From intervention to interfering

Leslie Cuthbert builds on the advice of previous articles on the particular need for a tribunal to be active, interventionist and enabling when one party is unrepresented or when their representation is poor.

In *Mongan v Department for Social Development*,[1] Kerr LCJ noted that: 'A poorly represented party should not be placed at any greater disadvantage than an unrepresented party' and that 'close attention should be paid to the possibility that relevant issues might be overlooked where the appellant does not have legal representation'. In previous articles in this journal,[2] the authors also highlighted the importance of proper preparation, effective case management and a focus on the overriding objective.

Inquisitorial questioning

This is a difficult area and the proper procedure will vary depending on the particular case and the jurisdiction in which it is being heard. (On page 4 of this issue, Julia O'Hara considers the finely balanced role that a tribunal must play in dealing with the unexpected.)

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It is worth noting here that the labels inquisitorial and adversarial can be misleading – few tribunals are simply one or the other and much depends on the subject matter and the particular case. Generally speaking, most tribunals take an inquisitorial approach. Those tending more to the adversarial include the Lands Chamber of the Upper Tribunal, the Immigration and Asylum Chamber, the Road User Charging Adjudication Tribunal and the Employment Tribunal, although views may differ even between judges in the same jurisdiction.

However, the message from Kerr LCJ's comments seems to be that it is part of the role of tribunals to be interventionist and to explore issues that might be relevant and have been overlooked as the result of a lack of proper representation.

Probing – issues and evidence

There may be a fine line to be drawn, however, between interventionist and interfering and a tribunal should exercise caution in initiating new arguments or propositions. In *Muschett v Prison Service*,[3] Rimer LJ sounded this word of warning:

> '[A]n employment judge, like any other judge, must satisfy himself as to the law that he must apply to the instant case; and if he assesses that he has received insufficient help on it from those in front of him, he may well be required to do his own homework. But it is not his function to step into the factual and evidential arena.'

The distinction would appear to lie between inquiring into an issue which is clear from the evidence, and which anyone with knowledge of the tribunal would raise, rather than going through all *possible* arguments that a party might put forward or taking over the case for one party or the other.

A tribunal is in a position, however, to be more probing in exploring the evidence before it in order to make a determination to the requisite standard of proof. Once the tribunal has the evidence to enable it to make its determination as to the validity of the assertion, it may stop its queries. If, for example, an argument is put forward by one party with no supporting evidence, it may be proper to probe the evidence to uncover any facts which may support the proposition.

Timing is an important factor in these matters. While a tribunal is not to be encouraged to raise new issues during the course of a hearing – and certainly not at the end of a case after the evidence has been heard – the process of clarifying the issues at a case management discussion or at the start of the hearing might identify additional or separate arguments.

Poor representation

Mr Justice Hickinbottom recently wrote:[4]

> 'Advocates may be inexperienced, or simply poor. A judge needs to have a temperament such that he is never seen to lose his temper, even in the face of ineptitude or ignorance of those before him.'

Remaining calm and non-judgmental is the order of the day. Tribunals may wish to wait until both parties have asked questions, or made submissions about an issue, before beginning to explore the subject themselves. In the First-tier Tribunal (Mental Health), some panels allow the patient's representative to ask their questions before the panel asks its own.

There are some advantages to this approach:

- It allows the panel the opportunity to assess the effectiveness of the representative and adjust its questioning accordingly.
- If the representative is effective, it helps the panel to focus on the issues in dispute.

This approach also has validity in a more adversarial setting.

Concessions

It is incumbent upon tribunals to explore how any concessions have been reached. A party may be oblivious to the concession they are making, and the tribunal should check that both parties understand the consequences. If the panel is not satisfied there has been a 'meeting of minds', it can request evidence on the point.

Level playing field

Finally, the following points are a useful checklist in ensuring a level playing field, particularly where one party is unrepresented, or does not attend.

- Appropriate and effective case management.
- A simple, clear and thorough introduction.
- Using basic language and explaining technical terms.
- Avoiding making assumptions based on knowledge or experience.
- Consider each issue to be decided from each party's perspective.
- Attentive listening – where you are focused on what the other person is saying, or essential listening – where you are more focused on what the other person is saying than on yourself, understanding the essence of what they are saying.

Conclusion

The overriding objective of the procedure rules – 'to enable the tribunal to deal with cases fairly and justly' – gives a tribunal a large degree of scope in how to manage a hearing. As long as a tribunal does not act outside its discretion – including by not doing something it should have done – there is a great deal that can be done to meet the various challenges inherent in dealing with both unrepresented and poorly represented parties.

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[1] [2005] NICA 16.

[2] 'The more preparation the better', *Tribunals*, winter 2010, Martin Williams. 'Walking a tightrope to a solution', *Tribunals*, summer 2009, Melanie Lewis.

[3] [2010] EWCA Civ 25.

[4] 'What Makes a Good Judge', *Judicial Appointments, Balancing Independence, Accountability and Legitimacy*, www.judicialappointments.gov.uk/static/documents/JA_web.pdf.