The more preparation the better

Martin Williams **describes the benefits – and limitations – of pre-hearing advice and some of the misconceptions that an unrepresented party might bring to a tribunal hearing.**

Some unrepresented parties appearing before a tribunal will have had advice before the hearing, dealing with the issues in their case and what to expect at the hearing. Such preparation can vary in quality. Other unrepresented parties will have had no such advice.

In this article, I try to give an insight into the expectations that many appellants have of a hearing and to describe the benefits and limitations of pre-hearing preparation – including common misconceptions and the likely limits of a party's understanding, despite the best advice.

Pre-hearing advice

Pre-hearing preparation may assist a party to overcome some of the disadvantages of not having a representative, but it is never an adequate substitute.

Many of the things that an adviser will have covered with a party are similar to the points that a good tribunal judge will make in their introduction to the parties. However, typically, an adviser will have had more time to spend on these issues and an opportunity to build a relationship of trust. They will have been able to question the party about what they expect to happen and to bring to light misconceptions that may need to be addressed.

Independence

An adviser will have been at pains to explain that the tribunal is independent from the decision-maker whose decision is the subject of the appeal.

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Where the appeal is against a decision of the state, there is often a mistaken belief that the state is somehow monolithic, and that all of its sections (including the judiciary) act as one, with access to the same information. Thus, many appellants in social security appeals are surprised that the tribunal considering their entitlement to a sickness benefit has not got a full copy of their medical records. This is often particularly true where many areas of a person's life depend on state provision.

An adviser will have explained that all the tribunal will know of the individual is what is contained in the bundle, plus anything else they are given before the hearing or told by the parties. Without such advice, a party may not have provided relevant evidence to support their case.

Finding facts

In practice, independence is very difficult to explain without also explaining the role of the tribunal in finding the facts from the available evidence and applying the law to those facts to reach a decision. An adviser might explain:

> 'They are not the same as the people who said you couldn't have disability living allowance. They are not on their side, but that doesn't mean they are on your side either. They are in between you and the other side, and they have to decide who they think is right.'

That on its own means little without an explanation of how a tribunal is to decide what is right:

> 'The tribunal's job is to look at all of the evidence and decide what they believe is true based on which of that evidence they think is correct. Then, having decided what the true facts are, they decide whether that means you meet the legal rules to get the benefit.'

That may lead on to further discussion of the relevant facts, based on the requirements that needed to meet the legal tests involved.

Substance

An adviser will have tried to explain what the central issues in the case are. This necessitates explaining the law which the tribunal must consider in a way the claimant understands. A client who understands the legal test which they must satisfy in order to succeed is in a stronger position, whether talking to their adviser or giving evidence. They stand a better chance of appreciating the relevance of the question being asked and therefore a better chance of answering it in a way that will give the tribunal meaningful evidence.

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Some tribunals seem to think that a party's evidence is more likely to be truthful where the claimant does not understand the importance of the question. Aside from being unfair, the practice of asking a claimant to answer a question whose relevance they do not understand is less likely to elicit a helpful response.

Powers

While an adviser may be able to explain that the tribunal is charged with making the decision, and a little about what it must do to reach that decision, it is very difficult to explain the powers of the tribunal in sufficient detail. Brief discussion of the format of the hearing can be helpful; for example, that there will be introductions, that the members will ask questions and that the party will have an opportunity to say what they feel is relevant.

However, it is simply not possible to prepare a client for all of the case management powers that the tribunal might exercise. For example, how can one prepare a party to know when to ask for an adjournment to consider new evidence produced by the other side just before the hearing? Many unrepresented parties will answer 'yes' when asked whether they have read the documents and be happy to proceed, although they have not had advice on their relevance to the case.

Similarly, although an adviser will do everything possible to ensure that all relevant documents are before the tribunal in advance of the hearing, where it becomes apparent in the course of the hearing that other documents might exist or could be obtained, few parties will know of the tribunal's power to summon witnesses or order disclosure of documents.

Even where the party does know enough to ask for an adjournment or a direction on further documents, understanding how that might be consistent with the overriding objective of any procedure rules will be beyond the capabilities of most unrepresented parties.

Given the fundamental difficulties that an unrepresented party has in dealing with procedural points as they arise, it is not surprising that many of the binding cases on fair hearings deal with tribunals that have failed to deal with such points.

Informality

Advisers will have tried to explain as carefully as possible that the proceedings will be informal.

This is often done by asking the party first what they think the hearing will be like. A typical discussion on this point would explain that there are no gowns or wigs, no standing up to give evidence and that it is very unlikely evidence will be given on oath.

However, the adviser will also have tried to make it clear that, though informal, ultimately the hearing is a type of legal proceeding and the tribunal judge has control of the proceedings.

Advisers should also have described the composition of the tribunal, including what is and is not included in the role of specialist members. For example, in social security cases, the party often expects the medical member of the tribunal to examine them.

The role of the representative

In a case where the adviser is attending as a representative, then they will also have explained that their role is not to give the party's evidence for them. Clients are often shocked by this and expect their representative to do all the talking. An adviser faced with this may have explained that, as the central issues are about things that have happened or apply to the party, then the tribunal wants to hear that first-hand.

The adviser will then explain that their role is to ensure that their client's evidence is as complete and relevant as possible by asking questions not asked by the tribunal, or drawing out additional points, and that they will comment on which evidence the tribunal should prefer where necessary and ensure that the tribunal understands the legal representations being made.

Written submissions

Where the adviser is not able to attend, they may send a written submission. Although that can assist a tribunal in forming a view of the issues, it cannot deal with all of the legal points that may arise at the hearing. Sometimes the relevance of the legal issues depends on the view of the facts the tribunal has taken. It is worth checking with the party that they know what is in the submissions made by their adviser. That may be a useful way to check what the party understands of their case and gain some view of how adequately the party has been prepared. The less preparation, the more the tribunal will need to enable the party to give relevant evidence, by explaining its own role and framing the legal issues in a way the party can understand.

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Conclusion

While unrepresented parties may often have been prepared for what to expect at the hearing, this is not an adequate substitution for proper representation, particularly in respect of procedural rules and legal submissions, and tribunal judges will need all their skills in ensuring that evidence is relevant and the party feels they have had a fair hearing.

Furthermore, although advisers will have tried to go over the essential features of the hearing and impress on their clients the matters that are relevant to the decision, careful explanation by the tribunal of its independence and the procedure to be followed, as well as the legal tests at issue, can only add to the fairness of the proceedings.

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Readers may wish to revisit two articles published in previous issues of the journal, and both available at *www.judiciary.gov.uk/publications-and-reports/jsb-publications/Tribunals+Journal*. They are: 'The Tribunal introduction', Mungo Deans (1998) Volume 5, issue 2; and 'Walking a tightrope: Strategies for when a party is poorly represented', Melanie Lewis (Summer 2009).