JUDICIAL COLLEGE

TRIBUNALS

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WINTER 2013

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LMS IS LIVE

The Judicial College recently launched its Learning Management System (LMS), which replaces the former training website.

The LMS is to be the repository of all judicial training materials. It is also the website on which judicial office-holders can, where appropriate, book their training and access information relating to training events. All judicial office-holders are encouraged to register to familiarise themselves with the site and what it offers.

The new site is based on the same technology as the public judicial website which has enabled significant cost savings to be made in the development. It provides users with improved access to more information and is accessible on any Internet-connected PC, laptop or device.

In addition, the LMS enables users to access training material remotely and enrol on training courses and seminars online.

Judicial office-holders are invited to register an account with the new intranet and LMS. The process should take a few minutes to complete. The user creates their own memorable password (and can reset this at a later date, if required or forgotten) without the need to contact anyone.

To register, copy *https://intranet.judiciary.gov.uk/register* in a browser and follow the instructions. Once on the LMS homepage, the user can access different jurisdictions to find training materials. The 'News' section, to the right of the screen, has direct links to recent items of interest.

If problems are encountered with the registration process (or to provide user feedback) please e-mail the Communications Team at *website.enquiries@judiciary.gsi.gov.uk*, or call 020 7073 4857.

Editorial

Welcome to the winter 2013/14 issue of the journal. It includes a selection of articles which demonstrate the range of experiences and variety of work taking place in tribunals.

We were very saddened to learn of the death of Hugh Stubbs after a short illness and we include, on page 6, an obituary by Andrew Bano, his predecessor as President of the War Pensions and Armed Forces Compensation Chamber, who knew him well. Our condolences go to his family.

Also by Andrew, on page 19, is an article on preparing a room to take account of the needs of the parties to a hearing. There are many factors to consider, and he examines several of them and their implications. An issue which also affects all of us is stress and, on page 7, David Latham, Michelle Austin and others review some aspects of the current thinking on this important topic.

Leslie Cuthbert and Melanie Lewis continue the theme of social media, covered in the last two issues of the journal, by exploring its impact on criminal and contempt proceedings in the court system. This includes a review of recent cases involving jurors, defendants and others who have 'tweeted' or sent other messages and ended up in court as a result. This is an issue with growing implications for tribunals hearings (see page 11).

Mark Hinchliffe has written the first of a two-part article about the implications of specialist knowledge on tribunals, and how panel members can use their expertise effectively (see page 2).

On page 14, Professor Cheryl Thomas shares some of the findings of her empirical research into tribunal decision-making.

Professor Jeremy Cooper, Chairman of the Editorial Board.

e-mail: jc*publications@judiciary.gsi.gov.uk*

'Experts in our own little niches' (part one)

Mark Hinchliffe assesses the implications of specialist knowledge on tribunals and considers how panel members can use their expertise effectively.

In a somewhat backhanded compliment to the programme's contestants, Alex Trebek, the veteran host of American TV game show Jeopardy, once said: 'Well, we're all experts in our own little niches.'

The tribunals world is full of little niches, and many of us like to think that we are experts within them. But are we truly experts in our own little niches? Where does that expertise come from? What is the pay-off for tribunals having expertise? Is deference to tribunal expertise deserved? How effectively do tribunals use their expertise? And is there a limit to how far we should go, in order to avoid giving evidence to ourselves?

Sir Andrew Leggatt in his seminal review of tribunals in 2001[1] considered that a key reason for choosing a tribunal to decide disputes was that tribunal decisions are often made jointly by a panel of people who pool legal and other expert knowledge, and tribunal decisions are the better for that range of skills.

Distinctive feature

If the civil courts require an expert opinion, they generally rely on the evidence produced by the parties, or on a court-appointed assessor – as, for example in the county courts and High Courts in Equality Act cases. Tribunals, on the other hand, are supposed to offer a different opportunity. By permitting decisions to be reached by people with a range of relevant qualifications and expertise, the need for outside expertise can, in theory, be circumscribed. Indeed, it was here that one of the distinctive features of tribunals was expected to have its greatest impact: with careful training and guidance in the art of finding facts and, in particular, in the weighing and evaluation of evidence, the use of expert decision-makers would enhance the judicial process.

For many jurisdictions, this is still the expectation. For instance, in my own jurisdiction of mental health, the Senior President of Tribunals has decided that a panel must comprise a judge, a registered medical practitioner, and a specialist lay member with substantial experience of health or social care matters.[2] In terms of criteria for appointment, medical members must have held a full-time or part-time appointment as a consultant psychiatrist for at least three years and have membership of the Royal College of Psychiatrists. Our specialist lay members must be aware of the range and nature of mental illness and mental disorders, and have an understanding of both the social context and the proper assessment of risk. The mental health panel is, therefore, exactly as Leggatt envisaged – comprising three people with a range of qualifications and expertise, coming together to pool their different (but relevant) experience, training and skills. The presence of a lay member, albeit a specialist lay member, may also add safeguards and legitimacy to decisions involving the deprivation of a person's liberty.

The mental health panel is, therefore, exactly as Leggatt envisaged – comprising three people with a range of qualifications and expertise . . .

In the First-tier Tribunal, War Pensions and Armed Forces Compensation Chamber, panels will usually comprise a judge, another judicial

office-holder who has substantial experience of military service, and a third member who is a registered medical practitioner.[3] In an appropriate case, the Senior President has given the Chamber President power to slightly alter this composition. In the Upper Tribunal Administrative Appeals Chamber (AAC), a range of non-legal expertise is on hand, and sometimes required, to assist the judge in certain categories of appeal, such as a safeguarding vulnerable groups appeal, or an appeal from a decision of a traffic commissioner where, in addition to the judge, there will generally be two other members with substantial experience in transport operations.[4]

On the other hand, some tribunals have reviewed their need for non-legal expertise and, with the consent of the Senior President of Tribunals, have altered their composition either permanently, or on a trial basis.

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Six-month pilot

The Senior President is required to ensure the fairness, efficiency and swiftness of cases coming to hearing and, in the special educational needs jurisdiction within my own chamber, he has decided to explore whether, along with an experienced tribunal judge, the use of a single experienced specialist member provides as fair an outcome as having two specialist members. Consequently, following a consultation, he has sanctioned a six-month pilot commencing on 1 October 2013 whereby, in appeals concerning refusals to arrange an assessment of a child's special educational needs, the decision may be made by one judge and just one other member where the other member has substantial experience of educational, child care, health or social care matters, and both the judge and member have sat on at least 25 hearings within the jurisdiction.[5]

In the Social Entitlement Chamber, the composition of panels varies depending on the type of case.[6] Medical expertise is used in all appeals involving a medical issue. Where an evaluation has to be made of the extent of a disabled person's need for attention from another person, a disability member will also sit, who will have expertise in aspects of disability, perhaps because of their professional work in healthcare other than as a registered medical practitioner. Alternatively their expertise may arise because they are themselves disabled, or they care for someone who is. Thus, in an appeal relating to an attendance allowance or a disability living allowance, the tribunal must generally consist of a judge, a medical member and a member who has a disability qualification. In some other cases the requirement will be for a judge and a medical member, and in others a tribunal judge sitting alone is sufficient. Moreover, in child support cases where there is a financial issue of some complexity the chamber has a number of financial members who are chartered accountants. Some also sit in the Tax Chamber.

