is not especially choosy, John's list of 'friends' grows to 400 within two months.

Robin Dunbar, professor of anthropology at Oxford, has suggested that the maximum number of meaningful friendships a person can maintain at any point in time is about 150, and recent research has validated the application of Dunbar's number to social media sites. John has thus connected on Facebook with an awful lot of people who – in the traditional, stable and secure sense – are not actually his friends.

On Twitter, many celebrities, performers and commentators have a prominent presence and, regardless of the quality of their online musings, garner thousands (and occasionally millions) of 'followers'. (To 'follow' a person on Twitter is not the same as 'befriending' a person on Facebook, since there is no reciprocal element by which the person must follow you back.) John now decides to follow several hundred celebrities and commentators on Twitter.

As he is not especially choosy, John's list of 'friends' grows to 400 within two months.

Receiving and transmitting

Some users of social media are only 'receivers' – they listen to what others say. But most are 'transmitters' – they are responsible for generating the content that is the lifeblood of social media, which includes the countless millions of texts, photographs and audio updates supplied across the world. On Facebook, John can transmit by writing a 'status update'. This will be a short item of written content in which he may explain what he is doing or thinking at that moment, or which he may link to something interesting he has read (such as a blog or newspaper article) or seen (such as a YouTube video or amusing cartoon). He may use it to support or complain about an issue, either as a social or political observation or simply a comment about a football match. John can also transmit on Facebook by uploading photographs in which he can 'tag' his friends. (i.e. put a name to the picture), or recommending Facebook profile pages for individuals, charities or campaigns. He can also comment on the updates of his friends, or approve of an update or photograph by clicking a link marked 'like', or engage in a conversation thread.

Crucially, John himself selects the visibility of all this content: he can limit it to a group of close friends, or he can show all his friends, or he can show 'friends of friends' (a potentially huge number) or he can even display it to the world at large. It will appear on his profile page and in the 'news feeds' of his friends. A news feed is how a Facebook user receives. Through this feed, John can read the updates shared by all of his friends or, if he wishes, only updates from a limited number.

On Twitter, John can transmit by sending a 'Tweet', a short message of no more than 140 keyboard characters. Again, this can be used to explain what he is doing or thinking or it may link to an article, photograph or video. This tweet will usually be open to the world at large to read, but the global volume of tweets is such that only John's few followers will be likely to see it. Alternatively, John can increase the visibility of his tweet by linking it to a more popular user or by giving it a 'hashtag', which simply involves adding a word or two at the end of the tweet preceded by the # symbol. Hashtags can cover an infinite number of subjects, from the weighty (the employment law hashtag is *#ukemplaw*) to television game shows (e.g. *#xfactor*). They represent the main mechanism by which Twitter's abundant content becomes searchable.John receives on Twitter simply by reading the content posted by bloggers who

interest him or by searching for the hashtags associated with his hobbies.

I hope this brief description of how Facebook and Twitter work will enable readers to understand better how social media content can produce evidence of importance in a legal dispute.

Undermining sworn evidence

Our first example is where social media content wholly undermines the sworn evidence of a party or witness. In one of my own cases, a hairdressing salon dismissed a claimant for doing private work on the side in breach of an express term of her contract. The claimant denied the charge, right up until the point that one of the respondent's witnesses arrived with a copy of a previous Facebook 'status update' showing her doing exactly that – complete with photograph.

Other cases include: a claimant dismissed for choreographing a show at London Fashion Week (revealed through her Facebook page) while on paid sick leave;[1] a claimant dismissed for 'liking' a comment by which a manager was described as being 'as much use as a chocolate teapot';[2] and lewd or offensive comments about colleagues.[3]

For our purposes, the most interesting question is this: how did such evidence come to light? John, our imaginary friend, reveals how: first, by being 'friends' with so many people, above Dunbar's number, who would happily disclose it to the employer; secondly, by being 'friends' with colleagues (who may be witnesses in the dispute) who may feel duty bound to reveal it; and, thirdly, through a lax approach to his privacy settings which exposes such content to 'friends of friends' or even to the world at large.

Damage to employer's reputation

Experience shows that many people make unguarded comments about their colleagues and employers on Facebook,[4] or about the quality of their employer's products,[5] or act in some other way that the employer perceives as damaging to its brand[6] or reputation.[7] As above, such evidence may emerge via colleagues or other Facebook 'friends' who have seen it.

