'Experts in our own little niches' (Part Two)

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

In the first part of this article, I concluded that a degree of expertise or, at least, specialism, is a unique selling point of the tribunal system. It is why many appellate judges have been prepared to treat the factual findings, predictions and assessments of specialist tribunals with a considerable degree of deference and respect.

But this poses 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?

Sub-specialty

Alexander Pope thought that 'a little learning is a dangerous thing'. But in my own jurisdiction, a consultant psychiatrist on a mental health tribunal dealing with an anorexic schoolgirl may, in fact, be a geriatrics specialist, or the doctor on a tribunal looking at the case of a dangerous criminal with a personality disorder may have little forensic experience. And yet, despite not being experienced in the relevant sub-specialty, our trained medical members should still have sufficient expertise to ask pertinent questions and test the treating clinician's professional opinion.

In *Shea (a child)*,[1] Mrs Commissioner Brown in Northern Ireland considered an appeal where the child claimant to disability living allowance (DLA) suffered from bilateral hearing loss and asthma. The claim to DLA was disallowed. On appeal to the Social Security Commissioner, the appellant was represented by the National Deaf Children's Society. One of the submitted grounds was that there had been a breach of the rules of natural justice as the appeal tribunal did not include as a member a person who was specifically 'deaf aware'. Mrs Commissioner Brown stated:

> '. . . there is no specific requirement to include panel members with a qualification in the disability suffered by the particular claimant. While it might be desirable in a particular case to have a panel member who has such a qualification, it is not a legal requirement. The members of tribunals will obviously have experience in assessing care and mobility needs across a range of disabilities and panel members, I am confident, take these responsibilities seriously . . . In addition a claimant's representative is always in a position to call the relevant expert's evidence in the appropriate case.'

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In *Southall v General Medical Council*,[2] Leveson LJ addressed a submission by the practitioner's counsel that the lack of a panel member from the same specialty as the practitioner required the court to pay less deference to the panel's conclusions. The judge considered the possible danger of too much expertise, stating:

> 'Any issues requiring particular specialist knowledge should be dealt with through the calling of expert evidence; neither the GMC nor the doctor would be in a position

> to challenge the opinion of a member of the panel and, if a professional in the same field, the risk would be that a decision would be made on the basis of an expert view that had not been subject of evidence or argument.'

To assure the public that the tribunal does have the expertise it claims, some jurisdictions have developed specialist panels because, even within the niche of the jurisdiction, there are several sub-niches where specialised knowledge and experience is deemed essential. In mental health, for example, in accordance with a promise made to Parliament, every effort is made to ensure that in any case involving a patient under the age of 18 years, at least one member of the tribunal – although not necessarily the medical member – is on the tribunal's Child and Adolescent Mental Health Services panel. And in every case involving a restricted patient who has come into hospital via the criminal justice system, the judge must be on the tribunal's Restricted Patients Panel, and this currently means that they have to be a circuit judge or a recorder with relevant experience, or an authorised salaried mental health judge.

. . . how does a tribunal ensure that it uses its expertise both profitably and fairly?

Induction training

Training is also pivotal. A new immigration judge, or traffic commissioner, or Upper Tribunal judge sitting alone in the Administrative Appeals Chamber, may or may not already have, upon appointment, the sort of experience necessary to fully deserve recognition as an expert or specialist judge. Over time, of course, experience will encourage the development of expertise, but this cannot be instantly acquired by osmosis, so proper induction training is essential. When the former commissioners in the Upper Tribunal started hearing mental health and special educational needs appeals, many learnt quickly, developing expertise by training and observation, and building their experience on a case-by-case basis.

Assuming that tribunals really do have expertise acquired through professional or personal background or experience, or through education or training, how does a tribunal achieve what the overriding objective requires, and use its special expertise effectively? Or, to put it another way, how does a tribunal ensure that it uses its expertise both profitably and fairly?

To answer this question, a distinction may be drawn between a tribunal that uses its expertise to assess and weigh the evidence and submissions placed before it, and a tribunal that uses its expertise to go off on what used to be called 'a frolic of its own' and to conjure up issues, points and solutions not raised by the parties.

In *Richardson v Solihull Metropolitan Borough Council*,[3] the Court of Appeal addressed the issue of an expert panel member becoming a sort of 'backstage expert'. The court heard an appeal against a decision of the High Court on appeal from the Special Educational Needs Tribunal that had included a member with particular experience of special schools. The tribunal decided that neither the school put forward by the local authority, nor the one put forward by the parents, were suitable for the child, but suggested (on the basis of its own expert knowledge) that a suitable school did exist. But the determination that there was an appropriate school other than those proposed by the parties was not made on the basis of any evidence presented by the parties. Indeed, the parties had not been offered any opportunity to comment on the factual basis underlying the tribunal's judgment. Beldam LJ said:

> 'I am conscious that it is sometimes difficult to distinguish between an expert tribunal using the expertise for which its members have been chosen in deciding issues before it, and using that expertise in a way which raises other issues that the parties may not

have had an opportunity to consider. I have no doubt that the specialist member of a tribunal who had in mind a specific school which neither party had considered would regard it as fair, and in the child's interests, to raise with the parties the possibility of the provision of such a school to meet the child's educational needs. But in the present case I think it would have been preferable, once the tribunal had decided that neither school proposed by the parties was appropriate, for the chairman to have indicated this to the parties and told them that the expert members considered suitable arrangements could be made, and to have invited submissions from the parties.'