Then there are those jurisdictions where decisions are made by a judge alone, such as First-tier Immigration judges, and Upper Tribunal (AAC) judges dealing with most social security or child support appeals from the Social Entitlement Chamber.

One-judge tribunal

Traffic Commissioners, not all of whom are lawyers, sit as a specialist one-judge regulatory tribunal, deciding who should have and who should keep a licence to operate large goods or passenger vehicles. Some of those decisions are made at a public inquiry; the majority are made based upon documentary submissions. As the then Acting Senior Traffic Commissioner told a parliamentary committee, all such decisions are judicial rather than quasi-judicial, and are frequently reported in the trade press.[7]

In the Employment Tribunal, non-legal members are no longer routinely involved in all unfair dismissal cases, and one can readily see that this may be an area where 'experts' are not necessarily needed. Many of us are employees or employers, and the issues are often either strictly legal, or more dependant upon general fact-finding rather than the ability to understand complex or specialist matters beyond everyday experience.

These 'judge alone' tribunal jurisdictions command respect as expert (or, at least, specialist) tribunals, even though the expertise comes not from some non-legal experience or qualification, but from doing the work, day after day, in a niche jurisdiction. Thus, as Edward Jacobs (himself an AAC judge) said in *Tribunals Practice and Procedure*,[8] some members may not come to the tribunal with previous knowledge, experience or expertise, but over time they 'acquire, through training and experience, familiarity with the particular legal and factual issues that arise before the tribunal'. Whether this is what Leggatt had in mind when he referred to tribunals comprising people who pool legal and other expert knowledge, or whether a newly appointed judge in a judge-alone jurisdiction can legitimately claim expertise from the start, are moot points.

In medieval times, if cases required specialist or technical knowledge, experts were invited to serve on juries.

Compelling jurisprudence

In any event, despite this diversity, we now have a consistent line of compelling jurisprudence about the deference to be shown to expert tribunals – whether they are specialist 'judge-alone' tribunal jurisdictions or those with outside expertise.

Initially, this deference appeared to derive, not from a sense of respect for expertise, but from the pragmatic pursuit of finality. As Lord Radcliffe explained in *Edwards v Bairstow*,[9] when referring to the General Commissioners:

> 'As I see it, the reason why the courts do not interfere with the commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up, the commissioners are the first tribunal to try an appeal, and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law.'

In time, however, the perceived expertise and specialism of tribunals began to supersede this somewhat down-to-earth argument, and the focus moved to the particular knowledge and experience of the members of the tribunal.

Having an expert or two on the decision-making panel is, in fact, nothing new. In medieval times, if cases required specialist or technical knowledge, experts were invited to serve on juries. Then, in the late Middle Ages, the experts left the juries and began to testify as witnesses. With the advent of tribunals, experts returned to the bench, and their presence has subsequently given tribunals a certain status. Thus, in *Cooke v Secretary of State for Social Security*,[10] Lady Justice Hale (as she then was) referred to 'a highly expert and specialised legally qualified body, the Social Security Commissioners'. Consequently, on appeal to the Court of Appeal:

> '. . . the ordinary courts should approach such cases with an appropriate degree of caution. It is quite probable that on a technical issue of understanding and applying the complex legislation the Social Security Commissioner will have got it

right. The Commissioners will know how that particular issue fits into the broader picture of social security principles as a whole. They will be less likely to introduce distortion into those principles. They may be better placed, where it is appropriate, to apply those principles in a purposive construction of the legislation in question. They will also know the realities of tribunal life. All of this should be taken into account by an appellate court when considering whether an appeal will have a real prospect of success.'

In *Secretary of State for the Home Department v AH (Sudan) and Others*,[11] Lady Hale (by then in the House of Lords) further developed the theme, saying in relation to the Asylum and Immigration Tribunal:

'This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right . . . Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts, or expressed themselves differently.'

In the Supreme Court, Lord Hope has further championed respect for judicial expertise.

Commenting on this passage, Waller LJ in *H v Essex CC and Others*[12] thought that the point made by Baroness Hale was particularly important to bear in mind where what was being criticised on appeal was not the arbitrary rejection of the unchallenged technical evidence of an expert witness where the tribunal has no expertise of its own (which would be difficult to uphold), but was the rejection of expert evidence offering an opinion in the very area where the tribunal had its own expertise, and upon the very issue that the expert tribunal had, itself, to make a decision.

Regulated industries

Traffic Commissioners are regarded as expert regulators of the large goods and passenger carrying vehicle industries. That expertise is respected within the regulated industries and is also relevant when judicial decisions are appealed to the Upper Tribunal. In *Bradley Fold Travel Ltd and Peter Wright v Secretary of State for Transport*,[13] Leveson LJ held that the Upper Tribunal (where there are expert members sitting alongside the judge) should not interfere just because it preferred a different view, but should only do so where it concludes that the process of reasoning and the application of the relevant law, require it to interfere – or, to put it another way, 'where reason and the law impelled the tribunal to take a different view'.

In the Supreme Court, Lord Hope has further championed respect for judicial expertise. In *Jones (by Caldwell) v First Tier Tribunal and Criminal Injuries Compensation Authority*[14] he specifically acknowledged the expertise of First-tier Tribunals, and added that tribunals were particularly well fitted to determine a consistent approach. It was important, he said, to ensure that:

'. . . the expertise of tribunals at the First-tier, and that of the Upper Tribunal, can be used to best effect. An appeal court should not venture too readily into this area by classifying issues as issues of law which are really best left for determination by the specialist appellate tribunals.'

All of this chimes with the overriding objective as it is defined in the procedure rules applicable to most tribunal jurisdictions. In both the First-tier and Upper Tribunal procedure rules, for example, the overriding objective to enable the tribunal to deal with cases fairly and justly includes using any special expertise of the tribunal effectively.[15]

But this begs a few pertinent questions. How much expertise is desirable? If the appellate jurisdictions are justified in backing off in deference to a lower tribunal's expertise, how can the public be assured that the tribunal really does have the expertise it claims? And how does a tribunal ensure that it uses its expertise both profitably and fairly – without, in effect, giving evidence to itself? I will look at these questions in Part Two.

