

Delegation: that's what you need?

PILOTS IN TRIBUNALS

By Meleri Tudur



Delegation of judicial functions has been an issue in tribunals for some time and with ongoing development of case officer roles, is a current 'hot topic' in courts. Although the concept is far from new, with registrar roles well established in several jurisdictions, there are competing views about it, with concerns voiced about the perceived blurring of boundaries between the judiciary and the administration. Despite these concerns, the new role of Tribunals Case Worker (TCW) continues to spread across Tribunals Chambers, and even pre-introduction sceptics are now extolling their virtues.

Background

Following the implementation of the Tribunals Courts and Enforcement Act 2007 and the various Tribunals Procedure Rules, many tribunals were for the first time empowered to deal with requests and applications on an interlocutory basis by judge alone.

Taking the First-tier Tribunal Special Educational Needs and Disability (SEND) as an example, the old tribunal regulations were drafted so as to impose strict procedural requirements on the parties, provided very little discretion to the tribunal chairs and no powers for them to act alone to consider interlocutory applications.

All such applications were dealt with by a full panel of three judicial office holders at weekly preliminary hearings, with formal decisions issued in respect of them. Following the implementation of the new procedure rules however, the volume of interlocutory applications became a major issue for SEND, highlighting the need for substantial judicial resources to deal with them.

In 2011, both the Health, Education and Social Care Chamber (HESC) and the Social Entitlement Chamber (SEC) engaged with a new initiative, piloting the use of legal advisers from the magistrates' courts as tribunals' registrars using delegated judicial powers to process interlocutory work.

In HESC and the SEND jurisdiction specifically, two legal advisers were selected for the first pilot. Both were qualified lawyers with significant experience and had worked in the various aspects of magistrates' work over many years. They had experience not only in criminal cases, but also youth and family matters, which was considered to be of greater relevance given the nature of the Tribunal's work, dealing exclusively with issues relating to children with special educational needs and disability.

The pilot

The HESC Delegation of Powers Order was signed on the 22 June 2011. For the first two weeks of the pilot, the registrars worked under close supervision, side by side with an experienced tribunal judge, who had sight of every draft order and direction before it was issued. Every order contained a standard clause informing the parties that they may apply for the order to be reviewed by a Tribunal Judge within 14 days of the date of the order.

Thereafter, the supervision was relaxed and although a tribunal judge was present in the office for most days, the orders were issued without further scrutiny. Both registrars had open contact with the judicial lead and permission to contact her by phone or email at any time about issues of concern.

The pilot was structured so that one registrar was in the office every day, providing administrative staff with access to legally qualified personnel throughout office hours. A rota was set up where the registrars work in the jurisdiction on a one week on, one week off basis agreed following consultation with the registrars about their preferred method of working. Their view was that it would enable them to build on the skills learnt in training and retain those skills over time, without losing touch with their 'home' jurisdictions.

In view of their considerable legal experience and training, the registrars considered every request received and the decision as to which they could process and which required a referral to a Tribunal Judge was theirs. The only interlocutory orders that registrars are not authorised to make are final orders bringing proceedings to an end. Registrars do not consider post-decision applications for costs or permissions to appeal.

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Training and supervision

The basic induction training for the role of a legally qualified registrar, constituted of the following:

1. A full day's training alongside fee paid tribunal judges who were being cross-ticketed into the jurisdiction. The training programme included a session on the Tribunal Procedure Rules, the scope of the jurisdiction and appeal procedures and legal issues arising as well as interlocutory applications.
2. Two days of 1:2 training prepared and delivered by a judge dealing specifically with boxwork issues and approaches, working through guidance notes and template orders, followed by work on specific examples within live files with an experienced tribunal judge.

For legally qualified registrars, a two-day course delivered by a judge in the context of a small group of up to 12 delegates could cover the black letter law, basic principles and worked examples showing the application of delegated powers. The skills taught could then be practiced on the job, with short intense input by a tribunal judge, working on live files, using prepared template orders, guidance and working examples to provide practice in the application of skills.

For second and further tranches of appointments, every registrar was allocated a peer mentor, and the initial induction training is delivered by a judge over two days. They then work alongside the judge for the first week. They are then rostered to work at the same time as their peer mentor for the first month, and thereafter enjoyed the same monthly meetings and open communication channels with the supervising judge.

Once their induction training is complete, registrars are invited to attend the same training days as every other judicial office holder within the jurisdiction and participate alongside the judiciary on training days. Once a year, specific registrar training is delivered by the jurisdictional lead judge, to visit any particular areas of difficulty and issues.

One of the concerns prior to the implementation of the Registrars' Pilot was the level of input and intensity of support required by the judiciary to ensure consistent decision making and high quality drafting of orders by legally qualified case officers. Physically moving away but retaining open lines of communication was necessary because SEND judges work in a national jurisdiction and are not allocated to hearing centres. As a result, once the initial intense training and the development of a working relationship is completed, the supervising judge meets with registrars as a group, initially once a month, then moving to quarterly, whilst retaining open channels of communication by email/ phone. Most enquiries or problems are referred by email and can be answered usually, within a day.

