Recording of tribunals – the way ahead

TECHNOLOGY By Andrew Veitch

"History will be kind to me for I intend to write it."

Winston S. Churchill

This article is primarily for judicial office holders (JOH's) who have little or no experience of tribunals which are going to be recorded.

As a District Tribunal Judge in the Social Entitlement Chamber based in Glasgow, and as a Convener of Mental Health Tribunals in Scotland, I am accustomed to recording tribunals. All tribunals in both the SEC and MHTS in Scotland are recorded. The present generation of recorders used in MHTS are no bigger than a mobile phone and are battery operated. In the SEC the recording devices are similarly small but tend to be mains operated. The recording technology is improving all the time and becoming easier and simpler to use. The recordings can be transferred onto disc if necessary and copies issued to parties.

In neither forum do I write a record of proceedings. The record of proceedings is a recording. In the SEC this follows

the Practice Direction issued by Lord Justice Carnwath on 30 October 2008:

'A record of the proceedings at a hearing must be made by the presiding member, or in the case of a Tribunal composed of only one member, by that member.

1. The record must be sufficient to indicate any evidence taken and submissions made and any procedural applications, and may be in such medium as the member may determine.
2. The Tribunal must preserve –
   a. the record of proceedings;
   b. the decision notice; and
   c. any written reasons for the Tribunal's decision

   for the period specified in paragraph 3.
3. The specified period is six months from the date of –
   a. the decision made by the Tribunal;
   b. any written reasons for the Tribunal's decision;
   c. any correction under Rule 36 of the above Rules;
   d. any refusal to set aside a decision under Rule 37; or
   e. any determination of an application for permission to appeal against the decision, or until the date on which those documents are sent to the Upper Tribunal in connection with an appeal against the decision or an application for permission to appeal, if that occurs within the six months.
4. Any party to the proceedings may within the time specified in paragraph 3 apply in writing for a copy of the record of proceedings and a copy must be supplied to him.'

This sets out the requirements of the record of proceedings and allows for a recorded record as opposed to a written record.

If a party requests a copy of the record of proceedings a disc will be made available. Should the appeal go to the Upper Tribunal a transcript can be ordered.

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Prior to the actual hearing in the SEC the tribunal judge will give a recorded introduction detailing points like place of hearing, name of appellant, the case number, who is present, the composition of the tribunal and any other procedural matters. This is done immediately before the parties enter the hearing room. This type of introduction sets up the recording by identifying the same information that you would expect at the top of a written record of proceedings. The recording is not on whilst the tribunal previews the appeal papers. The tribunal judge will normally be the person that switches the recording device on and off.

This is done by the tribunal judge because at the beginning of the hearing the clerk, outside the hearing room, will be making the parties aware of the composition of the tribunal, informing them it is being recorded and that the tribunal is independent of the Department of Work and Pensions. The clerk will also tell the parties where they should sit and organize them to enter the hearing room. During the hearing the clerk will often leave the hearing room to carry on with administrative business elsewhere. When the tribunal finishes, and the parties are getting up to leave the clerk may or may not reappear. Switching off the recording device does therefore fall to the tribunal judge.

In the MHTS the clerk usually will operate the recording device and introductions are done with the Patient being present. The introduction will provide similar information to enable identification of the hearing at a later stage.

In the SEC the recording will be paused whilst the parties come in and sit down. The tribunal judge will make introductions with the recording device on. Each judge has their own style of doing this as they do presently when introducing a hearing. The only addition will be to inform the parties that the hearing is being recorded. Some judges will ask, for voice recognition purposes, that each participant introduces themselves and their reason for being present.

The recording is switched off once the hearing finishes and the parties leave the hearing room. The tribunal deliberations are not recorded. After the tribunal has reached a decision, the parties will be invited back in and the written decision issued to them. My practice is not to switch the recording on again on the basis that the actual hearing was over after the hearing of evidence and submissions.

In the MHTS the procedure is slightly different as, at the end of each hearing, the convener, in conjunction with the other tribunal members, will prepare a full decision including facts, findings and reasons, which is issued to the parties immediately. The recording will be kept in case there is an appeal and in those circumstances a transcript will be prepared. The deliberations are not recorded but the issue of the decision is.

I continue to use my judicial notebook during SEC hearings to take notes of important points before, after and during a hearing. I also take some notes during MHTS hearings but these are given to the clerk at the end of the hearing for destruction. I do not keep them. I do not consider them to be a record of proceedings. These notes in either forum would not constitute a record of proceedings, but I do use them as an aide memoire on occasion.

The great advantage of not having to write an ongoing record of proceedings is that I am able to observe the appellant more closely, giving my full attention to what is being said and the way evidence is being given. I can ask more informed and better focused questions. I have received feedback in both tribunals that the act of writing distracts and worries appellants; they feel excluded as they do not know what is being written down. Quite legitimately it can be argued that is the nature of judicial proceedings.

A hearing is not a group discussion or a case conference. However, the more comfortable and relaxed an appellant feels the more likely they are to be less defensive and argumentative. In my experience they are much more open and honest in their answers. The reason is simple. There is less of a barrier. The judge is not sitting writing, apparently engrossed in his/her notes but can sit with an open posture and give full attention to the appellant. They feel heard and because the judge is less distracted it is likely that they will listen better and ask more relevant, and fewer questions.

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A further advantage is that initially there was a reduction in complaints after the introduction of recording. Appellants could not claim that a JOH had spoken to them in a hostile, unpleasant or aggressive manner as the recording would not support that contention. In Scotland complaints are increasing but they are more easily and more quickly dealt with.

One issue that does cause concern is what happens if the recording device is left on and records, for instance, deliberations at the end of the hearing. In Scotland the recordings are not issued if that occurs. The recordings are not tampered with and the clerk will note that this happened and in the event of an appeal being lodged the recording will not be made available. It would be a similar situation to where a written record of proceedings has been mislaid and lost. No system is infallible, but tribunals have very quickly adopted to the recording procedure and such events do not occur often.

Another concern is what happens if the recording ends up on social media, interfered with and giving a false picture. That could already happen. Mobile phones can record very well and go unnoticed in a tribunal setting. My feeling is that that would be a more likely source of a “corrupted” record. The advantage of there being a tribunal record is that it would provide an accurate and unadulterated record which it would be very difficult to challenge effectively.

Statements of reasons for the tribunal decision, in my experience, are better. The tribunal judge can rehear precisely what an appellant said in answer to a question and any comments representatives may have made as regards that evidence. The whole recording does not need to be listened to. As with any CD you can move forwards and backwards and because there is greater accuracy there is less room for misunderstandings or possible misinterpretations.

The experience in Scotland has been positive and most JOH’s would not want to go back to written records of proceedings. There was some nervousness initially but JOH’s very rapidly got used to the recording of hearings and effectively disregarded the presence of the recorder. Now if a hearing is not being recorded, because the recording device has stopped working, which is rare, that causes upset. Recorded proceedings provide a protection to all tribunal users – JOH’s, appellants, clerks etc. It is very difficult to argue that a recording is not correct, as opposed to a written record which may be partial hence the reference to the quote by Winston Churchill at the start. Records of proceedings are not there to present a picture of how the tribunal might have been but how they are actually were and, for the moment, recording is the best method of assuring this.

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