Mark Hinchliffe is the Deputy Chamber President of the Health, Education and Social Care Chamber, First-tier Tribunal, with responsibility for the mental health jurisdiction, and a judge of the Upper Tribunal (Administrative Appeals Chamber).

[1] Tribunals for Users – One System, One Service, March 2001.
[2] Composition of tribunals in relation to matters that fall to be decided by the Health, Education and Social Care Chamber on or after 18 January 2010 (Practice Statement 16/12/2009).
[3] Composition of tribunals in relation to matters that fall to be decided by the War Pensions and Armed Forces Compensation Chamber on or after 3 November 2008 (Practice Statement 30/10/2008).
[4] Composition of tribunals in relation to matters that fall to be decided by the Administrative Appeals Chamber of the Upper Tribunal on or after 1 October 2012 (Practice Statement 1/10/2010).
[5] Proposal to amend the Practice Statement regarding panel composition in the First-tier Tribunal (Special Educational Needs and Disability). Response from the Senior President of Tribunals, July 2013.
[6] Composition of tribunals in social security and child support cases in the Social Entitlement Chamber on or after 1 February 2013 (Practice Statement 1/02/2013).
[7] House of Commons Transport Committee, 2012.
[8] *Tribunals Practice and Procedure*, Jacobs, Legal Action Group, 2nd edition 2011, 1.128.
[9] [1956] AC 14.
[10] [2002] 3 All ER 279.
[11] [2007] UKHL 49.
[12] [2009] EWCA Civ 249.
[13] [2010] EWCA Civ 695.
[14] [2013] UKSC 19.
[15] See, for example, The Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

JUDGE HUGH STUBBS

Judge Hugh Stubbs, President of the War Pensions and Armed Forces Compensation Chamber of the First-tier Tribunal, died on 31 January after a short illness.

Hugh joined the Pensions Appeal Tribunal in 2001, following a distinguished career as a partner in a leading firm of City solicitors. He brought with him the benefits not only of the shrewd judgement and huge store of legal knowledge which he acquired in practise, but also of his experience in leading roles in the International Bar Association.

Even before his appointment as Chamber President in 2012, Hugh was frequently asked to unravel difficult legal problems at training conferences for colleagues throughout the country. Despite his incisive analysis, his presentations were always marked by his modesty and self-effacing charm.

Hugh was a person of immense courtesy, who devoted his life to the service of others. He was a valued friend and support to all his colleagues in the Chamber and in Scotland and Northern Ireland. Outside work, he played a leading role in a number of important charities and in school and university education.

We extend our deepest sympathy to Hugh's family and friends.

Pressure is one thing, but STRESS is another

Work-related stress is the most common reason for calls by the legal profession to the helpline run by support charity LawCare. Addressing potential sources of stress is thus essential for judicial managers.

We all experience pressure in our lives and it isn't always bad for us: a certain amount of pressure in our life and work can be exhilarating, an adrenaline rush, and the motivation we need to perform at our best. However, as the saying goes, 'you can have too much of a good thing' – there is a tipping point at which long-term sustained pressure starts to effect us negatively, sometimes with serious consequences. According to a widely held definition:

> 'Stress occurs when pressure exceeds our perceived ability to cope.'[1]

According to the 2011–12 Labour Force Survey, conducted by the Office for National Statistics, stress is the second most common cause of absence from work, with workers in Great Britain losing 10.4 million working days in 2011–12 due to work-related stress. The survey showed that the total number of UK cases of stress in 2011–12 was 428,000 (40 per cent) out of a total of 1,073,000 for all work-related illnesses. The 45 to 54 age group had the highest incidence rate for males and females combined.[2] The judiciary is not exempt from this; stress remains the most common reason for calls to LawCare's helpline.

Common myths about stress

Stress is an illness

Incorrect! Stress is the natural reaction people have to excessive pressures or demands placed on them. If stress is too excessive and prolonged, mental and physical illness may develop.

A bit of stress is good for you

Incorrect! There is a difference between pressure and stress. People who get things done under stress are succeeding in spite of their stress, not because of it.

Stress is inevitable

Incorrect! Stress doesn't come from what is going on in your life. It comes from your perceptions about what is going on in your life. With each new situation a person will decide whether they believe that they have the resources to cope (regardless of whether that belief is accurate or not).

Stress only happens to weak people

Incorrect! Stress affects people in different ways and what one person finds stressful can be normal to another.

Potential for stress in the judiciary

The build-up of stress is not necessarily caused by, and often not actually directly as a result of, the work environment. However, pressures from both inside and outside work can accumulate. According to the Health and Safety Executive, six factors can lead to work-related stress if they are not managed properly.

According to Judicial HR's data, the sickness rate across the whole of the salaried judiciary is currently less than two per cent which includes absences recorded as stress, stress-related illness and anxiety. This is remarkable given that the judiciary as a whole is an older workforce than the majority. However, the factors listed (see panel) are all relevant in the tribunal environment. In addition, judges are exposed to other factors linked to stress such as the risk of secondary trauma, by what they see and hear in the hearing room. Often absences that may be attributable to stress further down the line

present initially as another condition that is unlikely to arouse concern, e.g. headaches, colds and flu.

One tribunal's approach to stress management

The Employment Tribunal recently held a training event for its judicial managers (those judges with responsibility for other judicial office-holders) as both a preventative measure and to address issues that may already be present. President of the Employment Tribunals, David Latham, said of his tribunal: 'We have experienced considerable pressures: a high degree of change, shortage of resource, increased volume of claims due to the recession and other economic matters.'

All of these pressures relate to factors identified by the Health and Safety Executive as being a potential source of stress. Concern was expressed as to the well-being of the members of the judiciary, particularly those in salaried positions. Recent experience had indicated that two strokes and a heart attack suffered by salaried employment judges could have been related to or influenced by stress and pressure.

Having discussed this matter with Judicial HR and sought occupational health advice (from Atos, a supplier of services for the MoJ), the President concluded that the starting point would be training of the judicial managers (in our case regional employment judges in England and Wales) on stress management.

It was agreed that the focus of the training should include the identification of stress features, the possibility of stress having an adverse affect both on the individual human being and on their work performance, managing that stress (particularly if it was connected wholly or partly with work-related matters), managing any sickness absence caused by stress, and managing the result, impact and increased pressure on judicial colleagues as a result of absences.