In the same case, Peter Gibson LJ stated that:

'Although the tribunal is a specialist tribunal with members appointed for their expertise, it is important that the tribunal obeys the rules of natural justice and that the members should not give evidence to themselves which the parties have had no opportunity to challenge.'

Four years later, in *Butterfield and Creasy v Secretary of State for Defence*,[4] Park J had to consider a decision of a Pensions Appeal Tribunal which, in 2000, had dismissed an appeal against a decision of the Secretary of State that Mr Butterfield did not qualify to receive a disability award or pension under the Naval Military and Air Forces Etc (Disablement and Death) Service Pensions Order 1983. The court found that:

'There is a potential problem if a medical member of a tribunal is the only person present with specialist medical knowledge, and he perceives a possible medical objection to the appellant's case, particularly an objection which has not been taken in advance by the Secretary of State and of which the appellant has not had prior notice. If the medical member believes that there is such an objection, plainly he must say so. He is a member of the tribunal because of his medical expertise, and if he thinks that his medical expertise is relevant in some specific way that has not otherwise been pointed out, he must draw on it in the course of the hearing and the tribunal's deliberations. I do not for a moment suggest that the medical member of the tribunal should in some way suppress his personal expertise and reactions to medical issues which arise. However, if the point which concerns him is a new one and might in itself be decisive, it does seem to me that fairness requires that it be explained to the appellant or to the appellant's representative, and that the appellant should be given a realistic opportunity to consider it.'

If the medical member believes that there is such an objection, plainly he must say so.

This straightforward principle has subsequently been reasserted in a number of cases, from various jurisdictions, in both the High Court and the Upper Tribunal.[5]

On the other hand, where there is evidence on the table, an expert panel can, and should, use its expertise when analysing and assessing it. In *F Primary School v Mr & Mrs T and SENDIST*,[6] a substantive ground of appeal was that the tribunal used its own expertise without giving due notice to the parties. James Goudie QC, sitting as a Deputy High Court Judge, rejected this, saying:

'Of course, tribunals must not give evidence to themselves which the parties have had no opportunity to challenge. But this tribunal was not giving evidence to itself. It was, in my judgment, performing its function as a specialist tribunal, of evaluating all the evidence before it at the hearing and legitimately using its specialist expertise for that purpose.'

This distinction has also been well highlighted in two decisions from Stadlen J. In *Lawrence v GMC*,[7] the judge agreed that the use to which expert members of the tribunal can put their expertise or experience is limited to the evidence that is adduced and the submissions that are made. To go beyond that and reach a conclusion on an issue which was not live before the panel or on which no evidence or argument had been made would be unfair. But the same judge in *McKeown v British Horse Racing Authority*[8] said:

> 'There is in principle no reason why a tribunal including members with relevant experience and a knowledge of the sport in question should not draw on their knowledge and experience of viewing and interpreting video evidence and drawing inferences from it and from the evidence relating to such things as the nature and record of the contestants. Indeed there is every reason why they should be free to do so.'

. . . it is possible to argue that too closely aligned expertise may be seen as a dangerous thing.

Conclusion

To summarise, therefore, a degree of expertise or, at least, specialism, is a unique selling point of the tribunal system. It is part of its original *raison d'être*, and it is why the appellate judges are prepared to treat the factual findings, predictions and assessments of specialist tribunals with a considerable degree of deference and respect. But the expertise or specialism of a tribunal decision-maker cannot simply be taken for granted and may depend, at least in part, on judicial training and experience acquired over time.

On the other hand, such expertise does not have to be so closely aligned with the subject matter of the case as to give the decision-maker indisputable inside knowledge. Indeed, it is possible to argue that too closely aligned expertise may be seen as a dangerous thing.

When using their specialist insight, tribunals must carefully focus their expert analysis upon the evidence and submissions presented. However, if on the basis of his or her expert view a tribunal member feels constrained to look beyond the evidence for an answer, natural justice demands that the parties (and especially the party adversely affected) should be warned, and given a chance to respond. Indeed, a counsel of perfection would suggest that if, on the basis of his or her expert view rather than on the basis of material received, a tribunal member thinks it right to reject (or even accept) evidence put forward by one or other of the parties, such a warning and opportunity should also be given. After all, the tribunal member may have misunderstood, or be misinformed or out of date.

In 1698, an anonymous author signing himself 'AB', and referring to the philosopher and jurist Francis Bacon, wrote:

> 'Twas well observed by my Lord Bacon, that a little knowledge is apt to puff up, and make men giddy, but a greater share of it will set them right, and bring them to low and humble thoughts of themselves.'

In our own little niches, some humility is no bad thing.

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1 C11/01-02 (DLA).
2 [2010] EWCA Civ 407.
3 [1998] EWCA Civ 335.
4 [2002] EWHC 2247 (Admin).
5 See, for example, *Busmer v SoS Defence* [2004] EWHC 29 (Admin), and *DB v SoS Work and Pensions* [2010] UKUT 144 (AAC).
6 [2006] EWHC 1250 (Admin).
7 [2012] EWHC 464 (Admin).
8 [2010] EWHC 508.