Lessons from a trailblazer model

TECHNOLOGY By **John Aitken**

The beginnings of justice systems always speak of the parties entering the presence of the person (often a royal figure) to whom an appeal for justice is made, and explaining the case, the judge then gives an *ex tempore* judgment; almost unknown is talk of case management and adjournment. Despite this lack of case management, the decision is still often held up as an example to us all as to how proceedings should work and justice be done.

We now have technology to assist us, but too often that is viewed as a hindrance to justice rather than an effective aid. In the Social Security and Child Support (SSCS) Tribunal jurisdiction we hope, by looking at what is required at a fundamental level and building upon that, rather than taking our present paper-and-post based system and trying to run that in a more efficient way, to get closer to the ideal of good decisions without unreasonable waiting time.

It is the pace, accessibility, transparency and encouragement of full engagement with the proceedings that technology brings to justice that will transform the experience of our tribunal users. Through continuous online hearing or perhaps case management, the judge can start to focus the proceedings from the outset, engaging the parties in a shared objective of achieving the right outcome of the appeal at pace that gives dynamic effect to its purpose.

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Some lessons from a trailblazer model

The concept and evidence that this may work arises in the hearings of the Traffic Penalty Tribunal (TPT) where the Chief Adjudicator, Caroline Sheppard, has long advocated and indeed, innovated with the use of technology to provide user-friendly solutions for appellants. Anyone with doubts as to how technology, properly used, can assist a judicial process should look closely at what has been achieved, not only in terms of efficiency but in user-friendliness, and staff satisfaction. The TPT has already experienced greatly improved case closure time and impressive resource savings for the respondent authorities as well as the tribunal.

What brought the idea to the fore were the results of the TPT's own pilot schemes, introducing a form of online dialogue between the appellant, respondent local authority and the designated adjudicator dealing with the case. Not only are hopeless cases (from either side) resolved more quickly at an earlier stage, but also interaction between the adjudicator and the parties results in the more cases being determined without the need for a hearing. Previously, case management had been done on a 'courts' model of letters or e-mails with applications and directions as necessary. Following the introduction of an online dialogue, instructions from the tribunal through messaging – an e-mail-like process where the time for responses can be set – both sides can see the 'conversation' trail.

This process starts at an early stage, with the adjudicator referring to material points in the evidence, and where necessary asking for additional documents that would cast light on unsubstantiated submissions, clarifying misunderstandings on the part of the parties, and most importantly identifying the real issues in any appeal. It has also led to an increase in confidence in the adjudicator dealing with the case, by making it plain at an early stage that they understand the issues and that they appreciate the nature of evidence. Previously, an appellant saw only technical requests and demands before an oral hearing, and had no idea whether his case had been seen by an adjudicator and if so was it understood?

In redesigning their processes, the TPT now asks appellants whether they want a hearing *after* both sides' principal evidence has been uploaded and there has been a dialogue. There is the facility to comment on each item of

evidence and it is only after each side has had the opportunity to add comments and highlight the areas of contention that the hearing option is exercised. There comes a point (surprisingly quickly) when the parties agree that the appeal can be decided. This approach has led to a significant reduction in requests for hearings (12% of TPT appeals are now decided at a telephone hearing with 9% being listed for a face-to-face). The proportion of 'no-shows' has also been reduced because the appellant has engaged from the outset.

Application to SSCS

In the past at the TPT there had been evidence bundles prepared by the local authorities that were the size of a typical SSCS evidence bundle with the different items of evidence and copies of the relevant bylaw contained in a single bundle. Now they are uploaded item by item, with the bylaws and explanation of the regulations accessed through a link to a folder of general information. In SSCS, links to commonly used documents such as regulations or leading cases could be provided. Clear indexing prevents duplication and the evidence remaining in the case file is materially relevant to the appeal.

The openness and immediacy of the process has been shown to promote confidence in the appellants after online interaction. More than 75% at the TPT are content for an adjudicator to make a decision on the material supplied and the comments made by the parties online. It has, in short, revolutionised the way the work of the TPT is undertaken. A clear majority of appellants now want and have confidence in having their 'hearing' online and on the materials supplied.

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A project team has been set up and the benefits of an interactive system of online communication for case management coupled with electronic file handling are such that they are not considered to be in doubt, even where superimposed on our present system. Such a system would make files available to anyone who needs them and storage and access easier, enabling case management to be done much more quickly and efficiently.

Even assuming an appellant handles only paper and the file has to be printed out for a panel or judge to deal with at an oral hearing, it would still represent a significant improvement in the efficiency of our present systems, always of course assuming the implementation is well done. We would expect it to be more efficient and hearings to take place more quickly and with less delay due to adjournment, in part because of better engagement.

We do not, however, consider case management to take full advantage of the benefits which are available. There is, we feel, an opportunity here to fundamentally improve the system, to one which does not require the use of case management as a compensatory system for problems in the oral hearing system. Case management is after all designed to make sure that the parties are fully prepared for the oral hearing and the relevant (and only the relevant) material is before the panel or judge, with the issues narrowed down as far as possible.

The problems are, of course, the reverse of that list, parties are often unprepared, taken by surprise by the needs of the tribunal or the other party and issues are often wide ranging and have not been narrowed appropriately if at all. Case management by someone other than the judge who will be hearing the case is also fraught with problems. If a decision has been made, is it the same as the hearing judge would have made? If the decision is so obvious that any judge would have made it, why did it need making in the first place?

The use of a continuous online dialogue involving the judge and parties has the capacity to deal with such matters, and indeed is doing so at the TPT. Such a system throws up its own problems, and part of the work of the project team is to identify them and any solutions. The first which often occurs is the ability of unrepresented appellants to take full part in such a system.

