Second thoughts are not always BETTER

Nick Warren **wonders why it is so hard for judges to admit that they sometimes make mistakes – and suggests what a judge might do in those circumstances.**

I have attended a few induction courses in the past which, in retrospect, seem to have been no more than an opportunity for some senior judges to show off a bit and to point out that the job was simply impossible. The new judges must have travelled home in gloom.

I am glad to say that it is different now. Those who organise courses for the Judicial College know that the participants have been appointed to their judicial role amid fierce competition. The tribunals themselves are confident that they will be able to do the job well, and the course must pass on that confidence to the new recruits so that they can walk away with a spring in their step. But there is also something to be said – later on perhaps - for reflecting on the things that will go wrong, and to have the confidence to deal with that as well.

Being human

All judges make mistakes. It seems slightly odd that one should have to emphasise this; we are all human after all. Perhaps it is because the job is sometimes a lonely one so the burden feels heavy. Perhaps some colleagues, coming from a competitive professional background, do not have that attractive quality of readily admitting their own mistakes to their colleagues.

Sometimes, we may identify too much with our decisions. They are final; binding; of legal force; not to be argued with. It may be an occupational hazard to identify oneself too personally with these characteristics of our decisions.

Humility

I recall as a young boy my dad telling me that in his working life in the glass industry he tried to ensure that he got at least 51 per cent of his decisions right because if he fell short of that they could replace him by tossing a coin. The point is not frivolous. Other occupations probably have a much readier acceptance of error and I find it helpful to reflect on this.

Our main job is to give a decision. We make no promise to tribunal users that we will always get it right. It is a curiosity that humility doesn't find its way into any of those lists of competencies for appointment or appraisal.

In truth, a busy judge probably makes at least half a dozen mistakes of fact a week not to mention the occasions when he or she gets the decision right but makes mistakes in the way tribunal users are treated. Our main job is to give a decision. We make no promise to tribunal users that we will always get it right. It is a curiosity that humility doesn't find its way into any of those lists of competencies for appointment or appraisal.

Prepare

Of course, good practice will reduce the number of mistakes that you make, and in particular preparing carefully and checking out the conflicts of fact in the evidence.

Leave the right-hand page of your notebook blank so that your preparation notes can structure your deliberations and you can put a brief note of your reasoning on the right-hand side.

Take a break

At the hearing it is important to take your time rather than to do anything in a fluster. This won't add more than 10 minutes or so to the day. Take a break if need be. This is always worth doing if anyone at the hearing is becoming a little distraught. If at the end of a busy day you feel disappointed with the way things have gone, consider whether there is a lesson to be learned.

For example, one thing I feel is particularly difficult is to be courteous to an advocate who is putting a very bad case. Given the chance to pause and think, I realise that if it is obvious to me that the case is a bad one, I ought at least to consider the possibility that the same idea has occurred to the advocate– and that they are simply trying to make the best of a bad job. Sometimes it helps to write these lessons down just to get it out of your system.

Guidance

Similarly, impromptu judgments are really impressive, but there is no point in making things unnecessarily hard for yourself. Take the time you need.

One good thing about the new tribunal system is that almost all of us now have a supervising judge. Asking them for help or guidance is a sign of strength, not weakness. In my experience, such judges are often flattered to be asked and a five-minute telephone chat with one of them can save you an hour or two of anxiety.

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Apologise

Sometimes in the course of a hearing there is an incident which you think may give rise to a complaint. If you recognise that you have done something wrong, then don't hesitate to apologise – and make a record in your notebook that you have done so. You can also apologise if things go wrong which are strictly outside your control. I should like to see more apologies given in case management when the 'directions' which we are so keen to issue prove burdensome or wide of the mark.

Should you expect a complaint from a tribunal user, take an early opportunity of agreeing with your colleagues (if you are sitting as a panel), or with the clerk, an account of what happened and insert that into your notebook. If you are asked to respond to a complaint then the contemporaneous record may be important.

Delay

Some people say that they welcome complaints as well as adverse criticism at appraisals as an opportunity for self-improvement. For myself, I am not so thick-skinned. One thing I have learnt, though, is the importance of avoiding a partisan tone when you respond. This advice also holds good when dealing with an application for permission to appeal from a dissatisfied tribunal user. A common cause for complaint is delay in writing up a decision.

Written judgments

Different systems for writing up decisions operate in different chambers. Sometimes a statement of reasons is given only on request. In those circumstances, the kind of preparation and noting of deliberations which I have described should help you to have a framework ready for your statement of reasons. In other jurisdictions, often involving longer cases, a written judgment is required in every case. Here, it makes sense for you to record your preparation in a narrative

note. This will also greatly assist your members in their own preparation for the case.

Set out the background and agreed facts; refer to the law which governs the case; and pose the questions which the tribunal is likely to have to answer. Your tribunal hearing will be more focused and your narrative note will be a good start for the full tribunal decision.

Slightly different considerations may apply in the Upper Tribunal. Reflection may be needed if a particular decision will have consequences for other cases.

Change of mind

Of course, some delays are caused by that sinking feeling, every time you revisit the papers, that you got the decision wrong. If you've already announced your decision – or in the course of a long hearing have announced findings of fact from which you now want to resile, there is really not much you can do except plough on.

In *Re L-B* [2012] EWCA Civ 984, the Court of Appeal offered an even more restrictive view of the judge's power to change his or her mind than had previously been permitted. The case involved public law family proceedings which are dealt with in two stages. The judge had changed her mind about her conclusion at the fact-finding stage.

Sir Stephen Sedley commented:

> 'There can be few judges who have not worried about their more difficult decisions and sometimes have come to think that there was a better and different answer. But this by itself is not an objective reason why their original judgment should not have been right. Hence the need for some exceptional circumstance – something more than a change in the judge's mind – to justify reversal of a judgment.'

A material change of circumstances or the emergence of compelling new evidence were examples cited.

Second thoughts

Sir Stephen Sedley's words, combined with the notion that it's your job to issue a decision, might spur you on to deliver your judgment and avoid delay. If the parties have received no hint of the eventual outcome then you are of course free to change your mind or discuss matters with your fellow members which you didn't cover in your deliberations.

In every Crown Court trial the judge warns the jury that it will be ever so tempting for them to conclude that there is just one vital extra piece of evidence they need which will resolve all their difficulties. The judge tells them to put that thought out of their heads. There will be no more evidence.

However, unless you have actually applied the wrong law, I would think twice about sowing seeds of doubt. In every Crown Court trial the judge warns the jury that it will be ever so tempting for them to conclude that there is just one vital extra piece of evidence they need which will resolve all their difficulties. The judge tells them to put that thought out of their heads. There will be no more evidence. They must decide the case on what they have read, seen and heard and on the common sense conclusions they can draw from what they have read seen and heard.

Sir Stephen Sedley is right. Just because thoughts are second thoughts, doesn't mean that they are more accurate than your first ones. It is better to deliver the goods on time.

Judge Nick Warren is President of the General Regulatory Chamber of the First-tier Tribunal.