Sometimes the connection is subtler. John is proud of his work as a firefighter and so has chosen a picture of himself in uniform for his Facebook profile. Consequently, every time he expresses an online opinion to 'friends of friends' or to the world at large, that picture appears alongside it. Others may therefore deduce that his views are, in some way, representative of the fire service as a whole or capable of bringing it into disrepute, leading to potential disciplinary action.[8]

Drawing inferences

Because there is rarely direct evidence of discrimination, Employment Tribunals are commonly asked to draw inferences of discrimination from other facts. An example of possible inferential material in a race discrimination claim is that a manager has previously expressed hostile views about immigrants.

In my experience, it is increasingly common for claimants to examine social media content in search of inferential material. If John were accused of unlawful workplace harassment, his short Twitter biography might supply some cross-examination material, but the male stereotype it portrays would, without more, be of limited value. However, coupled with an analysis of those he chooses to 'follow' on Twitter or

Cases

1. ***Gill v SAS Ground Services Ltd*** **(ET/2705021/09).**
2. ***Young v Argos Ltd*** **(ET/1200382/11).**
3. ***Teggert v TeleTech UK Ltd*** **(Northern Ireland, 704/11) and *Dixon v GB Eve Ltd* (ET/2803642/10).**
4. ***Whitham v Club 24 Ltd t/a Ventura*** **(ET/1810462/10).**
5. ***Crisp v Apple Retail (UK) Ltd*** **(ET/1500258/11)**
6. ***Taylor v Somerfield Stores Ltd*** **(Scotland, 187407/07).**
7. ***Smith v Trafford Housing Trust*** **[2012] EWHC 3221 (Ch).**
8. ***Molen v Mid and West Wales Fire and Rescue Service*** **(ET/1601221/12).**

'like' on Facebook, it may be more persuasive. If John has used a term widely perceived as racist in one of his status updates, a claimant would no doubt place heavy reliance on that fact.[9] If he chooses to follow on Twitter a number of commentators with anti-immigration views, that would be a further source of cross-examination.

Practical issues for disclosure

If such evidence is out there, how do the parties obtain it? How does a judge get to see it? In my previous article, I suggested that many legal practitioners were insufficiently aware of the relevance of social media content as evidence. Such content may not be part of a document in the conventional physical sense but, as electronically stored information (sometimes abbreviated to ESI), it would still be subject to the rules governing disclosure. Jackson LJ has referred to this as 'e-disclosure'. He has emphasised the importance of judicial training on this topic in order to assist the effective operation of Practice Direction 31B in the civil courts. The Employment Tribunal has equivalent powers to the county court, and so PD31B will be of use when tribunal judges grapple with such disclosure applications.

However, as Jackson LJ recognised, there is a significant hurdle: the lack of IT understanding among many solicitors, barristers and judges, which can result in poorly drafted disclosure requests or orders, the production of excessive and disproportionate ESI and a failure to carry out a proper search for relevant material.[10] Anecdotal experience suggests that few parties or witnesses are told of the importance of ensuring that social media content is preserved (or, indeed, to resist the temptation to delete it). Further problems arise when trying to conduct an investigation of material on social media sites: the party conducting the search may know nothing of the other party's social media activities, while the other party may in any case be entirely unfamiliar with the way in which privacy or search settings operate.

It is possible, in theory, to obtain disclosure direct from the social media company by means of a *Norwich Pharmacal* order. Recently, for example, a High Court master ordered Facebook (incorporated in Delaware) to disclose the identity and IP addresses of several 'cyberbullies'.[11] The Employment Tribunal's statutory jurisdiction, by contrast, means that such orders can only be made against persons in Great Britain. So, while it may be theoretically possible to obtain a disclosure order through the civil courts against the likes of Facebook, it would be a very expensive exercise beyond the reach of typical litigants in the Employment Tribunal.

The likely result is that social media evidence will continue to become available more by accident than design. It will come to a party's attention as a result of the user's poor privacy settings and/or the intervention of an intermediary 'friend' or 'follower'. As is often the case, it may only emerge on the day of the hearing itself. However, if the relevance of the evidence is such that the balance of prejudice favours the party seeking to rely on it, at least it will eventually have come to the attention of the judge.