Health and Safety Executive – factors which can lead to work-related stress:[3]

1 Demands: workload, work patterns and the work environment.

2 Control: how much say a person has in the way they do their work.

3 Support: encouragement, information, resources and support from colleagues and superiors.

4 Relationships: levels of conflict, unacceptable behaviour, e.g. bullying at work.

5 Role: understanding of individual's role and responsibilities.

6 Change: how changes (large or small) are managed and communicated.

Both an occupational health physician and an occupational health consultant psychologist were invited to give a presentation to the regional employment judges on the matters outlined above. The session was designed over half a day and would include a presentation on the physical aspects and diagnosis but primarily concentrating on the psychological aspects.

The psychological aspects emphasised that it was not just pressures in the work environment that were contributory factors but all the other pressures on an individual. It was shown that the build-up of stress and pressure that could cause difficulties might not be work-related but was 'tipped over the brink' by something that occurs within the work environment or in the alternative as the case may be.

The course outlined how to identify the situation, how to manage the individuals and communicate with them, how to manage workload in order to obviate such matters having identified symptoms and causes, and how to communicate with any salaried judge who was away from sittings as a result of such medical conditions.

Importantly, the course also discussed the phased return to work that might be necessary and ongoing constant contact with such people. Attendees considered and discussed the importance of maintaining contact and not allowing an extended period away from the work environment which caused and created further problems.

The seminar was conducted very much on the basis of a plenary session with active participation from all members of the judicial management team but facilitated by the consultant psychologist who was leading the session.

The Employment Tribunal was fortunate to have the Senior President attend this session. As a consequence a report was made to the Tribunals Judicial Executive Board at its meeting that followed shortly after. That report was positively received and it was recognised that this was an area for training of all judicial management for the future.

We have not yet considered how to take forward the accessing of support mechanisms for people who are suffering from these symptoms as recognised by the judicial managers concerned. There are ongoing discussions with Judicial HR who were extremely supportive and cooperative in providing the facilities and funding for this half-day course.

There was some small resistance from the judicial managers as to whether or not they should receive such training and education but the majority were very positively in favour. As a result of the course, we believe that all those present gained substantially from the input into that course. How each individual now reacts as a judicial manager will be tested by time.

In response to requests from various courts and tribunals, [Education and Development Advisers] have coordinated half-day stress training events and short modules to support those who have a responsibility for the well-being of others.

Awareness and training

Education and Development Advisers at the Judicial College are a resource for courts and tribunals on all training matters. In response to requests from various courts and tribunals, they have coordinated half-day stress training events and short modules to support those who have a responsibility for the well-being of others. Such training was provided to help judicial leaders and managers in the Immigration and Asylum Tribunal to understand stress, how it might affect the judiciary, their role in handling stress in others and the importance of managing their own well-being.

A questionnaire used in the training may be useful for you to consider your own resilience.

The positive response from these events has led to the inclusion of stress and well-being training into the first cross-jurisdictional Leadership and Management Development Programme which will be launched in March 2014. This annual development programme will be run by the Judicial College for all newly appointed and existing leadership and management judicial office-holders.

Contact:
Education and Development Advisers
Michelle Austin – ***michelle.austin@judiciary.gsi.gov.uk***
Olivea Ebanks – ***olivea.ebanks@judiciary.gsi.gov.uk***
Kay Evans – ***Kay.evans@judiciary.gsi.gov.uk***

Helping the judiciary to manage stress

Addressing potential sources of stress before they develop into more serious health issues is essential and this is a responsibility which falls to individuals and also judicial managers. There is a range of help and guidance available both to

individuals who are suffering from stress and for judicial leaders and managers.

In accordance with the Senior President's health and welfare policy for salaried judges (which can be found on the judicial intranet), workplace stress, anxiety and depression are all triggers for immediate medical referral for the salaried judiciary, so that help and support can be offered at an early stage. In some cases – for example, stress and depression following a bereavement – there will be no need for medical referral as often the judge just needs time, space and understanding to work through the grieving process.

The [LawCare] service includes a confidential 365 days a year helpline, a website full of useful guidance, information packs . . . training courses on stress and vicarious trauma, and a well-being portal to help users recognise and manage stress in their lives.

Judicial HR

All judicial office-holders may contact the Judicial Health and Welfare team in the Judicial Office for initial help and advice on health and welfare matters and workplace relationship issues which relate to both salaried and fee-paid office-holders. They can arrange for medical referrals.

Contact:
Maureen Gillespie – 020 7073 1626
Michelle Bayley – 020 7073 1623

Judicial welfare lead

Miss Elisabeth Arfon-Jones is the judge with portfolio responsibility for judicial welfare. She is available to provide advice on welfare matters and to act as confidential 'next friend' to all tribunals judiciary who wish to speak confidentially about matters which concern their welfare and which affect the performance of their judicial role.

Contact:
Judge Arfon-Jones via her clerk on 020 7073 4221

Judicial helpline

For salaried judges, the Judicial Helpline is a confidential telephone line to access both practical and emotional support direct from trained personnel 24 hours a day throughout the year. Benefits of the service include provision of free telephone advice and telephone counselling to judges, their partners and resident children. Face-to-face counselling is also available but only for the judicial office-holder. The contact details are in the Judicial Health and Welfare Policy on the judicial intranet.

LawCare

LawCare continues to provide help, support and advice for both the salaried and fee-paid judiciary as well as members of the legal profession. The service includes a confidential 365 days a year helpline, a website full of useful guidance, information packs which can be downloaded from the website, training courses on stress and vicarious trauma, and a well-being portal to help users recognise and manage stress in their lives. These services are free at the point of contact, although if there is professional counselling or treatment this will normally have to be paid for.

Contact:
0800 018 4299 or *www.lawcare.org.uk*

Contributors to this article were David Latham, President of Employment Tribunals, Michelle Austin, Judicial College Education Adviser, and Maureen Gillespie, of Judicial Office HR.

[1] Palmer S and Cooper C. *How to Deal with Stress*, 3rd edition, (2013).

[2] Health and Safety Executive. Paul Buckley. Stress and Psychological Disorders in Great Britain (2013).

[3] Health and Safety Executive (2013) – *www.hse.gov.uk/stress/furtheradvice/causesofstress.htm*.

Tweet, tweet . . . all the way to PRISON

Leslie Cuthbert **and** ***Melanie Lewis*** **review some recent cases of individuals who have fallen foul of inappropriate and illegal use of social media.**

In the last two editions of *Tribunals*,[1] Barry Clarke gave a personal view about the potential impact of social media both on the role of judicial office-holders and on the potential evidential impact of sites such as Twitter and Facebook. As he quite rightly pointed out, the arena of the Employment Tribunal has been perhaps the first to experience a deluge of issues arising from social media but it is unlikely to be the only tribunal affected.