Doubts are often expressed about capacity to interact online and there is always concern for the appellants who may not have access to technology, or have the experience to use it confidently. The TPT had those concerns but recognised that the transformation of the back office meant that the administrators, no longer required to input data and scan papers, could become customer service representatives. This has had the effect that appellants now have a more bespoke and improved user experience than they did before the digital reform.

Those not wanting or able to appeal online can telephone for a form. They are telephoned back by a customer service representative who talks them thorough the process, and 10% are assisted in appealing online when it becomes clear they use email. The others can send the form back to the named customer service representative, who, as a 'PA' to the appellant, creates a 'proxy' appeal in the system. This enables the respondent authorities and adjudicators to continue to use the digital functionality. The assigned customer service representative sends letters and prints out messages for the appellant, and sends them with a personal note. The experience of the 'offline' has been enormously positive, without holding back the digital initiative.

It is clear that in SSCS we must make assistance available to engage fully. Substantial research is being undertaken to see how this can be achieved, and there will continue to be a need for significant numbers of staff to provide assistance in the customer services role. There may also be a role for supporting representatives financially, outside of legal aid, to enable interaction. There is a need to look at other bodies which offer and provide assistance to make sure we stop no one accessing their rights to appeal and benefiting from a new system. We expect, certainly in the early stages that online appeals are chosen because of the quality of service offered and that there is such an appetite if it is properly done appears from the work of the TPT. Once filed the appeal is visible to the appellant and the Department for Work and Pensions (DWP) office will simultaneously see the new appeal on their departmental dashboard, alerting them to upload their response documents. Since they will have had the evidence ready when they undertook the mandatory reconsideration, they should be able to upload their response to the appeal comparatively quickly. A judge will be allocated when this has happened (or the time to file it has expired).

The file provides for making notes and sending messages to any or all the parties, or privately between the judicial member or admin team. The continuous dialogue, like an e-mail trail, is similar to a transcript of oral proceedings. Anything a party says (writes) is recorded in the transcript and is available to the parties throughout. The parties are free to have a dialogue with each other, to sort out any misunderstandings. The judge or panel then begins a (non-synchronous) dialogue in writing identifying issues and the evidence in the case, in just the same way as is done at an oral hearing. Further evidence can be sought, or prompted. If necessary directions can be issued, time limits put on actions which will create an alert for the judge to consider. Once the parties have had their say and filed their documents, a decision can be taken. It will be open to the judge at any point to suggest a hearing, of whatever type. This dialogue remains part of the hearing.

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Advancing the new digital project

There are a number of incidental, but important, advantages to such a system. In England, representatives are rare for both sides. We envisage that a representative will be able to join in the dialogue easily and much more efficiently than in the quickest oral or even telephone hearing, making representation far more common – we see this as a key benefit of the system. Firms of representatives can have their own dashboard enabling them to manage their caseload – the savings and efficiencies created will enable them to represent more appellants.

There will be transformational benefits for the DWP, not only in time and postage savings in responding to appeals, but also because they will be able to see the later evidence presented by the appellant, have a chance to comment,

or even concede the appeal if the evidence is conclusive. Lack of representation means that frequently a judge or panel will make a decision on information very different from the first decision-maker. That will disappear. An online system presenting all of the evidence and opportunity to explain it on the desk of the person who made the decision removes the likelihood of any misunderstanding. Furthermore, the result of the appeal can be viewed immediately in the DWP office so they can take immediate steps to give effect to the outcome.

We in SSCS fully appreciate that only by testing such a system will we see all of the hurdles to be overcome, and possibly some further advantages, and to that end experimentation will commence soon with the assistance of the TPT which is facilitating dummy runs with judges, the DWP and representatives on cases with life-like scenarios to begin exploring the full potential of such a system.

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It's time to join civil courts structure

The EAT By **Ingrid Simler**

Returning to the Employment Appeal Tribunal in January 2016 as its 14th President (having appeared there as counsel regularly throughout my career at the Bar) has been a privilege and a pleasure. It was always a forum I enjoyed, in part because of the high quality and expertise of the tribunal itself. I now appreciate more than ever the quality of the staff at the EAT, the registrar, associates and many others, who are both effective and highly efficient in their 'cradle to grave' case management of appeals, matching that high quality and playing a vital part in the smooth functioning of the EAT.

The EAT, a superior court of record exercising authority at the same level as the High Court, was established in 1976, with a limited jurisdiction to hear appeals from employment (then industrial) tribunals. It replaced the National Industrial Relations Court, which had in addition to its appellate jurisdiction an original jurisdiction that brought it into conflict with the trade unions.

The scope of employment protection legislation has grown significantly since 1976 and with it the EAT's appellate jurisdiction has expanded beyond recognition. Tribunals and the EAT now have jurisdiction to determine more than 70 types of claim, many of them legally complex, including whistle-blowing detriment and TUPE[1] claims, and claims of unlawful discrimination on grounds that vary from gender, race and disability to age, religious belief, sexual orientation and pregnancy.

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Unlike with most other tribunals, these are disputes between private parties rather than between private parties and the state. The civil courts nevertheless retain jurisdiction in relation to many employment related claims: for example, wrongful dismissal, pension disputes and high-value contractual claims relating to pay and bonus, and the High Court has jurisdiction over collective disputes, industrial action and ballots, and injunctions in restraint of trade and confidentiality actions. Claims of unlawful discrimination outside the employment field, in goods and services, are also reserved to the civil courts.

During the intervening 40 years since it was established, the confidence of both unions and employers in the EAT has grown and its specialist employment expertise is recognised and valued on both sides. No doubt in part in response