Cases

[9] ***Swierczyk v Aldi Stores Ltd and another*** **(ET/1601502/11).**

[10] ***Earles v Barclays Bank plc*** **[2009] EWHC 2500 (Merc).**

[11] ***Applause Store Productions and Firsht v Raphael*** **[2008] EWHC 1781.**

Conclusion

The social media phenomenon is here to stay, in one form or another. Its evidential relevance comes not from its online provenance but from the simple fact that it reflects so many aspects of a person's existence – family, friends, interests and opinions – and which is the stuff of life and, by extension, the stuff of conflict. To judicial readers who already use social media: how much does your online activity reveal about you?

Barry Clarke is an Employment Judge.

A chance to pick the best of the BEST

Jeremy Gordon **explains some innovative dispute resolution methods used in Queensland, Australia, to provide a service that is 'accessible, fair, just, economical, informal and quick'.**

The court and legal system in Australia is currently undergoing many changes. In Queensland, there used to be 19 separate tribunals dealing with a variety of small claims, licensing, disciplinary, administrative review and specialist civil matters. On 1 December 2009, these tribunals were amalgamated into one: the Queensland Civil and Administrative Tribunal (QCAT).

In pursuit of their statutory aims, the previous Queensland tribunals had established their own processes to maximise the chance of a negotiated settlement in their own areas of dispute or, if that failed, to produce the most efficient methods of resolution. When the tribunals were amalgamated, it was an opportunity to pick the best of these processes, and to reshape them to suit the new tribunal. In the 3½ years since the amalgamation, QCAT has streamlined these processes, and the result is some innovative methods of dispute resolution, most of which work extremely well.

By this means QCAT has achieved its statutory aims and objectives of providing dispute resolution that is accessible, fair, just, economical, informal and quick, and within which alternative dispute resolution is encouraged where appropriate. Below is a brief outline of some of the processes used.

No lawyers

The starting point for QCAT is that the parties will not be permitted to attend hearings with lawyers. The idea is to try to keep a level playing field between the parties and to save costs. This is not always achievable. Lawyers are permitted in disciplinary or complex factual or legal matters, or where a party needs representation.

Limited costs

The starting point for QCAT is that generally no costs are awarded other than filing and service fees if appropriate. The idea is that dispute resolution shall be readily accessible and as efficient as possible. However, in some matters such as substantial domestic building cases where lawyers are involved (where QCAT's jurisdiction is unlimited), costs will be likely to follow the event.

> *The starting point . . . is that the parties will not be permitted to attend hearings with lawyers.*

Compulsory mediation

This is ordered in all civil claims over A$3,000 (QCAT has jurisdiction in debt, motor vehicle property damage, traders and consumer claims up to A$25,000). Parties are obliged to attend the mediation. By this means, misunderstanding of the benefits and process of mediation (common among the general public and also with some solicitors) is nullified. The mediation is normally set down for one hour and is heard in QCAT by trained officers from the Attorney-General's department.

If a party fails to attend the mediation then the case will be referred on that same day for final hearing by a tribunal member with only the party attending present. Since the notice calling the parties to the mediation contains a clear warning that this will happen if a party does not attend, this is considered to give the parties sufficient right to a fair trial in the tribunal. If the attending party is successful, the losing party may try to re-open the decision but this will only be allowed if

there a good reason for the non-attendance. By this means, the parties are forced to talk, and if there is any chance of settlement it can be explored by the mediator as facilitator. The settlement rate for compulsory mediation is 45 to 62 per cent depending on the type of dispute.

Reminders by text message

Parties expected to attend mediations are reminded by text message that they must attend. This has been found to improve attendance rates.

Compulsory conferences

These are described as 'mediations with teeth' and are used in more complex matters. The conference is set down for a half day and taken by a legally qualified member of the tribunal. The conference starts off as a mediation and chances of settlement are explored. However, if no settlement seems possible at that stage, the member will consider what case management is required and make directions for the future conduct of the case. Since the member is not making any final decisions, the member is not tainted by what may have been learnt during the earlier mediation process and is free to case-manage the dispute. By this means, the parties are saved two visits to the tribunal, one for mediation and one for directions if mediation fails, and this is also a good use of member time.