Though recent decisions have been predominantly in the courts jurisdiction, it is hoped that they will provide some assistance for members of First-tier Tribunals who may come across such situations in their jurisdictions. As a total of 653 people faced criminal charges in England and Wales in 2012 in connection with comments on Twitter or Facebook it is impractical to do a review of all of them!

. . . a total of 653 people faced criminal charges in England and Wales in 2012 in connection with comments on Twitter or Facebook . . .

Power of referral

As readers will undoubtedly be aware, s25 of the Tribunals, Courts and Enforcement Act 2007 provides the Upper Tribunal with the same powers, rights, privileges and authority as the High Court and Court of Session regarding 'all other matters incidental to the Upper Tribunal's functions'.[2]

First-tier Tribunals[3] have the power under their own rules to refer matters to the Upper Tribunal for the consideration of making an order under s25. In a 2010 Upper Tribunal decision, the panel made the following observation in regards to this power:

> 'The power of referral to the Upper Tribunal which have now been conferred on tribunals in order to aid them in ensuring compliance with their orders may have very serious consequences, including the deprivation of a person's liberty. In England and Wales a sentence of two years' imprisonment may be imposed – see section 14 of the Contempt of Court Act 1981.'[4]

In April 2013, Sir John Thomas, now Lord Chief Justice Thomas, warned that Facebook and Twitter users will face lengthy jail sentences if they defy orders banning the publication of information.[5] For some tribunals where decisions are made in a private, as opposed to a public, hearing, this judgment may have major ramifications for the administration of justice. The two men involved were given a suspended prison sentence of nine months for being part of a 'concerted campaign' to publish images purporting to be of James Bulger's killers on the 20th anniversary of his death, despite an injunction against doing so being in place. Sir John Thomas's words are worth quoting in their entirety.

> 'For the future, if there is publication on the Internet or through social media, then we consider there will be little prospect of such a person, if the publication occurs after the date of this judgment, escaping a very substantial custodial sentence without there being a prospect of suspension. We hope that message will be clear.'

The court heard that tens of thousands of people – 24,000 on Facebook alone – had shared the images, despite the injunction forbidding identifying the two offenders and which the defendants were aware existed. On his Facebook page with 141 friends, Mr Harkins had written: 'Intresting (sic) that this photo isn't allowed to be shown and there's an investigation on how it got out.'

As well as individuals potentially recording and/or disclosing what goes on in a private tribunal hearing, there have been numerous cases of jurors being involved in either discussing cases that they are sitting on or using Google or other Internet search engines to obtain information about cases.[6] This is less likely to be an issue within tribunals, it might be hoped, given that panellists will usually have been appointed through a rigorous selection process and will be aware of the principles of natural justice in deciding the case on the basis of the evidence presented to them during the hearing.

What, though, of witnesses who have chosen to research what they intend to say using the Internet or individuals who seek to influence a witness in relation to the evidence they are to give before a tribunal? Of course, some tribunal members, appointed because of their specialist knowledge, may be tempted to carry out forms of Internet research about a case in order to ensure their specialist knowledge is of assistance in the particular matter before them. Guidance may perhaps be needed for such members in where the appropriate line is between acceptable updating of specialist knowledge and case-specific research.

Of course, another area which may of be of concern to members of tribunals is potential social media commentary about them which may be libellous, i.e. in that it damages someone's reputation 'in the estimate of right-thinking members of society'. A particularly famous recent example was the case earlier this year involving the wife of Commons speaker, John Bercow, and Lord McAlpine.[7]

The age of parties appearing before tribunals is also likely to have an impact on how much of an issue social media is likely to be. For example, 46 per cent of 18 to 24 year olds surveyed[8] are unaware they can be sued for defamation if they tweet an unsubstantiated rumour about someone. That compares with 17 per cent of over-65s.

'As a general rule, threats which are not credible should not be prosecuted, unless they form part of a campaign of harassment specifically targeting an individual within the meaning of the Protection from Harassment Act 1997.'

Threats not credible

Then there are those individuals who consider that it is 'amusing' to make suggestions of criminal action on social media sites. One of the most significant was Paul Chambers who joked on Twitter in 2010 that he would blow up Doncaster-Sheffield's Robin Hood Airport and was convicted in 2010 for sending a 'menacing electronic communication' under the 2003 Communications Act but whose conviction was quashed on appeal in 2011.[9] It was accepted on appeal that the basis of the tweet did not carry real menace and new CPS guidelines state that:

> 'As a general rule, threats which are not credible should not be prosecuted, unless they form part of a campaign of harassment specifically targeting an individual within the meaning of the Protection from Harassment Act 1997.'

Another possibility is that of 'trolling', a phenomenon that has come to prominence recently where online forums, Facebook pages

and newspaper comment forms are bombarded with insults, provocative comments or threats about a specific subject or individual.

There is an offence of making 'grossly offensive' comments under the Malicious Communications Act 1988 which must be balanced against the right to be rude about someone in print under Article 10 of the European Convention on Human Rights protecting free speech. In one case, a Reading man, Sean Duffy, mocked the deaths of four children which resulted in the imposition of an 18-week prison sentence at Aberdeen Sheriff Court in 2011.

Tweeters may avoid prosecution if they rapidly withdraw a grossly offensive comment, express 'genuine remorse' for it, or if the comment was not intended to be widely distributed in the first place.

Tweeters may avoid prosecution if they rapidly withdraw a grossly offensive comment, express 'genuine remorse' for it, or if the comment was not intended to be widely distributed in the first place. Those aged under 18, who may not fully appreciate the potential harm and seriousness of their communication, are also unlikely to be brought before the courts.

Contempt of court review

A consultation was opened by the UK Law Commission in November 2012 to review the law relating to contempt of court, partly due to the case of a juror having researched a defendant online, and it will be interesting to see the conclusions of this review, once they have been finalised, for both courts and tribunals.

Even more recently, the President of the Family Division, Sir James Munby, gave a judgment[10] in relation to a childcare case involving posts to Facebook and a video which was placed on YouTube showing a child being removed by social services. In his judgment, Sir James Munby balanced the issues of the privacy and welfare interests of the child with the importance of the public debate as to the operation of the care system as highlighted by the video footage.

In advance of any additional specific guidance that may subsequently be issued by Chamber Presidents or from the Upper Tribunal, any current concerns tribunal members have regarding the uses or abuses of social media may either be referred to the Upper Tribunal for an order under section 25 or, in the first instance, may perhaps be referred to the Judicial Office press team.

The pace of change in this area is rapid, however, and with the advent of cameras within courts for the first time the impact of the media on tribunals is a matter we simply cannot ignore or expect will disappear.

