# WHEN SOME HELP IS NEEDED IN THE KITCHEN

**In hearings that require particularly active management, impartiality remains paramount. *Mary Stacey* discusses ways to deal with such situations with the aid of some recent case law.**

IN A PERFECT WORLD, judges and tribunal panels can resemble for the most part Trappist monks, speaking only at the end of the case to deliver their judgment. They sit back, listen and enjoy the hearing, heeding the moral of the child with a hoop and a stick – the more you poke it, the less likely it is to stay up. TV's Masterchef judges do not meddle with the sauce on the hob, but watch as two delicious meals are prepared and then decide which is better.

That model, however, presumes that both the parties and the tribunal agree and understand what issues are in dispute, that the parties and/or their representatives know how to present evidence and arguments to the tribunal, and have a grasp of the applicable law and obey the rules of procedure. In an even more ideal world, the judge or tribunal need have little pre-knowledge of the law and can rely on equally well-qualified representatives on both sides to explain the law succinctly and accurately, with copies of any relevant materials – but by now you may think I have strayed into fantasy.

Tribunals have long known that our real world rarely works like that, and to extend the Masterchef analogy, our parties quite often need a bit of help with the cooking and sometimes the chefs get irascible. We are accustomed to litigants in person (LIPs), and watch as the Crown and county courts cope with their increasing numbers as a consequence of legal aid cuts. Such was the concern that, in March 2013, the Master of the Rolls issued practice guidance on LIPs, applicable to courts, and a judicial working group was established, chaired by Mr Justice Hickinbottom, which reported in July 2013.[1]

Where parties – and sometimes their representatives – are at sea in a hearing and a case requires very active management, what can we do while maintaining our independence and impartiality?

## Overriding objective

The starting point in any tribunal hearing will be the overriding objective to deal with cases justly and the rules of procedure specific to the tribunal chamber. In every jurisdiction, dealing with cases justly includes, so far as is practicable, ensuring that the parties are on an equal footing, saving expense and ensuring cases are dealt with expeditiously and fairly. In some jurisdictions there are further aspects.

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The phrase 'dealing with cases justly' deliberately lacks precision and is the art of judgecraft, for which, as set out in the invaluable aid and go-to guide, the Equal Treatment Bench Book (ETBB),[2] there is no prescriptive list – 'it encompasses everything that you will not find in a book on law, evidence and procedure'. It is not a new concept. In 1612, Francis Bacon articulated it:

> 'A judge ought to prepare his way . . . so that when appeareth on either side an high hand, violent prosecution, cunning advantages taken, combination, power, great counsel, then is the virtue of a judge seen, to make inequality equal; that he may plant his judgment as upon an even ground.'[3]

Or in the more contemporary words of the ETBB:

> 'Fair treatment does not mean treating everyone in the same way: it means treating people equally in comparable situations and a litigant in person with little grasp of law and procedure and poor articulacy is not in a comparable situation to a QC.'

Appellate courts have consistently resisted attempts to set out hard-and-fast rules, finding every appeal turns on its facts and context. While identifying that 'the all-important dividing line between, on the one hand, "robust, effective and fair case management" and, on the other, "inappropriate pressure and unfairness" cannot be a sharp one',[4] applying it in practice can be tricky. The important recent case of *Drysdale v Department of Transport (The Maritime and Coastguard Agency)*[5] has provided guidance.

Mr Drysdale had brought employment tribunal proceedings against his employer and was represented by his wife. During the hearing, Mrs Drysdale, with her husband's apparent agreement, asked that the claim be withdrawn. When asked by the tribunal, she confirmed that Mr Drysdale agreed. The tribunal then acted on the request and dismissed the claim. When the respondent then made a costs application, the Drysdales walked out after an acrimonious exchange. They subsequently appealed against the dismissal decision on the issue of whether the tribunal had taken adequate steps to ensure that the claimant had taken a properly considered decision to withdraw the claim.

## General principles

Drawing on the ETBB and a review of the leading authorities, the Court of Appeal set out the following general principles which are likely to become the benchmark in future cases:

**1** It is desirable for courts generally, and employment tribunals in particular, to provide appropriate assistance to litigants in the formulation and presentation of their case.

**2,3** What level of assistance or intervention is 'appropriate' depends upon the circumstances of each particular case including whether the litigant is represented or not; whether any representative is legally qualified; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.

**4** The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.

**5** How much assistance or intervention is for the judgment of the tribunal hearing the case, and for the tribunal's assessment and 'feel' for what is fair in all the circumstances of the specific case. Rigid obligations or rules of law should be avoided.

**6** There is a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/omitted to do, and which amounts to unfair treatment of a litigant.[6]

The Court of Appeal stressed that other than in exceptional cases, it would be both inappropriate and unnecessary for a court or tribunal to ask why a party is withdrawing a claim, but the tribunal does need to be confident that the party understands what he or she is doing. The tribunal had acted with scrupulous fairness and propriety. The tribunal had checked and asked for confirmation that Mr Drysdale wished to withdraw his claim and the Drysdales were clear in their intention and apparently had a good understanding of their action.

The case also makes for fascinating reading for the frank accounts of the participants about what happened at the tribunal hearing. Interestingly, the Court of Appeal makes no comment on the questionable behaviour of the Drysdales. They had secretly recorded both the Employment Tribunal and Employment Appeal tribunal hearings; they refused to sit down in the tribunal; ignored the tribunal's request to listen to what was being said; accused the respondent's counsel of telling lies and then refused to respond to his points. The inference is that such behaviour is to be managed to enable a hearing to proceed rather than take a high-handed approach.