Again the parties are obliged to participate, and if a party does not appear, the member conducting the conference can proceed to hear the case there and then. Since the notice calling the parties to the compulsory conference contains a clear warning that this might happen if a party does not appear, this is considered to give the parties sufficient right to a fair trial in the tribunal. Compulsory conferences have a success rate of 50 per cent of matters being settled at that stage or soon afterwards.

Hybrid hearings

A hybrid hearing is a *combined* final hearing and a mediation conducted by the same tribunal member on the same day. The idea is to maximise the chance of an agreed settlement between the parties. It is not possible to have the mediation first and follow this with the final hearing before the same member if the parties do not settle the dispute in the mediation. This is because the member may be tainted by confidential information learned in the mediation process. Instead, the hearing is held first, and then the mediation takes place afterwards. This is achieved as follows.

After conducting the full hearing, the member makes a decision and places brief written reasons in a sealed envelope. If the parties settle the dispute, they are not informed of the envelope's contents. If they do not, the member opens the envelope and delivers judgment. QCAT has a statutory obligation to encourage alternative dispute resolution where appropriate, and hybrid hearings are seen as part of this.

. . . the parties can agree things in the settlement which are important for them which the tribunal would be unable to order . . .

It is found that the settlement is more likely to be complied with than a decision imposed by the tribunal. And the parties can agree things in the settlement which are important for them which the tribunal would be unable to order or find it difficult to do so. For example: apologies, undertakings, trial runs, progressive steps and conditions. The hybrid hearing has been found to be very effective in particular types of dispute.

On-the-papers hearings

When appropriate, substantive matters may be heard by a member 'on the papers'. Close case management is usually required to ensure that all relevant material is before the tribunal. This can result in a quicker decision and a saving of tribunal resources (no courtroom or its associated staff is required).

Experts' conclaves

Except in simple cases, where experts are involved an experts' conclave will generally be ordered. This is a private meeting between the experts instructed by each side, but unlike in England and Wales, the meeting is chaired by a legally qualified member of the tribunal.

Before the conclave, the experts are given a list of issues to be dealt with in the conclave. From the start of the conclave until its conclusion by the production of a joint report, the experts are not permitted to take instructions from or to disclose discussions to their clients. In the conclave, prompted by the member, the issues are discussed and agreements and disagreements between the experts will be recorded, at the direction of the member. In this way an experts' joint report for submission to the hearing is produced.

The process emphasises that the experts' duty is to the tribunal. It removes the expert from the constraints of their instructions . . .

The aim of the conclave is to deal with the expert evidence as efficiently as possible. The process emphasises that the experts' duty is to the tribunal. It removes the expert from the constraints of their instructions, it maximises the chance of agreement between them and therefore reduces the chance of the need for live expert evidence at the hearing. It also reduces the need for queries of the experts or gaps in the expert evidence because the member will ensure that all issues are dealt with. So for example the member will ensure that alternative scenarios important to the outcome of the case are covered – such as costings to fit various findings on liability at the hearing.

The process also ensures that irrelevant material is removed from the report used at the hearing. So far, in England and Wales, producing a joint report by the use of an experts conclave chaired by a judge has not found favour. Lord Woolf suggested that the court might set the agenda for experts meetings,[1] and Lord Justice Jackson emphasised the savings which can be made where it is possible for the court to identify the issues as part of case management.[2]

The experts' conclave is actually an extension of the commonly used process in Australian courts where experts give concurrent evidence at the trial itself under the control of the judge.[3] In England and Wales, following a successful pilot in the Manchester Technology, Construction and Mercantile Court as recommended by Lord Justice Jackson,[4] there has been a recent amendment to Civil Procedure Rule 35 so that the court now has the power to order expert witnesses to give their evidence concurrently, in a discussion chaired by the judge.

The inquisitorial process

In small claims cases and tenancy disputes, where there is usually no formal disclosure of documents, pleadings, or witness statements prior to the hearing, the parties are told to come to the hearing ready to prove their case. The tribunal member hearing these cases resolves the dispute by asking the parties about each issue in turn. There is no formal examination or cross examination. The member then decides the matter and gives reasons for that decision. This is found to be an effective and speedy way of dealing with such disputes which is highly appreciated by the parties. They have their say, it has not been a costly process, the matter is dealt with quickly, and they know why they have won or lost.