Progress

The number of requests processed by registrars increased dramatically over time as they became established in the role and from the data gathered, within three months of taking up the position, the registrars were at least as productive on average as an experienced tribunal judge in processing requests and continued to increase their output.

During the pilot, three very positive outcomes were noted:

1. The registrars were confident in dealing with a broader spread of requests than had been anticipated, with the number of requests referred to a judge significantly lower than expected.
2. The amount of work that the registrars processed led to a significant reduction in judicial input to cover box work from four days a week to three days a fortnight.
3. The number of orders being referred back by the parties for review by a Tribunal Judge was very low and much lower, even, than when the work was being undertaken by Tribunal Judges.

After the initial success of the project, registrars received training in other HESC jurisdictions. In Care Standards and Primary Health Lists jurisdictions, every case is the subject of a telephone case management conference to set a timetable for progressing the case to hearing. Parties are required to send in advance a draft set of proposed directions for discussion during the conference.

The senior registrars have been trained in such telephone hearings and this is an area of work which is well within their capabilities. As their experience of SEND work increased, so has their remit and registrars now consider applications for submission of late appeals and whether time for making the appeal should be extended.

Any applications which they consider fulfil the criteria are registered and any which they consider do not are referred to a Tribunal Judge who will consider the request themselves and decide whether to refuse the appeal or register.

The success of the first pilot in HESC led to the making of a business case to expand the number of registrars in the pool and the resource available. The second stage of development was the use of registrars as case progression officers, making telephone contact with parties before the final hearing to identify the possibility or probability of the case being settled and the likelihood of the hearing being ready to proceed on the allocated date.

Although this process started as long ago as 2013, the calls have not been consistently used because of a significant rise in the Tribunal's workload leading to a reallocation of resources to cover interlocutory requests. Proactive case management by registrars remains an ambition, but with implementation of legislative changes and increasing appeal volumes resources are currently used to their maximum keeping up with the current workload.

Digitisation of files means that the registrars can now work remotely as well as within the office and an electronic system of shared email boxes enable the registrars to flag more complex requests and applications for the salaried judges' attention or refer them for telephone case management. Telephone hearings are currently conducted by salaried judges, but these too are regarded as potentially within the capacity of experienced registrars following additional training.

Tribunals Case Worker Project

With the advent of HMCTS Reform, there was an opportunity to extend the use of delegated powers across all tribunals and to deliver much needed judicial support to release the judiciary to undertake more complex interlocutory work and hearings.

The Tribunals Case Worker (TCW) Project was a very fast moving and ambitious project to realise the opportunities offered by the delegated powers schemes.

Set up in 2014, by 2015 the first TCWs were in post and the success of the project has led to their being deployed across several Tribunals Chambers. Initially proposed for Tax, SEC and the Immigration and Asylum Chamber, TCWs were also deployed to the Mental Health jurisdiction in HESC. There is also interest displayed in other jurisdictions, as the benefits of the support offered to the judiciary are realised.

The difference between TCWs and registrars is that TCWs are administrative officers who are not legally qualified. They may possess a law degree or equivalent technical experience in courts and tribunals but they are not required to be legally qualified. Their role is different to that of registrars, and each Chamber defines the work to be carried out by the TCW within their jurisdictions.

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Both roles can exist side by side and complement each other. Once experienced in the Tribunal's work, a registrar can mentor a TCW, who has no legal qualification but who would be competent to tackle the most straightforward tasks.

For Tribunals Case Workers (TCWs), the induction training pack was devised as part of the HMCTS Reform Project as a generic training pack designed through collaboration between the Training Design Team and judiciary. Given the cross-jurisdictional nature of the appointments, whilst the pack provided the general framework, there was a requirement for each Chamber to devise its own jurisdiction-specific module for delivery as part of the training package.

Training for case officers will be considered by a working group and it would seem appropriate that there will be a future role for the Judicial College in the context of the exercise of delegated judicial functions.

The approach in HESC, accepted by the TCW project, is that training should be devised and at least be in part delivered, by members of the judiciary with an extensive knowledge of the jurisdiction and the interlocutory or other work in respect of which the powers are to be delegated. Judicial mentors should attend training to build a working relationship with the case officers and to begin the process of developing the open lines of communication which will be required.

Identification of the training need within the jurisdiction, can only be done once the work for delegation has been identified and the individuals selected have had their needs assessed. The preparation of tailored training packages can be achieved within the broader training needs for every individual appointed.

The variety of delegations across tribunals is interesting: in some, the TCW undertakes day to day interlocutory applications, in others consider late appeals and prepare case summaries for judges. It is the considerable flexibility which makes TCWs such a useful resource to the judiciary.

Future potential is also an area of interest. Whilst the different levels of work and responsibility delegated means that there is an inherent career structure, the expectation is that over time, additional qualifications and courses will become available to support the aspirations of those who would like a career in the decision-making field.

There is currently a review of TCWs going on across the Tribunals and Lorraine Fensome has been tasked with undertaking the information gathering for the review. There will at some point in the future be a formal post project implementation review but in the meantime it has been agreed that it is now an opportune time to take stock of what work is being undertaken, how the training has gone and to understand the reasons for any variations in practice across the jurisdictions. This is a continuously developing area of work with significant potential and the outcome of the review is awaited with anticipation.