

YOU ARE *in* CHARGE

How can tribunal chairs use their powers to enable the best possible decision to be made, while remaining fair to both parties? MARY KANE gives some practical tips.

Professor Hazel Genn's summary of her research *Tribunals for Diverse Users*, the subject of an article in the Spring 2006 issue of this journal, raises questions as to how a tribunal chair can ensure that tribunal users receive a fair hearing. How far can a chair intervene in the equality stakes without interfering?

Use the rules

Most tribunal jurisdictions are inquisitorial, and many have rules allowing the chairs to set the guidelines for how each hearing should be run. Feel free to use these rules to get the best result. You are in charge. Think about what your job as the chair of your specific tribunal entails, in particular what your remit is. It is your responsibility to make a decision. You can only do this if you have the necessary information obtained through written and oral evidence and questions.

The room

As a chair you are a combination of director, producer and ringmaster. The aim of every chair must be to ensure that, whatever the outcome of the hearing, the process should be seen by everyone as fair. Take control, set the scene – sometimes starting with simple matters. Furniture-moving is one example. Depending on your jurisdiction, you may sit in a variety of rooms and it may be possible to arrange the room to be as 'informally formal' as possible.

Make sure you can observe all parties easily and that they can see you and others without straining. Everyone should also be able to hear what is being said. Ensure that, if an interpreter is needed, they are in a position where they can best fulfil the role. If there is likely to be conflict between parties, consider whether the room

is large enough and whether particular people should be separated. Check whether anyone needs disabled assistance and whether the room is suitable for your particular type of hearing.

The preparation

If you sit with others, at your preview make sure you all have the same papers and give members time to read additional documents. Do the same, through your clerk if you have one, with all the parties and representatives. Never let people think they are being rushed. Make sure that any omissions are dealt with as soon as possible.

A punctual arrival is important so that you can discuss the case with your colleagues. This will also give you time to sort out the practical points of the hearing described above. You all need to know what the issues are and how they are to be dealt with. Extra time spent at this juncture means less likelihood of missing vital points during the hearing. Consider any particular worries expressed, either by your colleagues or made by the parties in advance of the hearing. If appropriate, discuss and agree who will ask questions on any specific topic. Avoid seeing either party on their own. This can be a particular difficulty if a legal representative just asks for 'a few words before the hearing'. Ensure the other side is also there to hear the few words.

The introduction

Hazel Genn's research has shown how great the impact of the introduction can be. Each jurisdiction will have its own style, but each will need to: set out who everyone is, stress independence, clarify the remit and describe how the decision will be made, whether it will be given in writing, orally or both, whether it will be

explained at the end of the hearing and when it will be sent out. Describe what will happen during the hearing and the procedures to be followed and ensure the parties, whether applicants, prisoners or patients, know that they will be listened to and that you will be taking notes.

Each of your colleagues may have a different role in the hearing, but it may be clearer to the parties simply to introduce them by name as members of the particular tribunal. Ensure you know the names of everyone attending the hearing and that you know how to pronounce them. Draw yourself a map if necessary and use phonetic spelling to help you with unfamiliar names. No one else will see your notes!

The hearing

Your scene is set, you have the players there and can start the day. You may have a hearing with unrepresented parties, with parties who cannot read or for whom English is not their first language, with aggressive or difficult witnesses or representatives. What can you, as chair, do to keep the tribunal going well and fairly?

You will need to find a style that combines sensitivity and sympathy with judicial independence.

Interpreters

With interpreters, check their independence, check their own language is that of their client and that the two of them actually understand each other, and make sure you always talk to their client, not to them. Make it clear that you expect them to interpret everything, not just questions to their client. The client needs to understand exactly what is going on in the hearing for it to be fair.

Breaks

Some tribunals offer regular short breaks to applicants, to allow them to think matters over, give instructions to their representatives or simply catch their breath. Realising such a break is necessary is part of the responsibility of all members of the tribunal, but you, as chair, will need to be particularly aware of the need for such breaks and suggest them when necessary.

