

# WEIGHED *in* the BALANCE



*In the first of a series of articles on fact-finding, ANDREW BANO describes the rational process by which a tribunal can establish the facts of a case.*

In his book, *The Business of Judging*, Lord Bingham casts doubt on the emphasis that has traditionally been placed on the demeanour of witnesses in the process of fact-finding. The evaluation of evidence is now seen increasingly as a rational, rather than as an intuitive, process.

In this article, I have attempted to identify the key elements in the process of logical fact-finding. I touch first on the tribunal's fact-finding role and the types of factual issue that a tribunal may be called on to decide.

## The tribunal's fact-finding role

Fact-finding is the central task of most tribunals. The tribunal hearing is usually the first, and often the only, time that the facts of a case are judicially determined. But the decision of a tribunal may be held to be wrong in law on the ground of procedural error, irrationality or inadequacy of reasons (see *Nipa Begum v Tower Hamlets LBC* [2000] 1 WLR 306), and the majority of appeals from tribunals to Social Security Commissioners that succeed do so because the process of fact-finding has not been properly carried out.

## Issues of fact

There are a number of different types of factual issue that can be encountered by a tribunal, including:

- Whether an event, or series of events, took place.
- Decisions on a state of mind, e.g. in an unfair dismissal case, the reason for the dismissal.
- Inferences or deductions from primary facts.
- Judgements and evaluations, e.g. whether a person reasonably requires continual supervision throughout

the day in order to avoid substantial danger to himself or others, or whether an employer has acted reasonably in all the circumstances in treating a reason for dismissal as sufficient.

- Causation, e.g. whether disablement is due to service in the armed forces.
- Medical diagnosis, e.g. whether a person has a prescribed disease.

## A logical approach

'The tribunal is a relatively poor environment in which to make judgements about deceit from demeanour.'

*Assessing credibility*, Professor Hazel Genn,  
*Tribunals*, Vol 11, issue 1

The first stage in the process of logical fact-finding is to identify those facts in the case that are certain, or almost certain. It will then be possible to assess the probability of the facts that are in dispute by deciding how well they fit into the overall picture. As Lord Devlin put it in *The Judge* (quoted by Lord Bingham in *The Business of Judging*): 'It is the tableau that constitutes the big advantage, the text with illustrations, rather than the demeanour of a particular witness.'

Some facts may be agreed or not seriously disputed. Other facts may be established in ways that do not depend on human recollection, such as through independent reports. But in very many cases it is documents that play the key role in establishing the factual framework against which the credibility of the witnesses should be assessed. The mere assertion of a fact in a document does not necessarily make that fact

more probable, but documents that were written before any dispute arose, or that were written for purposes unconnected with the dispute, may throw a very clear light on the knowledge and intentions of the parties at the time when the document was written.

### Oral evidence

‘Be wary of making judgements on the basis of body language or tone of voice. Body language varies significantly and this is more apparent in the tense atmosphere of the courtroom.’

*Equal Treatment Bench Book, March 2004*

As Lord Bingham points out, the reliability of oral evidence given by even an honest witness may be affected by factors such as a genuine but inaccurate perception of an event, loss of recollection or wishful thinking. When evaluating oral evidence, it will also often be necessary to consider factors such as how well placed the witness was to give reliable evidence and the extent of any interest the witness may have in the outcome of the dispute.

But in deciding whether a witness is telling the truth, it will almost always be necessary to test the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred. Other tests of credibility include the internal consistency of the witness's evidence, the consistency of the evidence with what the witness has said on other occasions and, finally, the demeanour of the witness. However, the evidence of the witness should always be evaluated by reference to the other evidence in the case taken as a whole.

### The approach in practice

Let me illustrate how the approach works in practice. An elderly woman was in receipt of a retirement pension on the basis that she was the widow of a merchant seaman who had paid UK national insurance contributions.

She lived in a country where records of life events such as births, marriages and deaths are often unreliable. In the course of an interview carried out as part of a fraud investigation, she gave an evasive and very confused account of her family circumstances. She was therefore found not to have been married to the merchant seaman and her benefit was withdrawn.

A number of facts in the case could be established beyond doubt. The names of the ships on which the deceased had served were shown on the merchant marine certificates of discharge, which had been submitted when the original claim was made. His national insurance records, which the claimant had not seen, showed that he had lived in a town in South Wales.

Taken in isolation, the claimant's failure at the investigation interview to give a coherent account of her family circumstances fully justified the decision that she was not the seaman's widow. However, she had previously correctly identified the first and last ships on which he had served and had also previously stated that he had lived in the town in South Wales shown as his address on the national insurance records.

By evaluating her credibility by reference to the known facts, a very different picture emerged, particularly as it became clear that the account she had given at the investigation interview could be explained by matters that were unconnected with her identity.

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### Balancing

‘Few people do better than chance in judging whether someone is lying or truthful.’

*Assessing credibility, Professor Hazel Genn, Tribunals, Vol 11, issue 1*

The importance of evaluating oral evidence by reference to all the other evidence in the case was highlighted

by Robert Goff LJ in *Armagas Ltd v Mundogas SA* [1985] 1 Lloyd's Rep 1, 57:

'It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence . . . reference to the objective facts and documents, to the witness's motives and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.'

*It is now clear that a failure to follow the approach in Armagas may amount to an error of law.*

In *Anya v University of Oxford* [2001] ICR 847, the Court of Appeal reversed the decision of an employment tribunal in a race discrimination case, holding (per Sedley LJ at p 861) that the tribunal had:

' . . . not given any ground, and none is evident, for departing from this classic mode of reasoning in a case where every one of the ingredients mentioned by Robert Goff LJ was present.'

It is now clear that a failure to follow the approach in *Armagas* may amount to an error of law. In *Heffer v Tiffin Green* (1998) *The Times*, 28 December, Henry LJ held that it was crucial to test the evidence of a witness against 'the objective facts, the contemporaneous documents, the motives of those involved or the lack of them and the overall probabilities', and held that the judge's judgement in that case had been arrived at:

' . . . without sufficient regard being paid to the building blocks of the reasoned judicial process, where the evidence on each issue was marshalled, the weight of the evidence analysed, all tested against the probabilities based on the evidence as a whole, with clear findings of fact and all reasons given.'

**Rules of evidence**

In assessing the probative value of the evidence in front of them, tribunals are not bound by the same strict rules of evidence that apply in civil courts.

The rules of most tribunals provide that they may allow evidence of any fact to be given in any way it may think fit, and must not refuse evidence simply on the ground that it would be inadmissible in a court. However, a factor that makes evidence inadmissible at common law may affect the weight of the evidence in proceedings where it is admissible. Direct evidence, based on a person's own knowledge, may be tested and for that reason is generally afforded significant weight. Hearsay evidence, however, is second-hand, cannot be tested by questioning and is generally considered less reliable.

**Recording findings**

Finally, care must be taken when drafting the tribunal's written decision to ensure that it can be seen from reading the decision that what Henry LJ called the 'building blocks of the reasoned judicial process' are all in place.

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The Spring 2006 issue of this journal will include the second article in this series, when Andrew Bano will consider how chairmen can use their professional and personal skills to create the conditions in which successful fact-finding can take place.

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