# 'Experts in our own little niches' (part one)

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

In a somewhat backhanded compliment to the programme's contestants, Alex Trebek, the veteran host of American TV game show Jeopardy, once said: 'Well, we're all experts in our own little niches.'

The tribunals world is full of little niches, and many of us like to think that we are experts within them. But are we truly experts in our own little niches? Where does that expertise come from? What is the pay-off for tribunals having expertise? Is deference to tribunal expertise deserved? How effectively do tribunals use their expertise? And is there a limit to how far we should go, in order to avoid giving evidence to ourselves?

Sir Andrew Leggatt in his seminal review of tribunals in 2001[1] considered that a key reason for choosing a tribunal to decide disputes was that tribunal decisions are often made jointly by a panel of people who pool legal and other expert knowledge, and tribunal decisions are the better for that range of skills.

## Distinctive feature

If the civil courts require an expert opinion, they generally rely on the evidence produced by the parties, or on a court-appointed assessor – as, for example in the county courts and High Courts in Equality Act cases. Tribunals, on the other hand, are supposed to offer a different opportunity. By permitting decisions to be reached by people with a range of relevant qualifications and expertise, the need for outside expertise can, in theory, be circumscribed. Indeed, it was here that one of the distinctive features of tribunals was expected to have its greatest impact: with careful training and guidance in the art of finding facts and, in particular, in the weighing and evaluation of evidence, the use of expert decision-makers would enhance the judicial process.

For many jurisdictions, this is still the expectation. For instance, in my own jurisdiction of mental health, the Senior President of Tribunals has decided that a panel must comprise a judge, a registered medical practitioner, and a specialist lay member with substantial experience of health or social care matters.[2] In terms of criteria for appointment, medical members must have held a full-time or part-time appointment as a consultant psychiatrist for at least three years and have membership of the Royal College of Psychiatrists. Our specialist lay members must be aware of the range and nature of mental illness and mental disorders, and have an understanding of both the social context and the proper assessment of risk. The mental health panel is, therefore, exactly as Leggatt envisaged – comprising three people with a range of qualifications and expertise, coming together to pool their different (but relevant) experience, training and skills. The presence of a lay member, albeit a specialist lay member, may also add safeguards and legitimacy to decisions involving the deprivation of a person's liberty.

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In the First-tier Tribunal, War Pensions and Armed Forces Compensation Chamber, panels will usually comprise a judge, another judicial

office-holder who has substantial experience of military service, and a third member who is a registered medical practitioner.[3] In an appropriate case, the Senior President has given the Chamber President power to slightly alter this composition. In the Upper Tribunal Administrative Appeals Chamber (AAC), a range of non-legal expertise is on hand, and sometimes required, to assist the judge in certain categories of appeal, such as a safeguarding vulnerable groups appeal, or an appeal from a decision of a traffic commissioner where, in addition to the judge, there will generally be two other members with substantial experience in transport operations.[4]

On the other hand, some tribunals have reviewed their need for non-legal expertise and, with the consent of the Senior President of Tribunals, have altered their composition either permanently, or on a trial basis.

### Six-month pilot

The Senior President is required to ensure the fairness, efficiency and swiftness of cases coming to hearing and, in the special educational needs jurisdiction within my own chamber, he has decided to explore whether, along with an experienced tribunal judge, the use of a single experienced specialist member provides as fair an outcome as having two specialist members. Consequently, following a consultation, he has sanctioned a six-month pilot commencing on 1 October 2013 whereby, in appeals concerning refusals to arrange an assessment of a child's special educational needs, the decision may be made by one judge and just one other member where the other member has substantial experience of educational, child care, health or social care matters, and both the judge and member have sat on at least 25 hearings within the jurisdiction.[5]

In the Social Entitlement Chamber, the composition of panels varies depending on the type of case.[6] Medical expertise is used in all appeals involving a medical issue. Where an evaluation has to be made of the extent of a disabled person's need for attention from another person, a disability member will also sit, who will have expertise in aspects of disability, perhaps because of their professional work in healthcare other than as a registered medical practitioner. Alternatively their expertise may arise because they are themselves disabled, or they care for someone who is. Thus, in an appeal relating to an attendance allowance or a disability living allowance, the tribunal must generally consist of a judge, a medical member and a member who has a disability qualification. In some other cases the requirement will be for a judge and a medical member, and in others a tribunal judge sitting alone is sufficient. Moreover, in child support cases where there is a financial issue of some complexity the chamber has a number of financial members who are chartered accountants. Some also sit in the Tax Chamber.