In England and Wales, some tribunal judges already use the inquisitorial approach in an appropriate case in the interests of efficient decision-making. It is noteworthy that the new employment tribunal rules recognise this as a useful tool. The new rules expressly refer to the tribunal itself at a hearing being able to 'question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit

the evidence'.[5] It would appear that it might be more widely used in the future.

Telephone attendance

In cases which are not too complex, telephone attendance by parties is permitted as a matter of course by application showing a good reason for non-attendance. Unlike in tribunals in England and Wales, it is quite common for only one side to attend by telephone and, while not ideal, this encourages the parties to participate in the process whereas otherwise they could find it too onerous bearing in mind some of the distances involved. It is also quite common for *witnesses* to give their evidence on the telephone. Although not ideal, this makes it easier for the parties to garner their evidence.

On-site hearings

In cases concerning vulnerable adults (guardianship), QCAT offers hearings at the hospital itself. This is appreciated by relatives and reduces the length of time to wait for a hearing. Neighbour disputes (trees and fences) are also often dealt with by on-site hearings.

Use of sessional members including specialists

Apart from the 20 permanent members and adjudicators of QCAT, there are a team of about 100 'sessional members' who are asked to sit on cases on an *ad hoc* basis. Most of these are legally qualified, but some are experts in their own specialist areas, for example construction, commercial retail property, or particular trades and professions. They may sit on panels in building cases, retail shop lease disputes, and disciplinary matters respectively. Generally a legally qualified member will chair these tribunal panels.

Use of assessors

QCAT can enlist the help of assessors to report on matters within their expertise. For example, in building disputes the Queensland Building Services Authority can provide building inspectors to produce a report, and in neighbours disputes about trees, an arborologist may be appointed.

Internal appeals

The first-level appeals are heard by the tribunal itself and usually 'on the papers'. The appeal panel will usually be made up of a senior member and another member who will be a peer of the original decision-maker. Prior to a final decision being made on the appeal, the original decision-maker may be consulted about the grounds of the appeal. After the appeal decision has been made, it is the practice to discuss the outcome of the appeal with the original decision-maker. The advantage of this system is speed, and the direct participation of members in the appeal process can be a learning exercise for them.

Autonomy

QCAT has its own budget and provided it continues to meet its statutory aims and objectives it may adjust its processes (within a statutory framework) to achieve them. Its President may make practice directions and its own rules committee may make rules of procedure and decide on forms. This gives QCAT the opportunity to improve on existing processes and to introduce new ones to further streamline the decision-making process. Constant monitoring, and regular meetings to receive member input, help to achieve this. Changes are not imposed from outside except from the Minister to whom QCAT answers (the Attorney-General) and the State Parliament.

Jeremy Gordon sits as a part-time Employment Judge in London and since moving to Australia also sits as an Adjudicator and Sessional Member of the Queensland Civil and Administrative Tribunal. He is a barrister in both jurisdictions.

[1] Final report 1996, Chap 13, para 45.

[2] Final report of December 2009, Chap 38, para 3.14.

[3] Colloquially known in Australia as 'hot tubbing'.

[4] Final report of December 2009, Chap 38, para 4.3(ii).

[5] Rule 41 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, which came into force in July 2013.

The LIGHT-BULB moment

Joyce Plotnikoff **and** ***Richard Woolfson*** **explain why they came to believe in the need for a website that offers guidance on questioning vulnerable people.**

When dealing with a vulnerable person appearing before a tribunal in any capacity, the judiciary has a responsibility to ensure that communication is developmentally appropriate. Procedural rules give tribunals unrestricted power to direct the manner in which evidence is to be provided and allow the tribunal to regulate its own procedure. Often the main questioning is conducted by the judge and members, so responsibilities about clarity of communication extend to the content and style of questions asked from the Bench.

Not so simple

Even experienced advocates may be unaware of the extent to which their communication may need to be adapted. In his chambers newsletter, a barrister recently complained that the trial judge had not allowed him to ask 'even the simplest question' of a very young complainant: *'X didn't cause your injuries, did he?'* The Court of Appeal had rejected his argument that this restriction on cross-examination was wrong. In fact, the question counsel wished to pose is not simple: a child is unlikely to understand the words *'cause'* and *'injuries'*; the negative makes the statement harder to decipher; and the form of the question, with a 'tag' ending, is complex and powerfully persuasive. The Judicial College's 2012 guidance *Fairness in Courts and Tribunals* notes that tag questions take at least seven stages of reasoning to answer and suggests that they be avoided with children. Tag questions may also lead a vulnerable adult witness to give an inaccurate response.

