

To see ourselves as others see us...

HOW ARE WE PERCEIVED?

By Andrew Veitch

O wad some power the giftie gie us to see ourselves as others see us.

Robert Burns



It probably is true that we all have an image of ourselves that may not necessarily be the one that other people have of us. I may think of myself as James Bond but to other people I may be more Captain Mainwaring.

As with individuals so with tribunals. As JOH's we may have a perception of how our tribunals work or how we as tribunal members act. Are our assumptions, good or bad, correct and how do we test them?

Appellants who have been successful may be full of praise whereas the unsuccessful appellant may feel they have neither had a fair hearing or been treated with dignity and respect.

There are however other people who regularly appear before tribunals who can provide an insight which is less partial and give feedback that we can usefully learn from.

As a District Tribunal Judge in the SEC I regularly sit in Glasgow and given that we have a higher percentage of representation than most areas I approached a very experienced representative, Chris Orr, and a very experienced presenting officer, Susan Soutar, to obtain their views on the tribunal process.

They both kindly agreed to provide their thoughts, and these are reproduced below. I asked for their views and then wrote this article in draft. I discussed the terms with them to ensure they agreed with how I had distilled their contributions. I should also make it clear that the views I have expressed about their articles, and what they said, are my own.

The Social Entitlement Chamber hears appeals from decisions relating to entitlement to benefits made by the Secretary of State for Work and Pensions.

Personal Independence Payment (PIP) and Employment and Support Allowance (ESA) are both points-based benefits. To meet the statutory criteria the claimant is assessed by a Health Care Professional and points are awarded. If insufficient points are awarded no award is made. The criteria for the award of points as regards each benefit are not the same. It is possible to meet the criteria for one but not the other.

Presenting Officers can attend hearings on behalf of the Secretary of State. Department of Work and Pensions (DWP). Presenting officers formerly appeared as "amicus curiae" but that role has changed, and they appear to argue that the DWP decision should be upheld.

They can and do cross examine appellants and witnesses. This has had the effect of making the hearing more adversarial. Presenting Officers do not attend appeals being dealt with by way of determination on the papers.

In Scotland ESA appeals are allocated 30 minutes and tribunals may consider four oral appeals at each session.

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There are two sessions a day. PIP oral appeals are allocated 45 minutes each and a tribunal may hear two in a session plus an ESA appeal. In terms of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008 the overriding objective of the Rules, as set out in Rule 2, is to enable cases to be dealt with fairly and justly.

This role is summarised in the Social Security and Child Support Bench Book (Thirteenth edition-November 2014) at page 97 paragraph 2.

'In the tribunal system however, the proceedings are "inquisitorial", i.e. the tribunal adopts a much more hands-on active approach to the case and assists the parties (particularly if unrepresented) to seek out the relevant facts and law before applying them. The role of the tribunal is more of an enabling role, i.e. enabling the people coming before it to understand and deal with the relevant issues, rather than remaining loftily above the conflict and leaving the parties to fight it out.

Susan Soutar:

"This is a job that I love. It is ever changing, challenging and often extremely interesting, both from an intellectual and a human-interest point of view. We are often the only person from the DWP who has actually seen and interacted with the appellant, so our colleagues are sometimes left puzzled when a decision, which appeared correct on the papers, falls apart when the appellant is there to tell their tale.

There can be a feeling amongst my Presenting Officer colleagues, regarding medical tribunals in particular (ie ESA and PIP tribunals) that a decision has been made before anyone has entered the room. I have heard on one occasion, whilst sitting in an adjacent room, a PIP tribunal review an appeal and agree the points before the hearing started. They proceeded to make an award on that basis.

On the plus side, we are generally treated with courtesy and respect by the Tribunal members, especially the chairs. I have only very rarely been made to feel that I am expected to answer personally for Departmental mistakes; most JOH's fully understand the position we are in, often as frustrated with our Department as they are. We are, of course, expected to have a good grasp, not only of the papers in front of us, but also of the relevant law, and of peripheral issues relating to the appellant's claim history and Departmental procedures – and the mysterious acronyms and abbreviations which litter the screen-prints we have submitted! That said, I have long learned that it is far better for me to admit to ignorance, and perhaps request a short adjournment to find out an answer, than pretend I know something that I do not.