Leslie Cuthbert and Melanie Lewis sit on the First-tier Tribunal (Health, Education and Social Care Chamber)

[1] Pages 18–20 Spring 2013 and 8–11 Summer 2013 respectively.

[2] s25 (1) and s25(2)(c).

[3] For a more detailed summation of the powers available to First-tier Tribunals in relation specifically to contempt, please see the Law Commission note as to the jurisdictional basis for courts and tribunals to act on a contempt in the face of the court here: *http://lawcommission.justice.gov.uk/docs/cp209_contempt_of_court_appendix-e.pdf.*

[4] *MD v Secretary of State for Work and Pensions (Enforcement Reference)* [2010] UKUT 202 (AAC).

[5] *HM Attorney-General v Harkins and HM Attorney-General v Liddle* [2013] EWHC 1455 (Admin).

[6] *HM Attorney-General v Kasim Davey and Joseph Beard* [2013] EWHC 2317 (Admin).

[7] *Lord McAlpine of West Green v Sally Bercow* [2013] EWHC 1342 (QB).

[8] Research company ComRes interviewed 2,047 British adults online from 5 to 7 December 2012.

[9] *Paul Chambers v DPP* [2012] EWHC 2157.

[10] *Re J (A Child)* [2013] EWHC 2694 (Fam).

Oral v Paper? Now that's a good Question

Cheryl Thomas **outlines the preliminary findings of research into tribunal decision-making. It covered the form of hearing, consistency, panel discussions and members' backgrounds.**

Tribunals play a vital role in the administrative justice system in the United Kingdom, resolving over one million disputes a year, largely between individuals and the state. Yet little is known about what influences tribunal decision-making.

This is the first empirical study of judicial decision-making by the professional judiciary in the UK using case simulation. Using a real Disability Living Allowance (DLA) appeal, a large number of tribunal panels around the country decided the same actual appeal in the course of their normal working day. Some panels decided the case based only on a written submission, while others also saw a film of the oral hearing in the case.

We examined the effect of the form of tribunal hearing (paper or oral) on case outcomes, the degree of consistency in tribunal decisions, the contribution of legally and non-legally qualified members, the role of panel discussions and the impact of panel member background and attitudes on tribunal decision-making.

Oral hearings versus paper cases

Most tribunals offer both oral hearings and paper cases, and in most instances it is open to the user to choose which option they prefer. Statistics show that those who opt for an oral hearing have a higher likelihood of having their appeal allowed. However, because each individual tribunal case is different with its own unique set of facts and participants, these results may simply indicate that appellants with stronger cases tend to choose oral hearings and those with weaker cases tend to opt for their appeal to be dealt with as a paper case. This research provides the first empirical research on the actual causal effect of oral hearings versus paper cases on tribunal decision-making.

An empirical study

This research was funded by the Nuffield Foundation and conducted in close cooperation with the Tribunals Judiciary and HMCTS. We are also extremely grateful to all of the DLA tribunal panels around the country that so generously and willingly agreed to take part in the research.

This article is extracted from the study's preliminary report, 'Understanding Tribunal Decision-Making: A Foundational Empirical Study', by Professor Cheryl Thomas and Professor Dame Hazel Genn, which can be downloaded from the Nuffield Foundation website at *www.nuffieldfoundation.org/tribunal-decision-making.*

Consistency in tribunal decision-making

The Leggatt Review argued that bringing together varied tribunals into a single unified service with common rules would enhance coherence and consistency of decision-making. The review also argued that tribunal panels comprising both lawyers and non-legal experts have the advantage of bringing a broad range of skills to bear on tribunal decision-making. To date, there has been no empirical research in this country on the consistency of tribunal decisions or research to indicate whether the different professional backgrounds of tribunal panel members affect their decision-making. This project is the first study of tribunal decision-making to examine these issues systematically.

Disability Living Allowance appeals

This research was conducted with tribunal panels hearing appeals against decisions by the

Department for Work and Pensions (DWP) on claims for DLA. DLA appeals are particularly well suited to examining the impact of the form of the hearing, the consistency of decision-making and the role of multi-member panels in tribunal decision-making. The Social Entitlement Chamber (SEC) has the largest volume of tribunal cases in HMCTS, and DLA cases have historically made up the single largest group of SEC appeals. DLA cases are decided by three-member panels, comprising a legally qualified member who chairs the panel (tribunal judge) and two non-legally qualified members (a medical member and a disability qualified panel member). These panels review the decision of DWP as to whether the claimant is entitled to any allowance, which can require assessing the claimant's level of disability and determining a level of entitlement according to a statutory scale.

There is a clear difference in success rates between paper cases and oral hearings in DLA cases. Claimants are 2.7 times more likely to be successful after an oral hearing, with 46 per cent of DLA appeals allowed by tribunals following an oral hearing and only 17 per cent allowed when the appeal is decided on the papers alone.

Impact of personal independence payment

From 2013, DLA for people aged 16 to 64 began to be replaced by the Personal Independence Payment (PIP). There are no plans to alter the tribunal appeals process under PIP, and therefore the phased replacement of DLA with PIP does not affect the relevance of the findings of this study. The findings may also provide important evidence that may assist in ensuring that the process of claims decision-making and appeals under PIP are as fair as possible.

Research questions

1 *Hearing form:* Is the main benefit of an oral hearing the ability to obtain more evidence? Or does an oral hearing affect outcomes even when a written submission contains identical evidence?

2 *Consistency:* To what extent does the form of the hearing contribute to the consistency of tribunal decision-making? Are other factors more determinative of consistency: such as institutional factors (decision options, legal rules), personal factors (panel member background, attitudes), or peer effects (composition of panels and process of deliberation)?

3 *Panel discussions:* Are panel members' initial assessments (from a first reading of the written submission) highly predictive of case outcomes? Or do panel discussions significantly affect case outcomes?

4 *Decision-maker's background:* Do different types of tribunal panel members perceive evidence or judge cases differently?

Methodology

This research involved asking a large number of actual DLA panels to decide the same case. All DLA tribunal panels in the study adjudicated the case in the normal course of their working day, and the one case was decided by 66 different DLA panels (comprising 198 different panel members) across three different regions: the South East, Wales and the South West, and Scotland.

The case selected for the study was an actual DLA appeal involving a new claim for DLA for a 10-year-old boy with attention deficit hyperactivity disorder (ADHD). DWP had rejected the claim in full. The appeal to the tribunal was filed by the child's mother on behalf of her son, following a further rejection by DWP after the mother had requested a reconsideration. The case simulation method requires that the case selected for the study not be an atypical case, but be one where the evidence is finely balanced and is very likely to produce differences of view among panel members about the correct decision. This case was carefully chosen because such appeals are not uncommon in DLA, there was evidence to support both allowing and

rejecting the appeal and the appeal had produced differences of view within the original tribunal panel that decided the actual appeal. Using both the original case submission and a filmed reconstruction of the oral hearing, three different variations of the case were created. Some tribunal panels adjudicated the appeal as a paper case after examining only the original written submission (Version 1). Other panels adjudicated the appeal after examining the same original written submission and viewing a film of the oral hearing (Version 2). A third group of panels dealt with the appeal as a paper case in which the original written submission was supplemented with any additional information that emerged at the oral hearing (Version 3).