> *. . . 'tag' questions take at least seven stages of reasoning to answer and [should] be avoided with children.*

Reading the advocate's complaint was a 'light-bulb moment' for us: was it possible to develop a resource to assist in the drafting of simple, developmentally appropriate questions – in relation to adults with communication needs, as well as children? This aspect of case preparation is surprisingly complex and cannot be done effectively at the last minute in court.

Together with Professor Penny Cooper, and with the support of the Nuffield Foundation and City University, we developed a prototype website, *The Advocate's Gateway*, to provide evidence-based guidance on responding to communication needs. Penny, now at Kingston University Law School, chairs the Gateway's inter-agency management committee which includes a tribunal judge.[1] The new website (*www.theadvocatesgateway.org)* was launched by the Attorney-General on 26 April and is hosted by the Advocacy Training Council. The advice is, of necessity, general. It remains advisable to obtain information about the communication abilities of the *individual* concerned, where possible through assessment by an intermediary (see below).

Free information

The Gateway contains a range of free information, including toolkits covering autism spectrum disorder (including Asperger syndrome); learning disability; 'hidden' disabilities (specific language impairment, dyslexia, dyspraxia, dyscalculia and attention deficit disorder); children or young people; and children under seven, or functioning at a very young age. These draw on current research and the expertise of registered intermediaries, with illustrations of good and poor practice. The toolkits describe potential areas of difficulty at court for each type of communication problem. Thus, someone with an autism spectrum disorder is likely to: be prone to heightened anxiety and

sensory sensitivities; show rigid behaviour with a pressing need for 'sameness' and predictability; have a limited attention span; experience delay between hearing something, understanding it and working out how to respond; lack the ability to imagine, interpret or predict others' thoughts, feelings or behaviour; be unable to sustain eye contact; and fail to recognise that they do not understand something said to them.

Framing questions

Each of these toolkits provides advice on 'framing your questions', highlighting those likely to produce unreliable answers. Transcript examples are used to illustrate problematic question types (e.g. *'You can't be certain that you think that it was not possible that you filled in the first side of the form?'* asked of a defendant with learning disabilities). Where possible, the guidance suggests how a question could be improved. One toolkit brings together 'General principles from research' when planning to question a child or adult with communication needs. Additional toolkits address case management in young and other vulnerable witness cases; ground rules hearings (to discuss how questioning should be adapted); and effective participation of young defendants. Further toolkits are planned, including one on mental illness.

Recent Court of Appeal (Criminal Division) decisions (beginning with *R v Barker* in 2010 and including the chambers newsletter case) emphasise the role of the judiciary to ensure that questioning of vulnerable people is developmentally appropriate. The judgments (to be found in the ground rules toolkit) explore limitations on questioning and the circumstances in which the Bench may decide that an advocate should not 'put his case' to the witness and should instead use alternative methods to explain challenges to the witness's evidence. These departures from conventional cross-examination are the subject of a modular 30-minute training film, *'*A Question of Practice', a joint project of the Criminal Bar Association, CPS, Advocacy Training Council and the NSPCC and introduced by the Lord Chief Justice. *'A* Question of Practice' was launched jointly with the Gateway on 26 April. Links to the film can be found on the Criminal Bar Association, Gateway and Advocacy Training Council websites.

Intermediaries

Tribunal responsibilities include 'ensuring, so far as practicable, that the parties are able to participate fully in the proceedings'. The use of 'registered intermediaries' (communication specialists who are mostly speech and language therapists) is confined to witnesses in criminal proceedings. However, in recent years judges have used their inherent discretion to appoint a non-registered intermediary for defendants[2] and, in 2012, an intermediary was appointed to assist a patient appearing before a Mental Health Tribunal. The intermediary assessed the person's communication needs, facilitated the taking of instructions by his solicitor and produced a report with recommendations for discussion with the tribunal (in the absence of the patient) before the start of the hearing. She enabled the patient to say what he wanted to happen, tried to ensure that, despite complex medical and legal language, he understood what was going on and alerted the tribunal when he needed a break. Her fee was paid by HM Courts and Tribunals Service.