Unrepresented parties

If the applicant is unrepresented, then your problem is how to obtain all the information the tribunal needs without stepping over to the other side of the table. You will need to find a style that combines sensitivity and sympathy with judicial independence. Find out if they have read all the papers that they are entitled to see or whether help will be needed here, perhaps by way of a short adjournment and assistance from a clerk. Does your tribunal allow you to appoint a legal representative or other advocate, or might funding for representation be available, especially if the applicant has any literacy problems, or has a mental illness or disability affecting their ability to present their own case? And if so what opportunity has been given for the applicant to seek legal advice?

Consider hearing an unrepresented applicant's evidence first to establish what their case is. This may calm any understandable nervousness and put the applicant at ease. It will also enable you to ask questions of other witnesses based on what you have heard from the applicant if they are not able to formulate them.

Few lay people understand how to pose questions. As chair, you must use your skills to reframe statements into questions, summarise evidence to make sure it has been understood, refocus parties who are losing the plot, check your understanding (and therefore everyone else's) of what is being said and asked and give the applicant time to answer. Always ensure that they do not stray too far from the points that need to be decided. Check details if you or anyone else is not clear what happened, and follow up questions asked by others to obtain more detail if necessary. If a party does not understand what is being asked, paraphrase the question. If they get stuck with answers, repeat the question or prompt them in an unbiased way. Use clear language and be patient and courteous at all times. Make sure your questions are simple and avoid jargon at all cost. Don't be afraid to admit your ignorance – if you don't understand, it's likely others won't either.

Witnesses

Ask each witness to give their evidence slowly so that a full note can be made. If the hearing is not being recorded it is your responsibility to write down the evidence, and there is nothing more frustrating to all concerned if you have to continually pause and ask for things to be repeated. Somehow you have to develop the art of taking down essential evidence, observing body language, controlling the hearing and making good eye contact. It can be done, but only you may be able to read your writing! You may need to ask a speaker to go a little slower. However, remember you are not expected to take down every word, but to produce a note that contains the essential information for your decision and your written reasons. Be firm yet considerate. Don't allow the hearing to drift into areas of irrelevance where evidence may become unnecessarily repetitive. Try not to let any party feel that they are being prevented from saying all that they need to. This can be difficult but a good chair will perform this balancing act with skill and adeptness.

When you have heard the facts, consider if it would help the parties to summarise what evidence you have obtained, relating it to the particular remit of your jurisdiction and giving the unrepresented applicant time to consider if there is anything else to add. In many jurisdictions it is considered good practice to offer the applicant the last word before any submissions are made, to ensure they have said everything they want to.

Keeping it fair

What else can you do to help the unrepresented party, and while helping them obtain what you need by way of evidence? Ask questions yourself, based on the issues that you so carefully identified in your preview. Remember, it is the answers to your questions that provide the evidence on which to base your decision, and if you have noted down the answers you have the basis of your reasons already there.

The real difficulty lies in making sure you don't step into the defence advocate's shoes when trying to elicit all you need from an unrepresented applicant. It is important at all times to stay objective, to listen to all parties, not to interrupt either side, save to keep the hearing on track, and to be as even-handed as possible. Call each party by name, rather than 'he' or 'she', invite both sides to give their stories and ask questions. It may help if, during the preview, you agree with your colleagues how to handle the situation and at the start of the hearing you explain to everyone that you will be taking account of the fact that so and so is not represented and how you will be dealing with this. Each jurisdiction may differ but so long as you are open, courteous, patient and objective with everyone present, it would be hard to describe the hearing as not fair.

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A situation that might cause problems with an unrepresented applicant is where a point of law or procedure is brought up during the hearing, either by the tribunal or any other party. How can you deal with this? Consider explaining the point and all issues involved in a simple way. Check the parties' understanding, not only by asking directly but perhaps by asking them to tell you what their understanding is. Ask

them again if they need time to take advice, depending on the consequences of the point raised. Ask them for comments, ask questions to clarify matters and, after all comments have been heard, discuss the matter with your colleagues in the absence of all parties. Above all, keep things simple, take your time, be confident you have explored all the issues, asked all the necessary questions, have enough information to make a reasoned and informed decision and have good enough notes to be able to write the reasons. In this way, the unrepresented applicant and all parties should leave the hearing, if not happy with the result, at least satisfied that you have given them all a fair hearing.

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