Based in Scotland, I am aware that I and my fellow Presenting Officers are very lucky to have a room to work in at most of our venues. I have had to attend Tribunals elsewhere in the country without this facility, which can cause difficulties when you are trying very hard to give the appellant and their representative privacy to discuss their case.

My only real complaint is that we can be forgotten about, especially if we are not attending the first hearing in a session. We do occasionally have to roam the building, looking for our clerk, to make them aware that we are there – hopefully before the hearing has started in our absence.

But these are small problems, for me, and do not detract in any way from a job that I hope I will continue to do for a long time to come."

Chris Orr:

"I have been representing clients for forty years, attending three or four times a week for between ten and fifteen appeals, often more. I have spent a lot of time in waiting rooms listening to clients, often spontaneously talking about what causes them stress in the process, apart from the obvious worry as to whether they will win or lose.

It is time and waiting that is the most expressed concern, falling into two broad sections.

Firstly, the length of the appeal hearing. I keep no statistics, but my subjective impression is that appeal hearings are taking longer and, as a consequence, clients are kept in the waiting rooms longer. In a typical scheduling of two PIPs followed by an ESA, the appeal scheduled last may involve the client waiting over two hours and their appeal then being adjourned through lack of time. Add travelling time and it is no wonder that clients with mental health and/or physical health problems experience their day as stressful.

Secondly, once in the tribunal further delay/stress can be caused by double and triple questioning. It is a common experience that once the medical member and disability member have asked their questions the judge will say "just a couple of questions from me." It never is just a couple and as well as taking time it creates the impression that the client is not believed. It may be there are gaps in the questions/answers that have already been asked/answered but from a nervous client's point of view they often seem to be repetitious – perhaps in the hope they

will contradict the evidence they have already given?

It needs to be remembered that the above is the culmination of a process leading up to the appeal day that can typically take months. This hasn't been helped by the introduction of mandatory reconsideration which builds in further delay.

This delay has an unfortunate side effect. The decision date being so far in the past that the client, already under stress, may feel that it is a "trick" to confuse them."

The views expressed by Mrs Soutar and Mr Orr, I believe, raise issues applicable to all tribunals not just SEC hearings, both for judiciary and HMCTS.

One issue that appears to be common is that of an apparent failure by tribunals to keep appellants, representatives and presenting officers as fully informed as we could. The propositions being given that presenting officers can be "forgotten about" or that appellants are kept waiting only to have their appeal adjourned without warning are suggestive of a perceived lack of concern. Perception can be as important as reality. We are all aware of the adage that "not only must the law be done, it must be seen to be done."

This is a matter for judiciary and on a very basic level it may be that this issue can at least be partially addressed by tribunals checking that there is no presenting officer immediately before the hearing (they should be doing this anyway) and, where they have a long hearing list, being more aware of the need to keep parties informed of delays.

Tribunals should not be frightened of adjourning appeals owing to time constraints sooner rather than later, even where parties would rather they did not ("they just want to get it over with" or "Please, I don't want to come back again") and where they, that is the judges, are concerned about their "adjournment stats".

The other concerns raised by Mr Orr regarding general delay raise issues that need to be addressed by both judiciary and HMCTS. Is there a way listing can be done so such delays are minimised? Can we all as tribunal users be more flexible? Is it perhaps that the number of appeals is such that hearing dates cannot be organised quicker? Is there any way that representative organisations could perhaps more quickly lodge the written submissions and documents/reports upon which they want to rely? Should we schedule fewer appeals to be heard but would appellants/representatives accept that inevitably, in the present economic climate, that hearing dates would be extended further? Should we have more telephone hearings or use Skype? Is digitalisation (where the appeal takes place over the internet based on written submissions and questioning and there is no actual hearing - the appellant could be in Derby, the judge in London, the medical member in Glasgow and the disability member in Truro) the panacea that will resolve all these issues?