. . . in recent years judges have used their inherent discretion to appoint a non-registered intermediary for defendants . . .

Joyce Plotnikoff and Richard Woolfson are founders of legal consultancy Lexicon Ltd.

[1] Leslie Cuthbert, Treasurer, Solicitors Association of Higher Court Advocates.

[2] For information about the appointment of non-registered intermediaries, see *www.theadvocatesgateway.org/images/toolkits/YoungDefendants040413.pdf.*

A one-way trend that is ever UPWARDS

After a year in his new post, *Sir William Charles* reviews the work of the Administrative Appeals Chamber and gives a warning on the consequenses of an increasing case load.

I was appointed as President of the Upper Tribunal (Administrative Appeals Chamber) in April 2012. I then knew little about the work and structure of the AAC and other tribunals. I have enjoyed my first year in my new pasture and now know a great deal more about tribunals and the important part that they play in the administration of justice relating to issues of considerable importance to individual claimants.

The Chamber has a UK-wide jurisdiction covering 25 appellate and first-instance jurisdictions. Its effective predecessor was the Office of Social Security and Child Support Commissioners and its main work, approximately 80 per cent of its caseload, is deciding appeals on points of law from decisions of the First-tier Tribunal (Social Entitlement Chamber) relating to the Social Security and Child Support jurisdiction.

. . . although many social security cases relate to relatively small sums of money, the effect of one decision on many others . . . can result in significant expenditure of public money.

Five million claimants

The social entitlement work comprises some 20 non-means-tested benefits (some of which depend on contributions and others of which are non-contributory) and six means-tested benefits: at present income support/income-based jobseeker's allowance.

There are five million claimants on out-of-work benefits and dependent on jobseeker's allowance and other benefits. Millions of the elderly are in receipt of social security pensions, based on contributions, with or without means-tested pension credit. No slice of the national expenditure exceeds that laid out on social security matters, which have a high political profile and often involve sensitive matters on which strongly held and contrasting opinions are expressed in the media and elsewhere. Also, and although many social security cases relate to relatively small sums of money, the effect of one decision on many others, especially regarding a major benefit, can result in significant expenditure of public money.

The remainder of the work relates to appeals on points of law from decisions of the Health, Education and Social Care Chamber, the War Pensions and Armed Forces Compensation Chamber and the General Regulatory Chamber of the First-tier Tribunal and from decisions of the Pensions Appeal Tribunals for Scotland and (in relation only to assessment cases) Northern Ireland, the Mental Health Review Tribunal for Wales and the Special Educational Needs Tribunal in Wales.

In addition, the AAC hears appeals from the Disclosure and Barring Service (formerly the Independent Safeguarding Authority) and from Traffic Commissioners. It also has a judicial review jurisdiction and determines references under section 4 of the Forfeiture Act 1982.

Approximately 20 new rights of appeals to the AAC are projected for 2013–14. These are not expected to give rise to a significant number of cases.

The jurisdiction is mainly appellate and is founded on 'error of law.[1] Most cases involve challenges by individuals to decisions of public authorities that are of great importance to most of the individual claimants and their families.

Although the social entitlement work comprises in percentage terms a big majority of the work of the AAC and thus effectively dictates its overall performance, the other work is growing, and it can be more time-consuming and demand more urgent attention than much of the social entitlement work. It too can have a profound impact on the lives of individuals. For example, it covers the right to liberty in mental health cases concerning detention, the right to be able to work with young people or vulnerable adults and the right to information. In a special educational needs case, the decision is obviously important for the child and the financial implications of an appeal to the AAC can be significant for the authority involved.

The Chamber takes an investigatory approach, many claimants are unrepresented and a high percentage of the social entitlement work is done without a hearing. Not many cases are appealed further and the decisions of the AAC are binding on the relevant First-tier Tribunals, regulators and decision-makers.The work of the AAC is generally and correctly recognised as being complicated and difficult work that relates to matters of considerable importance for the individual litigants and the expenditure of significant amounts of public money.

Challenges

The central challenge relates to how the AAC manages its increasing and widening work load in terms of numbers and jurisdictions.

