How to handle tales of the UNEXPECTED

In a tribunal that is intended to be informal and where many parties appear unrepresented, what is the appropriate response to an unexpected point? *Julia O'Hara* offers advice.

In *Peifer v Castlederg High School* [2008] NICA 49, Lord Justice Girvan said:

> 'Tribunals should not be discouraged from exercising proper control of proceedings to secure those objectives through fear of being criticised by a higher court which must itself give proper respect to the tribunal's margin of appreciation in the exercise of its powers in relation to the proper management of the proceedings to ensure justice, expedition and the saving of cost.'

But what are the powers of a tribunal judge to deal with unexpected points under their procedural rules and, in particular, the overriding objective?

Unexpected points can appear in various ways:

- A point not being identified in pre-hearing documents.
- Questions asked during a hearing that raise different legal issues from those disclosed in the pleadings.
- The tribunal identifying an issue which the parties have not raised.
- Issues becoming apparent to the panel making a decision after the hearing has concluded.

Overriding objective

Procedural rules are chamber-specific and each jurisdiction has its own version of the overriding objective. For example, the duty to ensure that the parties are on an equal footing is absent from the rules of the Social Entitlement Chamber of the First-tier Tribunal, a fact presumably intended to reflect the 'citizen v state' nature of the hearing. The Employment Tribunal's procedure rules provide significant flexibility to manage unexpected points, as will be seen below.

Nature of proceedings

Where an unexpected point arises, the nature of the proceedings – adversarial or inquisitorial – may affect the response. One clear statement of what the terms mean is:

> 'The basic idea underlying the adversarial system is that the truth is best discovered by allowing parties who allege conflicting versions of what happened (or of what the law is) each to present, in its strongest possible form, their own version of the truth, and leave to an impartial third party to decide which version more nearly approximates to the truth. An inquisitorial system depends much more on the third party making investigations and, by questioning each of the parties and other relevant persons, deciding where the truth lies.'[1]

Inquisitorial

Referring to the process of benefits adjudication – which she described as a 'cooperative process of investigation' between claimants and decision makers – Baroness Hale commented in the House of Lords decision in *Kerr v Department for Social Development* [2004] UKHL 23:

> '. . . it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof.'

This is not to say that each party in a hearing before this tribunal does not have to prove

matters relevant to the decision. Baroness Hale was referring to the inquisitorial nature of decision-making at the benefit entitlement stage. Appeals from decisions made by departmental decision makers lie to the Social Entitlement Chamber of the First-tier Tribunal. In hearings before this tribunal, depending on the issues in any given appeal, both sides need to prove the elements of their case although the tribunal may take a more active role in eliciting relevant information from witnesses and documents. The rules of procedure in this jurisdiction also provide extensive case management powers to the tribunal to identify the issues on which it requires evidence and strike out claims with no reasonable prospect of success. This type of tribunal is therefore a mixture of inquisitorial and adversarial.

Natural justice

Common to all jurisdictions are rules governing procedure, such as the rules of natural justice and Article 6. The rules of natural justice include two main principles, the rule against bias and the fair hearing rule.

The natural justice safeguards of a fair hearing include:

- Notification of time, date, place of hearing.
- Adequate time to prepare one's case in answer.
- Access to all materials relevant to one's case orally or in writing or both.
- A right to examine and cross-examine witnesses.
- A right to have the decision based solely on material which has been available to (and answerable by) the parties.
- A right to a reasoned decision which takes proper account of the evidence and addresses parties' arguments.

They can also include a right to be represented, possibly by a lawyer.

Aware

So, a fair hearing is one where each side is aware of the principal allegations or claims made by the other and has a reasonable opportunity of meeting them. This can mean allowing amendments to claims and responses as well as adjournments to give parties the opportunity to investigate issues of which they have not received notice. At the beginning of or during a hearing it may become apparent that one party is raising a new point. If it was not in the pleaded case, it can still be considered. The problem was described thus by Mr Justice Langstaff in *Ministry of Defence v Hay* [2007] IRLR 928:

> 'It cannot, however, be the case that a party's contentions are frozen artificially yet definitively at some time prior to the hearing. Thus the rules make provision for the amendment of an originating application or, as the case may be, a defence to it. It is often desirable for the sake of clarity that there should be a formal amendment . . .'

Article 6

Article 6 is an increasingly important source of procedural norms. One of the features inherent in the concept of a fair trial is the existence of a judicial process which requires each side to have the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the opposing party. As stated by the European Court of Human Rights:

> 'The effect of Article 6(1) is, *inter alia*, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision.'

Commissioner Jacobs preferred to explain a decision on a procedural ground of appeal in terms of the claimant's Convention right to a fair trial. He made the observation that while tribunals may be familiar with the principles of

natural justice, he found that, increasingly, they were not applying them.

> 'I could, no doubt, have reached the same conclusion under domestic principles of natural justice. However, the Human Rights Act 1998 provides a convenient opportunity for Commissioners to rebase their decisions on procedural fairness in fresh terms. In my view, this would be desirable . . . The introduction of the language of balance would provide a touchstone for tribunals.'