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Then there are those jurisdictions where decisions are made by a judge alone, such as First-tier Immigration judges, and Upper Tribunal (AAC) judges dealing with most social security or child support appeals from the Social Entitlement Chamber.

### One-judge tribunal

Traffic Commissioners, not all of whom are lawyers, sit as a specialist one-judge regulatory tribunal, deciding who should have and who should keep a licence to operate large goods or passenger vehicles. Some of those decisions are made at a public inquiry; the majority are made based upon documentary submissions. As the then Acting Senior Traffic Commissioner told a parliamentary committee, all such decisions are judicial rather than quasi-judicial, and are frequently reported in the trade press.[7]

In the Employment Tribunal, non-legal members are no longer routinely involved in all unfair dismissal cases, and one can readily see that this may be an area where 'experts' are not necessarily needed. Many of us are employees or employers, and the issues are often either strictly legal, or more dependant upon general fact-finding rather than the ability to understand complex or specialist matters beyond everyday experience.

These 'judge alone' tribunal jurisdictions command respect as expert (or, at least, specialist) tribunals, even though the expertise comes not from some non-legal experience or qualification, but from doing the work, day after day, in a niche jurisdiction. Thus, as Edward Jacobs (himself an AAC judge) said in *Tribunals Practice and Procedure*,[8] some members may not come to the tribunal with previous knowledge, experience or expertise, but over time they 'acquire, through training and experience, familiarity with the particular legal and factual issues that arise before the tribunal'. Whether this is what Leggatt had in mind when he referred to tribunals comprising people who pool legal and other expert knowledge, or whether a newly appointed judge in a judge-alone jurisdiction can legitimately claim expertise from the start, are moot points.

## Compelling jurisprudence

In any event, despite this diversity, we now have a consistent line of compelling jurisprudence about the deference to be shown to expert tribunals – whether they are specialist 'judge-alone' tribunal jurisdictions or those with outside expertise.

Initially, this deference appeared to derive, not from a sense of respect for expertise, but from the pragmatic pursuit of finality. As Lord Radcliffe explained in *Edwards v Bairstow*,[9] when referring to the General Commissioners:

> 'As I see it, the reason why the courts do not interfere with the commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up, the commissioners are the first tribunal to try an appeal, and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law.'

In time, however, the perceived expertise and specialism of tribunals began to supersede this somewhat down-to-earth argument, and the focus moved to the particular knowledge and experience of the members of the tribunal.

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Having an expert or two on the decision-making panel is, in fact, nothing new. In medieval times, if cases required specialist or technical knowledge, experts were invited to serve on juries. Then, in the late Middle Ages, the experts left the juries and began to testify as witnesses. With the advent of tribunals, experts returned to the bench, and their presence has subsequently given tribunals a certain status. Thus, in *Cooke v Secretary of State for Social Security*,[10] Lady Justice Hale (as she then was) referred to 'a highly expert and specialised legally qualified body, the Social Security Commissioners'. Consequently, on appeal to the Court of Appeal:

> '. . . the ordinary courts should approach such cases with an appropriate degree of caution. It is quite probable that on a technical issue of understanding and applying the complex legislation the Social Security Commissioner will have got it

> right. The Commissioners will know how that particular issue fits into the broader picture of social security principles as a whole. They will be less likely to introduce distortion into those principles. They may be better placed, where it is appropriate, to apply those principles in a purposive construction of the legislation in question. They will also know the realities of tribunal life. All of this should be taken into account by an appellate court when considering whether an appeal will have a real prospect of success.'

In *Secretary of State for the Home Department v AH (Sudan) and Others*,[11] Lady Hale (by then in the House of Lords) further developed the theme, saying in relation to the Asylum and Immigration Tribunal:

> 'This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right . . . Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts, or expressed themselves differently.'