### Approach to adjournment

In another recent case, the Employment Appeal Tribunal considered a tribunal's approach to adjournment. In *U v Butler and Wilson*,[7] it was held that an employment judge had failed to exercise properly her case management powers to adjourn to permit a party the opportunity to reflect on what course he wished to pursue. Furthermore, the tribunal had been in error in not explaining to a claimant that he had an option to make a written application for a review, rather than proceed immediately with an oral application. The EAT was at pains to stress that no prescriptive guidance should be given on how to deal with litigants in person – each case is fact-specific and there is ample guidance in the ETBB.

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However, a number of observations have wider resonance. It was an important factor that the tribunal knew that the claimant was disabled with post-traumatic stress disorder and episodic psychosis, which should have been taken into account when making case management decisions. It is trite law that the right to a fair hearing may require a judge to adjourn a hearing, even without an application from a party. The tribunal judge noticed the claimant's considerable signs of disquiet and he had told the tribunal that he was having a psychotic episode. The EAT held:

> 'Anyone conducting a judicial or quasi-judicial hearing confronted with a person who is plainly unwell would necessarily and obviously adjourn the hearing for a brief time to enable them to recover sufficiently to present their case, or their evidence, if possible during the course of the hearing.'

Furthermore, once the judge had chosen to inform the claimant that he could apply for a review of a decision it was necessary to explain that the application did not need to be made on the spot. By explaining only one, of several, ways in which a review could be applied for she had misled the claimant in respect of his entitlements.[8]

The difference between the two cases is that in *U v Butler and Wilson* the claimant was not participating effectively[9] in his hearing and was not receiving justice. He wanted time to collect his papers from the nearby printing shop and challenge the dismissal of his case in his absence when he arrived late, which could have been reasonably accommodated. He was then given only a partial explanation of what to do next. In *Drysdale,* there had been no such injustice or lack of understanding.

In 1995, the Woolf Report[10] noted:

> 'All too often the litigant in person is regarded as a problem for judges and for the court system rather than a person for whom the system of civil justice exists.'

Depressingly, the Hickinbottom Report needed to make the identical point 18 years later. It is the court or tribunal's duty to ensure that litigants have every reasonable opportunity to present their case, without assisting them with it. It is clear

from *Drysdale* that we have considerable freedom to achieve that objective, provided we keep the principles of equality and justice at the fore.

Sometimes basic case management and communication skills are sufficient: such as explaining the rules and the representative's role and why, for example, a particular line of questioning is not relevant. Lack of confidence and nerves can manifest itself in aggression – if the representative can be reassured of the fairness of the process, difficult behaviour may disappear.

### Serious inadequacies

But in other cases the problem can be far more fundamental. In the case of *AD v Conduct and Competence Committee of the Nursing and Midwifery Council (NMC)*,[11] the issue on appeal concerned what, if any, steps the quasi-judicial body of the NMC should have taken to address serious inadequacies in a nurse's representation before her regulatory body. The appellant nurse's lawyer had neither mastered nor understood the NMC's case – which was all based on circumstantial evidence, and had consequently overlooked the potential weaknesses, and had not prepared the defence. He had not identified witnesses, or sought evidence and nor had he considered the disclosed evidence. The lawyer then withdrew four days before the start of the two-week hearing, leaving the nurse to represent herself.

In acknowledgement of the difficulties, AD was permitted to lodge documents at the start of the hearing and the case was adjourned for one day while she did so. The appeal court found those limited steps were inadequate and that competent legal representation was essential if the nurse's defence was to be presented properly. The NMC's decision to strike AD off the roll for serious misconduct and dishonesty was overturned. No competent lawyer could behave in such a manner and the conduct led to identifiable errors in the hearing which rendered the process unfair and the conclusion unsafe.[12] The Court of Session Inner House readily saw the weaknesses in the NMC case and the injustice caused to the nurse, as did an Employment Tribunal when she brought separate proceedings for unfair dismissal. She could not effectively participate because her lawyer had not prepared and did not understand the case, and when she was left to represent herself at the last moment, it was not possible for her to remedy his failings. A real injustice had occurred and the decision was quashed.

In all three cases the acid test was whether the parties, represented or not, had effectively participated in their case and understood what was happening. Tribunals have the power and should assist to level the playing field for the parties where we can. We will generally have the support of the appellate courts who will see that we have done our best to exercise our powers fairly and be reluctant to interfere, leaving tribunals to get on with the spade work.

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[1] The Judicial Working Group on Litigants in Person: Report. Available at *www.judiciary.gov.uk*.

[2] Re-issued and updated 2013. Available at *www.judiciary.gov.uk*.

[3] 'The Essays or Counsels, Civil and Moral', Of Judicature, Francis Bacon, Viscount St Albans 1612.

[4] *Gee v Shell UK Ltd* [2002] EWCA Civ 1479.

[5] [2014] EWCA Civ 1083.

[6] Paragraph 49, abridged.

[7] UKEAT/0354/13, 2.09.2014.

[8] Under Employment Tribunal rules of procedure, an application for a review may be made in writing within 14 days of receiving the written decision sought to be reviewed, or orally at the hearing itself.

[9] The ETBB stresses that justice requires effective participation in any legal process – whether as a litigant in person, witness, or representative – based on an understanding of what is going on and what is expected of you.

[10] Lord Woolf, Access to Justice Report, 1995.

[11] [2014]CSIH 90, the Inner House, Court of Session, 4 November 2014.

[12] Applying the test in *R (Aston) v Nursing and Midwifery Council* [2004] EWHC 2368 (Admin).