The additional information from the oral hearing included:

- Diagnosis of ADHD and treatment.
- More detail on child's behaviour indoors and outdoors.
- Child's behaviour at school.
- School and SAT results.
- Medication.
- Violence towards mother and two siblings.
- Child's night-time activity.
- Child's eating habits and personal hygiene.

Because all other elements of the case were identical except for either the form of the hearing or level of information provided to the panel, any differences in case outcome or tribunal members' perception of the case can therefore validly be attributed to the differences in the form of the hearing or the information available to the panel.

Members of the tribunal panels were asked to complete a decision questionnaire at each stage of the tribunal panel decision-making process, recording their individual view of the following:

- Assessment of appeal (reject or allow).
- Level of award if appeal allowed.
- Individual panel member's confidence in the decision.
- Whether to adjourn the case (and reasons).

Factors affecting differences in case outcomes

The design of the study meant that all of the following factors could be analysed to determine whether they could account for why some DLA panels rejected and some allowed the appeal:

- Form of the appeal (paper versus oral).
- Information available to the panel.
- Interpretation of evidence.
- Panel member attitudes towards the claimant and appointee.
- General attitudes of panel members.
- Personal background characteristics of panel members.
- Interactions between panel members in the decision-making process.

Findings

What difference does an oral hearing make?

It is clear that the form of the appeal coupled with the information contained in the submission affected tribunal decision-making. Where the information in the written submission is identical (Versions 1 and 2), the outcome was affected by the form of the hearing, with claimants 2.5 times more likely to have their appeal allowed with an oral hearing (60 per cent allowed) compared with a paper case (24 per cent allowed). It is interesting to note that this is almost the same difference in success rate by the form of the hearing as found in actual DLA cases (where claimants are 2.7 times more likely to succeed with an oral hearing than a paper case).

However, where the information presented to the panel was the same regardless of whether it was presented in an oral hearing (Version 2) or in a paper submission only (Version 3), the outcomes were much more similar: 60 per cent of panels allowed the appeal when there was an oral hearing compared with 50 per cent who

allowed the appeal in the paper case containing any new information from the oral hearing.

Do decisions differ by region?

Panel members in Scotland were more inclined towards rejecting the appeal on a first reading of the case submission than panel members in the South East and even more so than panel members in Wales and the South West. However, in their final decisions, the proportion of panel members who rejected the appeal was very similar in all three regions. This finding illustrates two things. First, there is good consistency in DLA tribunal decision-making between the three regions. Second, tribunal panel discussions contribute to this consistency, since the final decisions followed panel discussions in both paper and oral hearings of the case.

Does panel member type affect decision-making?

The study examined both the initial impressions and final decisions of each panel member based on whether they were the legally qualified tribunal judge or either the non-legally qualified medical member or disability qualified panel member. We found no significant differences in either first impressions or final decisions according to the member's position on the tribunal panel.

Do members' backgrounds affect decision-making?

The key question here was whether personal background is a predictor of decision-making, and the panel member characteristics examined included: gender, age, household income, ethnicity and religion. We found no significant correlations between panel member decisions and any of these personal characteristics. Some theories about the effect of gender on judicial decision-making suggest that male and female judges are most likely to assess cases differently when gender-based issues, such as childcare, are raised. This appeal involved a single mother trying to manage a challenging child in difficult circumstances. Although male panel members were slightly more inclined than female panel members to reject the appeal on the first reading of the case submission, there was no significant difference in decision-making by male and female panel members and final decisions were very similar.

Which evidence is most influential?

In order to assess how panel members viewed the evidence presented in the case and how this related to their final decisions, all panel members were asked to rate the importance of the following pieces of evidence in reaching their decision:

- Information on claim form.
- DWP decision.
- Mother's letter with appeal.
- Statement of social worker.
- School report.
- Mother's oral evidence (for those who saw the oral hearing).

With one exception, no correlations were found between how panel members rated the importance of any of these pieces of evidence and whether the panel members rejected or allowed the appeal. The exception was the school report of the child's behaviour and performance, which in this case said that he had no problems at school. Among those panel members who rejected the appeal, 80 per cent said that the school report was important to their decision, compared with 41 per cent of those who allowed the appeal.

How important are panel member attitudes?

The finding on the importance of the school report is reinforced by responses panel members gave to some general attitude questions about DWP decision-making, oral hearings and paper cases, parenting and school reports. The only general attitude that showed a correlation with panel members' decisions to reject or allow the appeal in this case was their attitude to school reports in DLA claims. Those who allowed the

appeal felt most strongly that school reports often overestimate what a child claimant can do. In this case, the school report indicated that the child had no problems at school. The views of those who rejected the appeal tended to be more divided, with a larger proportion disagreeing that school reports overestimated a child's abilities.

How important are impressions of the claimant?

The study also examined panel members' impressions of the child and the mother. Panel members who allowed the appeal felt very strongly that the child had a genuine disability and were much more likely to believe this than those who rejected the appeal. In addition, most panel members who allowed the appeal felt that he was both a danger to himself and to others and most who rejected the appeal felt he was not. There were also clear differences in panel members' impressions of the mother's believability: 72 per cent of panel members who allowed the appeal strongly believed the mother, while those who rejected the appeal were more likely to say they did not believe her.

None of the personal background factors . . . accounted for significant differences among those panel members who changed their assessment of the case and those who did not.

The form of the hearing had an impact on the extent to which panel members believed the mother. In the paper cases, the mother was more believable when the panel had more information about the case (Version 3). But the mother was most believable when the panel had this same information and was also able to see and hear from the mother herself in an oral hearing (Version 2).

Group decision-making and multi-member panels

The value of tribunal group decision-making is reflected in the fact that 39 per cent of all the panel members who took part in the study felt their decision in the case would or may have been different if they had not had the benefit of deciding the case as a panel. This is reinforced by what panel members said about the extent to which they relied on the expertise of their two other colleagues on the panel. For each type of panel member, at least 80 per cent of their colleagues said they relied very heavily to a moderate amount on that panel member's expertise in reaching a final decision in the case.

