

WHY LAY VOICES SHOULD BE HEARD AND SEEN



Stephen Hardy surveys current practices on the involvement of non-legal members of tribunals in advocating an enhanced use of such members in the process of drafting judgments.

ACCORDING TO THE latest statistical data from the Senior President of Tribunals' annual report for 2015, non-legal members account for 66% of judicial office-holders in the tribunal constitutional landscape. Without doubt, these valued individuals come with their own expertise and experiential wealth which assists tribunals with their day-to-day business.

However, the Court of Appeal in *Eyitene v Wirral Metropolitan Borough Council* [2014] EWCA Civ 1243 highlights that some tribunal practices do not involve the non-legal members in the process of judgment-writing (at para 4). Arguably, the absence of lay voices in the judgment could be purported to be an error in law, as alleged *Eyitene*. Most notably, in *Eyitene*, the Employment Judge had included a comment about 'brinkmanship' which the claimant alleged to be evidence of bias. The Employment Tribunal's non-legal members, while party to the substantive decision, had not seen a draft including the offending words which caused offence. But at the Employment Appeal Tribunal (EAT), Judge Richardson robustly defended the process in the first instance appeal (at para 5 of the Court of Appeal judgment):

'The practice is for the Employment Judge [in the Employment Tribunal] to consult the [lay] members and agree findings, conclusions and reasons before the judgment and reasons are given. Based on the results of that consultation, the Employment Judge will then give reasons orally or in writing.'

Yet Rimer LJ, granting permission for appeal before the Court of Appeal, raised concern, observing that such practice gave rise to 'arguable

concern' (at para 6 of the Court of Appeal judgment). However, in its full judgment the Court of Appeal recognised what the EAT described as 'the practice and arrangements' of the Employment Tribunal as 'standard practice' (at para 11) about the drafting of written reasons. Such 'confirmed practice' is when at the conclusion of the hearing all members of the tribunal have a full discussion. Such discussions culminate in the deliberation of decisions and reasons are agreed. If the matter is 'straightforward' and time permits, the reasons of the tribunal are given orally (*The Partners of Haxby Practice v Collen* [2012] UKEAT 0120_12_2911).

Where the matter is complex and/or the decision is reserved (i.e. later promulgated in writing), the judge drafts the reasons on the basis of the notes taken and the substance agreed, in the discussion with the lay members and the lay members are entitled thereafter to request to see the draft text, but the draft is not routinely circulated to them. Consequently, it is reaffirmed by the Court of Appeal that the detailed expression of the reasons is a matter for the judge only. The exception to this strict practice arises where there is dissenting judgment, when the lay members, in recognition of the differing views, will see the text of the reasons prior to promulgation, as established in *Anglian Home Improvements Ltd v Kelly* [2005] ICR 242 (per Mummery LJ at para 12).

So the key issue for tribunal practice is: whether written reasons represent the reasons of all the members of the tribunal, where lay members have not seen and approved the form in which they are finally promulgated? For tribunals members and users alike – is this practice problematical or pragmatic?

Problematical practices

What emerges from this pertinent question is variant tribunal practices and the vexed question of: how involved lay members should be in the writing of tribunal reasons? Incontrovertibly, all members of the tribunal are involved in the decision-making, but to what extent should they be involved in the actual judgment-drafting? A brief survey of current practices shows where we currently stand:

Criminal Injuries Compensation Authority

Under the 2012 criminal injuries compensation scheme, the CICA applies the SEC Rules 2008 (set out below) and its practice is to give a decision at the hearing and thereafter, upon request of either party, provide detailed reasons in writing. The judicial member (its Chairman) is therefore under a duty to provide these reasons and the customary practice is to provide reasons without consultation with the non-legal members.

Employment Tribunals the EAT

In Employment Tribunals (ET), the non-legal (specialist) members only sit on discrimination cases and in 'complex cases' where they are deemed required or in other cases where the parties have requested them. However, where Employment Judges sit with non-legal members, as governed by Rule 55 in Schedule 1 of the ET (Constitution and Rules of Procedure) Regulations 2013 [SI 2013 No 1237], they, as described and accepted in *Eyitene*, are involved in the decision-making, but unless they request to see the judge's reasons, they are not routinely circulated to members before promulgation. In fact, Rule 62 assigns the sole responsibility for the written reasons to the Employment Judge. Furthermore, Rule 49 grants a second or casting vote to the Employment Judge, where the Employment Judge sits as a two-person panel, in order to ensure majority decisions where possible. The latter is a well-established practice since 2005. In contrast, the customary practice in the EAT is for all members to approve a written

decision in draft before it is finally promulgated (at para 13 in *Eyitene*). Yet, such is unwritten practice and one not found in the Employment Appeal Tribunal Rules (as amended) 2013 [SI 2013 No 1693].