Improvements in the administration and the hard work of the judicial complement and the office resulted in a significant increase in both the number of applications for permission to appeal and appeals that were disposed of during the year. But this increase was less than the increase in applications and so the outstanding workload increased.

This trend is expected to continue. Cases received (for England and Wales alone) in 2011–12 were 4,887 and 6,150 in 2012–13. The forecast for 2013–14 is about 6,700 cases.

The changes in the benefits system, and in particular the introduction of Universal Credit and Personal Independence Payments, will increase the work of the Social Entitlement Chamber and, in turn, that of the AAC.

The changes in the benefits system, and in particular the introduction of Universal Credit and Personal Independence Payments, will increase the work of the Social Entitlement Chamber (SEC) and, in turn, that of the AAC. Workload forecasts are likely to be imprecise and history has not demonstrated a consistent correlation between the caseload of the SEC and that of the AAC. Understandably, the increases forecast by the SEC have fluctuated but they have been consistently high.

The nature of the changes in the law and their impact on people who have been in receipt of benefits and new claimants is highly likely to give rise to challenges to the decisions of the Department for Work and Pensions, and then of the SEC, based on points of law and so, for some time after the introduction of the changes, they are likely to give rise to a percentage of appeals from the SEC to the AAC that is greater than the current percentage (of the order of one per cent).

Forecasting the size and period of the increases of workload at the SEC and the AAC is an inexact science that involves a number of matters that are difficult to predict. It is highly likely that

those increases will be significant. Also, it is likely that, for a period, the AAC will receive a higher percentage than at present of appeals from a significantly greater number of SEC decisions. Even a small increase in that percentage (say 0.5 per cent) will result in a high percentage increase in the work of the AAC (around 50 per cent). If this is combined with the expected increase of SEC decisions, the increase in the work of the AAC will, in percentage terms, be large.

Judicial complement

The AAC does not have a fixed or agreed judicial complement. Since 2005 (in its previous guise until November 2008 as the Office of Social Security and Child Support Commissioners) there have been approximately 16 salaried judicial office-holders.

On 1 April 2012 (excluding myself) there were 16 salaried Upper Tribunal judges in the AAC, two based predominantly in Edinburgh. Including part-time working, this equates to 14.5 full-time equivalent (12.7 FTE in London and 1.8 FTE in Edinburgh).

It also has a body of 20 fee-paid appointed deputy judges who sit regularly (17 in England and five in Scotland). Deputy judges sit a minimum of 15 to 20 days a year. Since August 2012 we have had agreement from the budget holders to sit increased numbers of deputy judges to manage the rising workload. Deputy judges deal predominantly with social entitlement appeals on the papers. They are a vital resource for the AAC, and considerable benefits flow from retaining the experience of salaried judges as deputy judges after their retirement.

In addition to its core salaried and deputy (fee-paid) judges, there are also approximately 70 specialist fee-paid judges and members who sit on appeals from decisions of the Disclosure and Barring Service; from the First-tier Tribunal Information Rights and appeals against decisions of the Traffic Commissioners.

There are nine registrars who work a mixture of full- and part-time hours. Within that team there are also two legal information officers who job-share. The role of the registrars is to assist the AAC judges and the administration by providing legal and procedural advice. This is an important role, particularly because a significant number of appellants are unrepresented.

. . . if the forecast of an increasing workload is correct, the present judicial and administrative resources will not be able to prevent a significant year-on-year increase in the backlog of cases at the AAC . . .

The future

It is axiomatic that ultimately the output of the AAC is governed by the number of cases that its judges can deal with properly in the relevant period and the administration should be geared to maximising that output.

In the short and medium term, higher increases in workload than that in 2012–13 are forecast and without an increase in its judicial and administrative resources there is realistically no prospect that the increase in throughput of 2012–13 can be repeated year on year.

So, if the forecast of an increasing workload is correct, the present judicial and administrative resources will not be able to prevent a significant year-on-year increase in the backlog of cases at the AAC and so of the time it takes to deal with appeals to it.

Mr Justice Charles is President of the Upper Tribunal (Administrative Appeals Chamber).

[1] A mistake in a court proceeding concerning a matter of law or fact, which might provide a ground for a review of the judgment rendered in the proceeding.

AIMS AND SCOPE

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

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

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

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

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

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