Almost a quarter (22 per cent) of panel members did change their view of whether to reject or allow the appeal between their initial assessment of the case and their final decision. Of those panel members that changed their view, almost two-thirds (64 per cent) moved from rejecting to allowing the appeal while 36 per cent moved from allowing to rejecting the appeal. None of the personal background factors (gender, age, ethnicity, income, religion) accounted for significant differences among those panel members who changed their assessment of the case and those who did not. Only experience came close to significance, with an increased tendency for a panel member to change his or her mind where the two other members had more years experience sitting on DLA panels.

While it does not claim to be an exhaustive study of tribunal decision-making, the findings are relevant to the future of tribunal panels and tribunal training. These findings, along with all the issues covered in this article, are explored in more detail in the preliminary report.

Cheryl Thomas is professor of judicial studies at University College London.

The study's final report, to be published later in 2014, will be available from both the Nuffield Foundation website and the UCL Judicial Institute website at *www.ucl.ac.uk/laws/ji.*

There's a place for us, SOMEWHERE . . .

When preparing a hearing room that takes into account the needs of the parties, there are many factors to consider. *Andrew Bano* examines the implications of several of them.

The importance of suitable hearing rooms and a satisfactory environment for tribunal users has long been recognised. In its first annual report in 1959, the Council on Tribunals stated that when visiting tribunals they had '. . . paid particular attention to the suitability of the accommodation provided from the point of view both of the work of the tribunals themselves and of the convenience of those appearing or waiting to appear before them'. Subsequent inspection visits by members of the Council and of its successor the Administrative Justice and Tribunals Council – now alas no more – paid close attention to the standard of tribunal accommodation, often stressing the need for good disabled access and the undesirability of tribunals and criminal courts using shared facilities.

Design specification

The Standards and Design Guide for new tribunal accommodation issued in January 2010 drew a distinction between formal and informal hearing rooms. For formal rooms, the guide identified the need for a small dais in order to give the judiciary a clear view of the parties, including those not giving evidence, but stated that there would usually be enough space to rearrange a table in front of the dais to allow formal rooms to be used for informal hearings. The design specification for informal tribunal rooms called for an 'an informal business-like meeting room with a simple layout without distractions', with a large central oval table for the tribunal panel and the parties to sit opposite each other.

The creation of HMCTS as a single body to administer both courts and tribunals and a need to rationalise the courts and tribunals estate has meant that, increasingly, tribunals find themselves sitting in accommodation which falls short of previous design standards. Faced with that situation, tribunal members may have to meet the challenge of doing whatever they can do to make up for the defects in the accommodation.

Legal requirements

The first step is to ensure that the hearing complies with any legal requirements. Most tribunals are required to hold hearings in public. An example of the strictness with which such a requirement may be interpreted is *Storer v British Gas PLC* [2000] 1 WLR 1237, an employment tribunal case in which a hearing took place in a part of the tribunal building to which access could be gained only through a door with a number-coded lock. The Court of Appeal set aside the tribunal's decision on the ground that there had been a breach of the requirement for a public hearing in rule 8(2) of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993. If a hearing has been arranged in a part of a court or tribunal building which is normally private, such as a judge's room, it may therefore be necessary to consider whether the conditions needed for a 'public' hearing have been satisfied. Pressure on tribunal accommodation or the absence of a tribunal venue at a particular location may occasionally lead to a hearing being arranged at a location such as a hotel, and on such occasions it may again be necessary to ensure that there is public access to the part of the building in which the hearing is to take place.

The 'enabling' role of tribunals envisaged by Leggat can be thought of as encouraging tribunals to consciously identify anything which prevents users from playing a full and effective

part in tribunal proceedings, and that approach is likely to be particularly relevant in overcoming difficulties resulting from tribunal hearings in accommodation not intended for that purpose. Tribunal members will need to consider, in particular, whether the accommodation creates difficulties for users with disabilities, whether the layout of the room makes it more difficult for the parties to communicate with their representatives, and whether the greater formality of rooms such as courtrooms is likely to increase a party's anxiety to the extent that it is more difficult for them to present their case.

The Standards and Design Guide envisaged that the furnishing of tribunal rooms would be flexible, so that the furniture in a formal tribunal room could be rearranged to make it suitable for less formal hearings. A tribunal that normally sits in an informal room which finds itself sitting in a formally furnished room – such as the type normally used by employment tribunals – will not usually be able to insist on the tribunal panel and the parties sitting together at one table, but it may be possible to create a more informal sitting by arranging for the tribunal members to sit at a table in front of the dais, as envisaged by the design guide.

Tribunal hearings in accommodation which is not ideal make good 'judgecraft' even more important than usual.

Courtroom sittings

A similar approach can be taken when a tribunal finds itself sitting in a courtroom. The obvious first step in such cases will be for the tribunal to sit if possible at the clerk's table in the well of the court, rather than on the judge's bench. The parties should be asked to sit next to their representatives, rather than behind them, and as close as possible to the front of the court. Parties with impaired hearing may well encounter greater difficulties in a courtroom than in a tribunal room, and if a hearing loop is not being used it may be necessary to check that hearing-impaired parties are able to follow the proceedings.

In some cases security may be an issue. When sitting in an unfamiliar venue, tribunal members should familiarise themselves with the emergency evacuation procedures and also ensure that anything which has been done to make a hearing less formal does not affect the tribunal's ability to summon assistance if it is needed. It is also important to ensure that means of escape from the tribunal room have not been compromised – even in a normal setting it is a good idea to check that doors which are intended to allow tribunal members to leave the tribunal room quickly in an emergency have not been locked.

The anxiety experienced by tribunal users, even in normal circumstances, is often not fully appreciated and that anxiety is likely to be greatly increased by a tribunal hearing in a court environment, particularly if it is a criminal court. In those circumstances, it is obviously sensible to spend perhaps a little more time than usual explaining the nature of proceedings before a tribunal and trying to counter any feeling that the tribunal user may have that he or she is on trial.

Tribunal hearings in accommodation which is not ideal make good 'judgecraft' even more important than usual. A tribunal member who demonstrates a clear understanding of what the case is about and what Leggatt called the 'point of view', as well as the 'case' of the citizen will do much to allay the fears of an anxious tribunal user. Clear, open and sensitive questioning will reassure the user of the professionalism and skill of the tribunal member and go a long way to allaying the anxieties of a tribunal user in a challenging environment.

Andrew Bano is a Deputy Upper Tribunal Judge and former President of the War Pensions and Armed Forces Compensation Chamber of the First-tier Tribunal.

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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Publications Coordinator
Judicial College
3A Red Zone
102 Petty France
London
SW1H 9AJ

Tel: 020 3334 2794
E-mail: jcpublications@judiciary.gsi.gov.uk
Website: www.judiciary.gov.uk