

READING THE PAPERS - *Fact or Fiction?*

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It is Mrs Podsnap's big day.

'It was a terrible shock,' as she had said to Mrs Ramsbottom at the butcher's 'when I got the letter from the Council saying I couldn't do my washing on a Tuesday any more, because Tuesday is easily the best day really, what with Ethel, and Walter's feet. But I suppose it's since we joined the Common Market, and if that means I can't do my washing when I want to, it's progress I suppose.'

The letter telling Mrs Podsnap about the Council's decision had said that she could appeal to the independent tribunal, so she had written them a careful letter. A few weeks later there had been a reply to let her know that her case would be considered at a hearing in the town hall.

Today is the day of the hearing. Mrs Podsnap got up early and made sure Ethel was ready to come with her. Of course she could not bring Walter's feet, but in her bag she had one of his shoes, just to show the tribunal. She is sure they will understand. With all the commotion Thompson (the cat) thought they were moving again and so he had to come along as well. 'But he won't be any trouble, honestly,' Mrs Podsnap had told the Clerk. She had taken quite a liking to the Clerk, a nice boy she thought, although he could do with a few square meals if the truth be told.

Now Mrs Podsnap is sitting in the hearing room, as she was asked to, and Ethel is sitting next to her and Thompson is curled up in the corner and they are told all to stand up for the tribunal to come in. After they have all stood up they all sit down again and Mrs Podsnap thinks she begins to see why everything in the law takes so long.

The middle person of the tribunal says that he is the Chairman and Mrs Podsnap does not catch his name or the names of the other members but they all look quite ordinary people really, just like her and Mrs Ramsbottom, and the lady on the left is wearing a skirt just like the one mother had for best, and they must all have washing to do and of course they will understand about Tuesdays. The other

man is the Presenting Officer and he is very handsome, but Mrs Podsnap remembers that he is against her and she should not smile at him in case it shows weakness.

The Chairman is speaking 'Now, Mrs Erumph,' he begins. 'We shall ask the Presenting Officer to outline the case first, and then you will have every opportunity to tell us about your allotment and why there are so many turnips on it. But although we may fully understand your difficulty, in the end we shall have to make our decision according to the law.'

There is a small commotion from the direction of the Presenting Officer. 'Sir,' he reminds the Chairman, 'this is an appeal by Mrs Podsnap under section 422 of the Domestic Activities (European Co-ordination) Act. Mrs Podsnap has raised an objection to a Timetable Order.'

'Do forgive me, Mrs Peppercorn,' returns the Chairman. 'I expect this is your daughter sitting with you? We shall do our very best to sort things out so that she has a Compulsory Homework Timetable that fits in properly with her school and your commitments.'

The Clerk is new to the job. His jaw has now dropped to such an extent that he resembles an innocent vicar in an H. M. Bateman cartoon. The Presenting Officer has been in the job far too long (in his opinion). He sighs deeply, for he has no difficulty in recognising the problem, which is that *The Chairman has not read the papers* – as usual. Thompson (the cat) senses trouble and leaps onto the Presenting Officer's lap for comfort.

There is no comfort for Mrs Podsnap. She has come all this way to have her washing day sorted out by the independent tribunal and the man in charge obviously has not got the slightest idea what he is doing. As she will tell Mrs Ramsbottom at the butcher's next week, there is no way she is going to get justice from this lot. She might as well not have bothered – as they apparently have not.

Sounds familiar?

This story may strike a familiar note, though it may be more universally perceived from the judicial side of the bench. If we have not read the papers we may well be afraid of looking stupid in the hearing room, and perhaps fear is the principal motive in ensuring that as tribunal members we do at least some basic preparation for each case we are to hear. It is our job. For the appellant, however, nothing is routine about a tribunal hearing. It may be the appellant's one day in court in the whole of her life. She deserves to be able to be confident that her case has been fully appreciated and justly decided. She expects expertise. She will never be confident with an adverse decision if she thinks that the tribunal did not know what it was doing. Proper preparation not only assists tribunal members to do their job: it is also vital in developing the public image of the tribunal.

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No extra effort required

It is worth noticing, though, that we need expend no *extra* effort on the tribunal's image because everything done in showing all the Mrs Podsnaps that we are able to do our job does in fact make our job easier. The tribunal's decision will, in any case, need to set out the basic details of the appellant and the decision against which she is appealing: so it makes sense for the tribunal members to make themselves familiar with these matters well before the hearing. Few tribunal members can be confident that they have at the front of their minds the whole of the law applicable to every appeal which may come before them: so it makes sense to try to discover in advance what legal provisions are likely to be engaged by any case. If modest research takes place, and the parties can be kept to the point, then the decision is likely to be well-informed. Once the legal framework is identified, it is possible to reach provisional conclusions about what facts are relevant.

If the only matter of fact in issue is the location of Mrs Podsnap's house, there will be no point in allowing her to sound off

about Ethel and Walter's feet. A well-prepared hearing is an efficient hearing. It is also more likely to be a complete hearing. If the papers have been properly considered in advance, the members of the tribunal will be able to ensure that every matter of importance is canvassed at the hearing.