New point

When a new point comes up, the tribunal will need to consider whether to give the parties the chance to deal with it. In practical terms, the later the point emerges the more difficult this will be. Lady Justice Smith spoke about the failure by an Employment Tribunal to give the parties the opportunity to make representations about a finding of fact for which neither party had contended:

> '. . . the giving of such an opportunity is not an invariable requirement. The Employment Tribunals Regulations give the employment tribunal very wide discretion on procedural matters which is wide enough to encompass a decision as to the appropriate course to take where this kind of situation arises. In any event, if the legal effect of the findings of fact that are to be made is obviously and unarguably clear, no injustice will be done if the decision is promulgated without giving that opportunity. Even if an opportunity should have been given and was not, an appellate court will set aside the decision only if the lower court's application of the law was wrong.' [2]

An appeal against a tribunal decision on a procedural matter will only succeed if the appellate court finds that the tribunal exercised its discretion wrongly.

Good practice requires identification of the issues for determination before the hearing begins and checking with the parties and representatives that they agree with those identified by the tribunal. Rule 14 of the Employment Tribunal's procedural rules gives the panel a discretion to make such enquiries of parties and witnesses as it consider appropriate and otherwise conduct the hearing in such a manner as it considers appropriate for the clarification of the issues and just handling of the proceedings. This provides a certain amount of inquisitorial leeway in an essentially adversarial tribunal determining disputes between two parties. Other tribunals can identify their issues by reference to the possible outcomes of a hearing.

In hearings before the SSCS tribunals, presenting officers rarely attend. This can create a practical problem for tribunals if a new point emerges during the hearing. The extent to which natural justice requires an adjournment in these circumstances may be balanced with the decison by the department not to send a presenting officer and the overriding objective to deal with the case proportionately and avoid delay.

Artificially truncating

Judgments enlarging or constricting the issues are another example of the exercise of a discretion to which the rules referred to above apply. In a race discrimination case, Lord Justice Sedley said this:

> 'Employment Tribunals need to bear in mind that in carrying out their useful role of defining the issues in complicated cases in advance of the hearing they must avoid setting limits which artificially truncate a necessary narrative, a very different exercise from the one of cutting out things that are irrelevant or legally inadmissible.' [3]

Here, the claimant was represented by a pupil barrister who had conceded a time point at a

pre-hearing review. The Employment Tribunal dismissed the claim. The EAT allowed an appeal but the Court of Appeal, with some regret, upheld the tribunal decision. Lord Justice Mummery expressed surprise that the tribunal had not allowed an amendment to the originating application or exercised its discretion to extend time on the just and equitable grounds in the Race Relations Act, as it then was. Facts helpful to the claimant had not been pleaded but were included in the claimant's witness statement. According to Lord Justice Mummery, those facts showed that the claimant '. . . may have had a good case'. He emphasised the very wide and f lexible jurisdiction to do justice in the case, as contained in the Employment Tribunal's procedural rules.

Representation

In its proposals for the reform of legal aid, the Government maintains that legal aid for advocacy before most tribunals is 'not justified given the ease of accessing a tribunal, and the user-friendly nature of the procedure'.

Judicial colleagues are acutely aware that the absence, presence and quality of legal representation can have an impact on the conduct of a hearing. Where a party has the benefit of effective representation, the task of the tribunal in identifying the issues in the case and dealing with unexpected points by way of amendment or adjournment can be facilitated. Conversely, without such representation, the tribunal will need to make a careful judgment about the level of user friendliness with which they feel it appropriate to engage.

Conclusion

An appeal against a tribunal decision on a procedural matter will only succeed if the appellate court finds that the tribunal exercised its discretion wrongly. Much of the case law on procedural issues shows that the appellate courts give tribunals a wide margin of appreciation in these types of issues. Ultimately, if tribunals show in judgments on procedural points that they have taken all relevant factors into account, fully explain the reasons why they allowed or refused an amendment or adjournment, refer to the overriding objective and demonstrate sound judgment in the outcome they will be exercising their discretion appropriately.

Julia O'Hara sits on the First-tier Tribunal (Social Entitlement Chamber) and the Employment Tribunal and teaches at Sheffield University.

[1] Administrative Law, Peter Cane (4th ed, Clarendon Law Series).
[2] *Judge v Crown Leisure Ltd* [2005] IRLR 823.
[3] *Ahuja v Inghams* [2002] ICR 1485.

Continued from page 1

In its first year, the college will focus on ensuring that training promised in the JSB and tribunals training programmes for 2011–12 will be delivered in the usual way. But the college will also be looking at ways in which best practice can be shared, different training methods can be pioneered and extended and (where appropriate) judicial skills training might be delivered across jurisdictional boundaries.

An exploration of the greater use of e-learning, and a concentration on the development of a lifelong learning strategy for individual judges and tribunal members to match their professional career development need also to figure high on the college agenda. The development of a working relationship with those tribunals outside the HMCTS will also be given priority. In the longer term, the desirability, practicalities and affordability of establishing a permanent home for the college will also need to be carefully explored.

Judicial College

Professor Jeremy Cooper sits on the First-tier Tribunal (Mental Health) and is Director of Studies for Tribunals Judiciary at the Judicial College.