The INSOLENT *and the* INCOMPETENT

STUART VERNON *considers the difficulties a tribunal may have in deciding whether an advocate is incompetent and asks what it should do when it reaches such a conclusion.*

Two recent decisions have highlighted the difficulties encountered by tribunals when faced with advocates who are either insolent or incompetent. In *Bennett v London Borough of Southwark* [2002] IRLR 407, the Court of Appeal giving judgment on February 21, 2002, had to deal with the consequences of the 'inexcusable petulance and insolence' of a lay representative. A lengthy Employment Tribunal hearing had been adjourned and the applicant was not able to attend the adjourned hearing because of illness. Her representative's application for a further adjournment was refused on the basis that the applicant had already given her evidence, that her representative could cross-examine in her absence and that it would cause a waste of time and resources, further expense to the respondent and result in likely delays of months. The applicant made it clear to her representative that she was unhappy for the case to proceed in her absence and further applications to adjourn were made. During the final application the representative accused the tribunal of racism by suggesting that: 'If I were a white barrister, I would not be treated in this way', and 'If I were an Oxford-educated white barrister with a plummy voice, I would not be put in this position.'

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The tribunal responded to these remarks by retiring to consider their position. They concluded that they could no longer hear a case on race discrimination when they themselves had been accused of racism. They returned and announced that they were consequently discharging themselves from the case. They left any newly convened tribunal to deal with any application from the London Borough of Southwark that the case should be struck out on the grounds that the manner in which the proceedings had been conducted was scandalous, frivolous or vexatious (rule 13(2)(e) of the Employment Tribunal Rules of Procedure 1993 under which the Tribunal has no power to punish a party or representative for contempt). After appeals against the decision of a newly convened tribunal to the EAT, the matter finally came before the Court of Appeal.

Lord Justice Ward was critical of the way in which the original tribunal dealt with the problem. He suggested that they should have listened to the diatribe with 'phlegmatic fortitude, retiring, if necessary, to compose themselves and to cool the advocate's ardour', and then calmly continue. Resort to familiar tribunal skills might have saved the situation: 'One cannot help but wonder whether a few soothing words . . . would not have defused this explosive moment in a way which would have allowed (the representative) to pull himself together, and behave with sufficient decorum to allow the hearing to continue.' In this way the tribunal would not have 'abdicated its responsibility'. 'Where its authority is challenged it must deal with that challenge itself.'

In a colourful phrase, Lord Justice Ward declared: 'In getting on their high horse they fell off the judgment seat.'

The Court of Appeal's decision emphasises the responsibility of tribunals to rise above such challenges so that they can discharge their responsibility to judge

impartially. Lord Justice Ward went on to discuss what should be done in the circumstance that the tribunal concluded that they were incapable of hearing the case impartially. In such cases, the tribunal would have been wrong to continue. To do so would 'deny justice being done'.

In *Parmar and Others (t/a Ace Knitwear) v Woods (Inspector of Taxes)* (2002) *The Times*, June 5, Mr Justice Lightman held that incompetence by a chartered accountant conducting a tax appeal before a special commissioner did not render the proceedings unfair and did not entitle the advocate's clients to a fresh hearing. Chartered accountants have statutory rights of audience as advocates before commissioners. By acting as such, the advocate in this case warranted his fitness, legal knowledge and expertise to assume that role.

In this case, the advocate had been the appellants' accountant and had taken an active role in formulating insurance claims after a fire at their premises. However, at the hearing none of the appellant taxpayers or the accountant advocate had given evidence on the numerous issues of fact.

The commissioner rejected the taxpayers' appeal on the grounds that their case was not supported by evidence.

It was said that the accountant advocate thought that his submissions, so far as they covered areas within his own knowledge, constituted evidence. Lightman J held that the commissioner was obliged to treat the submissions as such; they could not therefore constitute evidence in favour of the taxpayers. The conduct of the advocate was consistent with a decision taken by him that he had little evidence to give or had not wished to expose himself to cross-examination.

This decision confirms the principle set out by the House of Lords in *Al-Mehdawi v Secretary of State for the Home Department* [1989] 3 All ER 843 that a party to a dispute, who had lost the opportunity to have their case heard through the fault of their legal advisers, could not complain that they had been the victim of procedural impropriety or been denied natural justice.

However, the decision of Lightman J suggests that assumptions of competence in those who have rights of audience, may end when their incompetence becomes apparent. Such a suggestion raises interesting questions: when, and on what evidence, is a tribunal to conclude that an advocate is incompetent; and what is a tribunal to do when it reaches such a conclusion? Answers on a postcard!

STUART VERNON is Adjudicator, Office of Fair Trading. Readers may find Michael Johnson's article on the under-represented party helpful (published in Volume 7, Issue 1 of this journal).

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Enquiries to John Gibbons on 020 7217 4772 or e-mail *tribunals@jsb.gsi.gov.uk*