Otherwise it sometimes happens that, after a hearing is over, when the tribunal is considering its decision, a factor comes to light which should have been taken up with the appellant. Now it is too late, unless the hearing is to be reconvened. If the members of the tribunal had been better prepared their decision would have been sounder.

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Other advantages

Another advantage gained by reading papers in advance is that any personal interests or connections of a tribunal member can be identified, and a replacement can be found. All sorts of individuals will have been involved in making the decision under appeal, and their names or descriptions may be on the file.

A tribunal member who has access to the file will have notice of all its contents and, if it later comes to light that, for example, one of his professional partners was at some stage acting for one of the parties, or that his wife was the doctor who did the blood test in question, it may be very difficult for the member to defend himself from a charge of having deliberately taken part in a decision in which he had an interest. Who would believe that a member of the tribunal judiciary had not read the papers?

Thus proper preparation is part of our own defence against any suggestion of impropriety. It can also be part of our shield against the inappropriate use of our own knowledge. Members of tribunals do not leave either their common sense or their professional skills at home; but in deciding a case they must not use factual information which they happen to know, for every case is to be decided on the evidence. By reading the papers one can be prepared to guard against inadvertent use of private knowledge; one has

sufficient warning and can be ready to put ones own knowledge out of ones mind.

Developing form

Fast and effective preview of cases comes with practice, and must vary between jurisdictions. Many experienced tribunal members recommend developing a form – its precise characteristics will vary from individual to individual – on which the bare bones of a case can be entered when they are disinterred from the file. There may be spaces for the appellant's name, the type of decision which is the subject of the appeal, the date of the decision, the applicable law and forth. There needs to be plenty of space on the form for notes and queries. It is worth particularly trying to see which of the papers in the file are essential for the case and, of those, which can be summarised in the mind or as a note, compared with those which have so much important information that cannot be summarised but need to be referred to in full. The latter can be the subject of a mention on the form, and can be marked in the file with a marker note protruding from the edge so that they can easily be found again.

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Some tribunal members mark up the file with a highlighter pen and one occasionally sees files which have passed through the hands of colleagues who have a wide range of these pens and an advanced colour-coding system. Names have been marked in cerise, dates in aubergine, statutory provisions in eau-de-nil, and so on. This is quite astonishingly annoying to anybody else who has to use the file – if, for example, the case is put off to another day when a different tribunal is sitting. If the practice of your tribunal is to make photocopies of the papers for each tribunal member you are no doubt at liberty to treat them as you will, but it is probably better not to mark any original documents in the official file.

Whatever the method you adopt to record the results of your reading of the file, the effect is that before, during and after the hearing you are a master of its contents, knowing precisely what has been established and what needs to be

established; how any new evidence fits with evidence on the file; and how any new argument will affect the result of the case. The parties before you and your sponsoring department deserve no less. If Mrs Podsnap sees that tribunal members can see their way around the file on the desk in front of them and clearly know a lot about the case already, she is more likely to go away with the impression that the hearing was all it should have been, even if, in the end, she loses her appeal.

A hidden danger

Hidden in that last paragraph is, however, a reference to the greatest danger in reading the case papers in advance. Did you spot it? The words 'know a lot about the case already' are the troublesome ones. It is only too easy to read the papers with such a mind that you decide the case before the hearing. being well-informed about a case in advance should not include knowing how you are going to decide it. Questions may be identified, but no answers should be offered. It may be that your reading takes you to the position that unless, at the hearing, a point in issue is dealt with in a particular way the appeal is doomed to failure: but it is vitally important to keep an entirely open mind on the issue until all the relevant material is before you. Otherwise preparing for the hearing runs the risk of closing your ears and eyes to what happens in the hearing itself. Suddenly there seems to be a grain of wisdom in Oscar Wilde's remark: 'I never read a book before reviewing it – it prejudices one so.'

It is for this reason that a few tribunal chairman take the view that although every member of the tribunal should prepare themselves properly before the hearing begins, that should be an entirely private exercise, and the members of the tribunal should not discuss the case at all together until they are making their decision at the end of the hearing. This is a somewhat extreme position and may be difficult to enforce. It may also make it difficult to divide matters likely to arise in the hearing between different members of the tribunal. But there is clearly sense in it. One is likely to remain much more open-minded if one does not know what ones colleagues are thinking, and a pre-judgement may be much more difficult to revise when it has once been spoken

aloud. If the tribunal is to discuss the case in advance it should confine itself to isolating the issues and, however great the temptation, should resist the temptation to guess the result of the hearing.

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Conclusion

No doubt many of the above comments embody a counsel of perfection. In at least one tribunal jurisdiction it is often impossible to get ones hands on the files sufficiently long before the hearing to do them justice. It is nevertheless worth knowing what one is aiming at. The rule in reading the papers is to know the case well enough to be able to do justice to it and for the parties to see you are doing so; but not so well that you can't keep an open mind.

About the author

Mark Ockelton is Deputy President of the Immigration Appeal Tribunal.