Fundamentally different from COURTS

Andrew Bano **describes how the terms of the relevant legislation, the public interest in consistency in decision-making and the need to ensure 'equality of arms' all make it necessary for tribunals to act inquisitorially – thus marking them out from other judicial bodies.**

It is often said that one of the defining characteristics of tribunals is that they are 'inquisitorial'. However, there is as yet no clear consensus on how far the duty to act inquisitorially extends, or whether it is even desirable for tribunals to operate in a way which is fundamentally different from courts. In the run-up to the merger of the courts and tribunals, it is important to be clear about how the inquisitorial character of tribunals marks them out from other judicial bodies.

First appearance

The term 'inquisitorial' in the tribunal context seems to have made its first appearance in 1958 in *R v Medical Appeal Tribunal (North Midland Region) ex parte Hubble*.[1] Mr Hubble was a coal miner who sustained a slipped disc as a result of an accident at work. He appealed against a final assessment of disablement of 5 per cent. The Minister did not challenge the assessment, but the tribunal nevertheless removed Mr Hubble's award altogether, on the ground that his disablement was due to the aggravation of a pre-existing condition. In upholding the tribunal's decision, the Divisional Court rejected the argument that the tribunal should not have decided the appeal on a basis which had not been raised by the parties. Diplock J held:

> 'A claim by an insured person to (disablement) benefit is not truly analogous to a *lis inter partes*. A claim to benefit is to receive money out of the insurance funds fed by contributions from all employers, insured persons and the Exchequer. Any such claim requires investigation to determine whether any and if so what amount of benefit is payable out of the fund. In such an investigation the Minister or the insurance officer is not a party adverse to the claimant. If analogy be sought in other branches of the law, it is to be found in an inquest rather than an action.'

Extended

The approach in *Hubble* was adopted and significantly extended by the House of Lords, this time to the claimant's advantage, in *Kerr v Department for Social Development*.[2] Mr Kerr claimed a payment for the funeral expenses of a brother on the basis that the brother had no relatives in closer contact. Mr Kerr's claim was rejected because he was unable to show that that condition was satisfied. However, the House of Lords upheld the claim, on the basis that the department was in possession of national insurance records from which it could obtain the information necessary to decide Mr Kerr's entitlement to benefit. Having set out the somewhat complex legislative provisions, Baroness Hale concluded:

> '[62] What emerges from all this is a cooperative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.

> '[63] If that sensible approach is taken, it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof. The first question will be whether each partner in the process has played their part. If there is still ignorance about a relevant matter then generally speaking it should be determined against the one who has not done all they reasonably could to discover it.'

Legislation

It is however noteworthy that the basis of the decisions in *Hubble* and *Kerr* was not that social security tribunals are inherently inquisitorial, but that an inquisitorial approach was required by the terms of the legislation which the tribunals in those cases had to apply. It may therefore be necessary for tribunals in other jurisdictions to consider whether the legislation with which they are concerned also calls for an inquisitorial, rather than an adversarial, process of adjudication.

Public interest

In deciding how far to act inquisitorially, it may also be necessary to take into account the public interest. The responsibilities of many tribunals, for example in the fields of immigration and mental health, are every bit as important as those of the courts. Quite apart from the public interest in ensuring that tribunals reach a just and correct decision, there is an increasing recognition of the importance of consistency in decision-making, particularly in asylum and immigration appeals.[3]

Consistency

Even employment tribunals, dealing with disputes between private individuals, may need to bear in mind the public interest in consistency of decision-making when deciding how to exercise their powers in cases involving important matters of wide public interest. In *Harvest Town Circle Limited v Rutherford,*[4] for example, an employment tribunal was held to have erred in law in not joining the Secretary of State as a party in a dispute concerning the discriminatory effect of the upper age limit for bringing a claim of unfair dismissal.

As long ago as 1948, Denning J pioneered a system of 'signpost' cases in war pensions appeals, observing that 'when the material facts are indistinguishable the results should be the same.'[5] The notion of 'factual precedent' has been described by the Court of Appeal as 'benign and practical' in asylum appeals[6] and there is provision for treating specified decisions in asylum and immigration cases as binding. Although the concept of 'factual precedent' has not as yet achieved a significant foothold in other jurisdictions, it may nevertheless be necessary for tribunals to act inquisitorially in those jurisdictions in order to ensure that inconsistent decisions on similar facts are as far as possible avoided.