The questioning of appellants by tribunal judges is a matter of judicial training and views will vary considerably between the parties involved. There are many occasions when JOH's, including judges, will ask appellants questions that both they and their representatives might wish they had not. Tribunals are investigative and as well as seeking facts they must be allowed to question credibility and reliability. It may be with training, it can be done more effectively, but it may still need to be done.

Do we react as well as we could to appellants with mental health problems? Should more time be allowed for hearings? Should they be offered representation more proactively? Do we do enough for young people and children attending tribunals? Should we provide child care facilities? These are questions that might usefully be discussed even if the answers were not those that participants would favour.

Having said that these comments, and those by Mrs Soutar in respect of tribunals prejudging matters, are important and need to be more fully addressed. I would suggest that to dismiss what they have said as "Well, we know that already. Nothing new there." would be short-sighted and unhelpful.

Surely what we should say is "Yes that does resonate with my own experience" or "that hasn't happened to me but...". In other words, recognise that perhaps our system is more "Captain Mainwaring" and less "James Bond" than we would like it to be. Or somewhere in between. If that is true, then how do we change and improve?

By way of example it is not comfortable to read that Mrs Soutar has heard an SEC tribunal prejudge an appeal but if that was simply dismissed, that would be defensive, and nothing would have been learned. By accepting that it did happen there is learning that can be taken from it for judicial training and discussion.

The other question that may arise "Is what did she hear? All SEC tribunals should preview the appeal that they are about to hear and discuss strengths and weaknesses of the appeal, both for and against the appellant and the department. Would it necessarily be so wrong for a tribunal to preview an appeal and agree that if the evidence remained the same these are the points they would be likely to award? I do not want to be defensive about this because what is important is Mrs Soutar's perception of how the tribunal acted. It may be what she heard was a tribunal closing its mind to further input and therefore prejudging the appeal, which would be wrong. Or it may be

what she heard was a tribunal previewing and agreeing a way forward based on the information before it and that information did not change during the hearing.

Her perception, right or wrong, crystallises why it is important that all tribunal users work together to achieve the overriding objective set out in Rule 2 of the Tribunal Procedure (First Tier Tribunal) (Social Entitlement Chamber) Rules 2008 which is to enable the tribunal to deal with cases fairly and justly. What else could or should have happened in that situation and at what stage? Should she have informed the tribunal that she had heard their discussions? And if so when? What if it had been the representative rather than the presenting officer? What should they have done? Should the tribunal have adjourned? Should the decision have been set aside? Is the tribunal venue appropriate?

What should have been a straightforward hearing has suddenly grown arms and legs. These are pertinent problems that can and do affect the way our tribunals function, and, more importantly, whether tribunals are implementing Rule 2.

This article does not provide even a “snapshot” of tribunal procedures and practice but both Mrs Soutar and Mr Orr have raised concerns which, although they may seem obvious to us who work in the tribunal system, do demand further consideration.

Discussions where participants are not defensive but are willing to concede that there are occasions we could all do better might help all of us involved in the tribunals system achieve a hearing system that is the best it can be and assist the positive change that it is expected the Tribunals Judicial Ways of Working 2022 document will implement.

Another way to consider such an exercise is to view it as organisational appraisal. Given that any appraisal should be a positive experience, can we accept that we may be given feedback that is not initially what we would feel comfortable with or expect but which does provide a plan, or at least pointers, for growth and improvement. This could be both challenging and exciting and it might ensure that tribunals maintain a dynamism that could be lost otherwise.

The Tribunals Judicial Ways of Working 2022 document responses are being collated and analysed even as this article is being written. The detailed feedback provided will hopefully lead to positive change. In the meantime, more interaction with all tribunal users, and I include JOH's, might help resolve some of the more practical issues around actively managing tribunal lists, suitability of venues, ensuring parties are present and avoiding delays where we can.

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