Health, Education and Social Care Tribunal

In the HESC Chamber, the tribunal must provide to each party as soon as reasonably practicable after making a decision a decision notice, written reasons and notification of any right of appeal, pursuant to Rule 41 of the Tribunal Procedure (First-tier Tribunal) (HESC) Rules 2008, [SI 2008 No 2699]. The practice being that the judge drafts the reasons on the basis of the decision-making of the whole tribunal, the draft having been sent to the specialist members who are expected to give comments and such input as requested by the judge. Ultimately the HESC judge will decide the final content.

Immigration and Asylum Tribunal

Rule 29 of the Tribunal Procedure (First-tier Tribunal) (IAT) Rules 2014, [SI 2014 No 2604] reinforces the role of the judge-member to provide written reasons, particularly in an asylum appeal, or where requested. For example, where there is a decision relating to deportation and the tribunal consists of a legal member and a non-legal member, the non-legal member will consider the draft decision before it is issued. To that end, the practice of the IAT judiciary is to write up the decision and reasons as soon after the hearing as possible.

Mental Health Tribunal

Established practice within the MHT has historically been that the oral hearing is undertaken and thereafter, the decision is written up. In fact, statutorily, under the Mental Health Act 1983, the role of the 'legal member' (i.e. the judge) is to ensure observance of all legal requirements. To that end, Rule 28 of the Tribunal Procedure (MHRT) Rules 2008, [SI 2008 No 2699], ensures that the legal member

consults with the specialist (usually mental health practitioners) and medical (typically consultants) members prior to writing up the decision. Usually, the decision is written on the day when all of the members are present. However, the decision is typically written after the verbal decision has been given. It is drafted by the judge and the other non-legal members then check and approve or suggest changes. This practice is adopted since often the MHT judge is asked not just to correct typographical errors, but to provide clarification.

Residential Property Tribunal

The First-tier Tribunal (Property Chamber) requires all members of the tribunal to participate in the decision-making process. Yet, Rule 36 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) 2013, [SI 2013 No 1169] reaffirms that the legal member shall provide the written reasons for the tribunal's decision. Typically, the legal member drafts the decision but it is approved by the other specialist, non-legal members (housing and surveyor members) before it is issued. Normally, the RPT hears one case per day, the decision is not issued on the day, and the reasons are usually longer and more detailed.

Social Entitlement Chamber

The First-tier Tribunal (Social Entitlement Chamber) requires the judge, where they have sat with members, upon receipt of a request for a statement of reasons, to consult the file, including the decision notice and record of proceedings, and their notes, where a record of discussion, deliberations and/or reasons were agreed by all members of the tribunal. Rule 34 of the Tribunal Procedures (First-tier Tribunal) (SEC) Rules (as amended) 2008 [SI 2008 No 2685] states that 'the tribunal' shall provide a written statement of reasons on request. Interestingly, the Rule does not expressly specify the judge, although it is always the judge who drafts the statement of reasons, usually without input from the non-legal members.

Upper Tribunal

Rule 40 of the Tribunal Procedure (UT) Rules 2008 [SI 2008 No 2698] provides for decisions to be given orally at a hearing and/or in writing. Where the Upper Tribunal sits as a panel of three judges, all the judges are consulted prior to promulgation. However, where the UT sits with non-legal members, its practice is to empower the judge to provide the reasons based upon the agreed grounds for the decision. The different practice reflects the different position where a three-judge panel sits in a truly appellate capacity to decide points of law, and where a UT judge sits with non-legal members as a first instance appeal tribunal.

Pragmatism prevails

As this survey of the tribunals landscape attests, different practices are not necessarily anomalous if they arise from differences inherent to the particular jurisdictions. Yet, is it appropriate practice, even if it is lawfully justifiable?

In view of the variant practices, it is clear that where tribunals comprise of non-legal members their input into decision-making is crucial. But that does not mean it is necessary for them to contribute to the drafting of the judgment. The statutory rules for each jurisdiction themselves do not expressly state the mechanisms by which the expert/specialist laity are involved in the judgment-writing, save for affirming that the judicial (legal) member has the sole statutory responsibility for providing them.

As clearly reasoned in *Eyitene* (at para 13), it is not necessary for all members of the tribunal to approve a written decision in draft prior to its promulgation, as they were fully involved in the decision and reasons. Thereafter, what is more important is that the reasons as promulgated truly record the tribunal's conclusion with such conclusions representing all of the members of the tribunal. Yet, how can such be assured, when the non-legal members are absent, if not silent, at the final stage?

In terms of practice and procedure, each tribunal appears to have different expectations and/or differing shades of opacity on the need for lay/specialist involvement in the final statement of reasons. More significantly, nowhere is the rationale for such variations explained. What becomes more problematical is the long-standing concern surrounding minority decisions, where the tribunal, sitting as three, deliberate and conclude 2:1. Are such dissenting voices then to provide a ‘minority judgment’?

As guided in *Anglian*, Mummery LJ stated:

‘... in relation to decisions in which the members of the tribunal are not unanimous.