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Flexibility

The 1957 Franks Report came down firmly on the side of tribunals forming part of the judicial system, rather than part of the machinery of administration. The Tribunals and Inquiries Act 1958, which was passed in response to the report was, in the words of the late Professor Wade, 'the first real step towards applying general standards of procedure based on ideals cherished in the traditional courts of law'.[7] However, the Act did not seek to establish a rigid legal or procedural framework for tribunals and, in particular, did not bind tribunals to the common law rules of evidence. Although tribunals after 1958 therefore satisfied the legal requirements necessary for them to be considered as judicial rather than administrative bodies, they retained the flexibility necessary to conduct proceedings in the most appropriate and efficient way in any particular case.

Equality of arms

That flexibility left the 2001 Leggatt review free to concentrate on the organisation of tribunals, rather than having to consider whether legal changes in tribunal practice and procedure were necessary to achieve a 'user-focused' approach. Leggatt noted the implications for tribunals of the principle laid down in *Airey v Ireland*[8] that Article 6 of the ECHR requires 'equality of arms' in order to ensure that the parties to a dispute are procedurally in a relatively equal position.

The Leggatt review concluded that neither the traditional adversarial approach of the common law nor a fully inquisitorial approach, on the Australian model, were appropriate for tribunals. The report stated at para 7.4:

> '. . . tribunal chairmen may find it necessary to intervene in the proceedings more than might be thought proper in the courts in order to hold the balance between the parties, and enable citizens to present their cases. All the members of a tribunal must do all they can to understand the point of view, as well as the case, of the citizen. They must be alert for factual or legal aspects of the case which appellants may not bring out, adequately or at all, but which have a bearing on possible outcomes. It may also be necessary on occasion to intervene to protect a witness or party, to prevent proceedings to become too confrontational. The balance is a delicate one, and must not go so far on any side that the tribunal's impartiality may appear to be endangered . . .
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> 'We are convinced that the tribunal approach must be an enabling one: supporting the parties in ways which give them confidence in their own abilities to participate in the process, and in the tribunal's capacity to compensate for the appellant's lack of skills or knowledge.'

Enabling

In his paper in *Public Law*[9] written on the eve of the coming into force of the 2007 Act, Sir Robert Carnwath noted that the Act was neutral on the question of whether tribunals should be adversarial or inquisitorial, but pointed out that the principles of accessibility and expertise gave an indication that court procedures would not necessarily provide the model for tribunals. Within the flexible structures created by the Tribunals and Inquiries Act 1958 and replaced by the Tribunals and Inquiries Act 1992, tribunals are free to adopt the enabling approach called for by Leggatt and to put into effect the principles of tribunal justice enshrined in section 2 of the 2007 Act. But as we have seen, there may be a need for an inquisitorial approach for other reasons: the terms of the relevant legislation, the public interest, and the need to ensure 'equality of arms'.

As pressures on public funding result in litigants in person becoming an ever more common feature of litigation in the courts, the inquisitorial approach of tribunals is likely to become increasingly more relevant across the whole justice system.

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This article is based on a presentation given to the Tribunals Judicial Training Group on 20 February 2011. The author will consider the meaning of the word 'inquisitorial' in a future issue of *Tribunals*.

[1] [1958] 2 QB 228.

[2] [2004] UKHL 23; [2004] 1 WLR 1372.

[3] See the observations of Sedley LJ in *Shirazi v Secretary of State* [2004] 2 All ER 62 [69].

[4] [2001] IRLR 599.

[5] *Armstrong v The Minister of Pensions, Larkin v The Minister of Pensions* (1948) 3 WPC 1449.

[6] *S v Secretary of State* [2002] EWCA Civ 539.

[7] HWR Wade, *The Cambridge Law Journal,* Vol 16 No 2, Nov 1958.

[8] (1979) 2 EHRR 305.

[9] Sir Robert Carnwath, *Tribunal Justice – a New Start,* [2009] PL Issue 1, 2009.