Commenting on this passage, Waller LJ in *H v Essex CC and Others*[12] thought that the point made by Baroness Hale was particularly important to bear in mind where what was being criticised on appeal was not the arbitrary rejection of the unchallenged technical evidence of an expert witness where the tribunal has no expertise of its own (which would be difficult to uphold), but was the rejection of expert evidence offering an opinion in the very area where the tribunal had its own expertise, and upon the very issue that the expert tribunal had, itself, to make a decision.

### Regulated industries

Traffic Commissioners are regarded as expert regulators of the large goods and passenger carrying vehicle industries. That expertise is respected within the regulated industries and is also relevant when judicial decisions are appealed to the Upper Tribunal. In *Bradley Fold Travel Ltd and Peter Wright v Secretary of State for Transport*,[13] Leveson LJ held that the Upper Tribunal (where there are expert members sitting alongside the judge) should not interfere just because it preferred a different view, but should only do so where it concludes that the process of reasoning and the application of the relevant law, require it to interfere – or, to put it another way, 'where reason and the law impelled the tribunal to take a different view'.

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In the Supreme Court, Lord Hope has further championed respect for judicial expertise. In *Jones (by Caldwell) v First Tier Tribunal and Criminal Injuries Compensation Authority*[14] he specifically acknowledged the expertise of First-tier Tribunals, and added that tribunals were particularly well fitted to determine a consistent approach. It was important, he said, to ensure that:

> '. . . the expertise of tribunals at the First-tier, and that of the Upper Tribunal, can be used to best effect. An appeal court should not venture too readily into this area by classifying issues as issues of law which are really best left for determination by the specialist appellate tribunals.'

All of this chimes with the overriding objective as it is defined in the procedure rules applicable to most tribunal jurisdictions. In both the First-tier and Upper Tribunal procedure rules, for example, the overriding objective to enable the tribunal to deal with cases fairly and justly includes using any special expertise of the tribunal effectively.[15]

But this begs 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? I will look at these questions in Part Two.

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1 Tribunals for Users – One System, One Service, March 2001.
2 Composition of tribunals in relation to matters that fall to be decided by the Health, Education and Social Care Chamber on or after 18 January 2010 (Practice Statement 16/12/2009).
3 Composition of tribunals in relation to matters that fall to be decided by the War Pensions and Armed Forces Compensation Chamber on or after 3 November 2008 (Practice Statement 30/10/2008).
4 Composition of tribunals in relation to matters that fall to be decided by the Administrative Appeals Chamber of the Upper Tribunal on or after 1 October 2012 (Practice Statement 1/10/2010).
5 Proposal to amend the Practice Statement regarding panel composition in the First-tier Tribunal (Special Educational Needs and Disability). Response from the Senior President of Tribunals, July 2013.
6 Composition of tribunals in social security and child support cases in the Social Entitlement Chamber on or after 1 February 2013 (Practice Statement 1/02/2013).
7 House of Commons Transport Committee, 2012.
8 *Tribunals Practice and Procedure*, Jacobs, Legal Action Group, 2nd edition 2011, 1.128.
9 [1956] AC 14.
10 [2002] 3 All ER 279.
11 [2007] UKHL 49.
12 [2009] EWCA Civ 249.
13 [2010] EWCA Civ 695.
14 [2013] UKSC 19.
15 See, for example, The Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

# JUDGE HUGH STUBBS

Judge Hugh Stubbs, President of the War Pensions and Armed Forces Compensation Chamber of the First-tier Tribunal, died on 31 January after a short illness.

Hugh joined the Pensions Appeal Tribunal in 2001, following a distinguished career as a partner in a leading firm of City solicitors. He brought with him the benefits not only of the shrewd judgement and huge store of legal knowledge which he acquired in practise, but also of his experience in leading roles in the International Bar Association.

Even before his appointment as Chamber President in 2012, Hugh was frequently asked to unravel difficult legal problems at training conferences for colleagues throughout the country. Despite his incisive analysis, his presentations were always marked by his modesty and self-effacing charm.

Hugh was a person of immense courtesy, who devoted his life to the service of others. He was a valued friend and support to all his colleagues in the Chamber and in Scotland and Northern Ireland. Outside work, he played a leading role in a number of important charities and in school and university education.

We extend our deepest sympathy to Hugh's family and friends.