It is the responsibility of the [judge]... to write up the decision. In my view, where the members are unable to agree, at the conclusion of the hearing, on what the result of the complaint should be, it is preferable, in general, for the [judge] to reserve the decision so that he can write it up and circulate it to the other members of the tribunal. If, as happened in this case, it is the two lay members who are in the majority and are disagreeing with the [judge], it is preferable to give the two lay members not only an opportunity to see that their views are correctly expressed in the decision document drafted by the [judge], but also an opportunity to reflect on the grounds on which they are disagreeing with the [judge] about the outcome of the hearing.’

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However, to date no provision exists for separate reasons for majority and minority decisions to be given where the decision is non-unanimous.

As observed by Mullan (*Tribunals* autumn 2009), the ‘remarkable variance in the composition of appeal tribunals... the background and qualifications of the members’ makes for ‘constructive and professional’ decision-making, be it by agreement and/or disagreement. While such valuable expertise in composition has been preserved under the Tribunal Courts and Enforcement Act 2007, in both the First-tier and Upper Tribunals, the variant Rules have yet to specify how divergent views are incorporated into judgments and how all members’ voices are heard in the final judgment.

Accordingly, the various statutory procedural rules for tribunals remain ambivalent on the need for all members of the tribunal to review and approve the final judgment. This review of practices of the various jurisdictions within the tribunals landscape reiterates the perennial question: do non-legal members need to see the draft of a reserved judgment?

Plainly, the Court of Appeal in *Eyitene* vigorously replies in the negative and requires no such need. Nevertheless, the residual management of the long-standing problem of non-unanimous decisions remains to be resolved. Where there is disagreement there can be no doubt that the whole tribunal ought to be engaged in agreeing the final judgment.

Plainly, such advice ensures that the lay members can be fully engaged in the judgment-writing process. For example, in *Smith v Safeway* [2004] IRLR 456, when the lay members of the EAT who were in the majority and Pill LJ in the minority, the judge drafted the whole judgment explaining both majority and minority views.

The perilous legacy of the provision that the presiding (legal) member has a casting vote, if votes are divided when only two members are sitting, devalues the decision-making of that outvoted member (maybe for good reason), yet it remains lamentable that the judgment might not reflect this. However, the Court of Appeal in *Eyitene* reminds all tribunal judges

that they are duty bound to draft reasons which satisfy the requirement that they truly record the conclusions of all members of the tribunal. Therefore, as Underhill LJ guides in *Eyitene* ‘... it is entirely legitimate for the (lay) members to leave the detailed expression of the reasons to the judge’ (at para 14).

Such a judicial responsibility is reinforced in the requirement across all tribunals that the judge is singularly required to sign the reasons for authentication. Yet, to that end, the reasons as promulgated remain those of the tribunal, as a whole. Such clarity though fails to expressly address the situation of the dissenting/minority view, save for such dissent or minority view, even disagreement, be specifically disclosed and addressed in the reasons. Further, in such exceptional circumstances, the ‘healthy practice’ to be adopted ought to be that all the tribunal members peruse the draft reasons before promulgation.

Ultimately, it is particularly important that tribunal judges do whatever is necessary having regard to the Rules and practice within their own tribunal, as well as ensure that the non-legal members are fully signed up to the judgment and its substantive rationale – whether or not they see a draft. If reasons are given orally, care will be needed to ensure that at least the substance of the reasons has been approved by the whole tribunal. Consequently, it may be worthwhile for the Tribunal Procedure Committee to examine this issue and provide some welcome guidance for lay members and judges alike. This might include Underhill LJ’s remarks about feeling no inhibition about asking to see a draft before promulgation if they wish to do so in a particular case. Even so, the Tribunal Procedure Committee could, alternatively, reaffirm the sole legal responsibility of the judge for the reasons and provide a guiding rationale for excluding the other tribunal members from

perusing, commenting, amending and even approving the draft statement of reasons.

One of the key observations of the Court of Appeal in *Eyitene* was in relation to the use of language in judgments:

‘... the comment about brinkmanship to which the appellant takes exception was specifically included in the notes agreed in discussion or was part of the passages dictated in the members’ presence. But even if there were some doubt about that, the comment was simply an observation in the course of the narrative section of the reasons and had no conceivable bearing on the dispositive reasoning.’

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While that settled the matter in *Eyitene*, it appears obvious that judges would do well to avoid unnecessarily colourful expressions, which may give rise to offence, especially if these come to mind during the lone writing up rather than in conference with the non-legal members.

Conclusion

Perhaps *Eyitene*, above all, is itself a timely reminder of best practice which should pervade the whole tribunals system: that is, for the judge to consult the non-legal members and agree findings, conclusions and reasons before the judgment and reasons are given. The active participation by all tribunal members will ensure inclusive decision-making in which the judge will then give reasons orally or in writing. In any event, all members of the tribunal ought to be fully involved and responsible for the judgment, which they have reached, whether unanimously or otherwise, in order to ensure that all lay voices are equally heard in the final judgment.

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