JUDICIAL COLLEGE

TRIBUNALS
TRIBUNALS
EDITION 3 — 2018
TRIBUNALS

Editorial 2018 Edition 3

EDITORIAL

By Christa Christensen

Welcome readers! In this third and final edition of 2018, I am pleased to offer you a wide-ranging platter of topics in the hope that you all find something to whet your appetite and give you food for thought in the holiday season ahead.

How frequently do judges hold a mirror to themselves and consider how others see them? Is it helpful to do so? In his article, *To see ourselves as others see us*, District Tribunal Judge Andrew Veitch, explores these questions with the invaluable insight and assistance of Susan Soutar and Chris Orr. It creates an interesting challenge to all Judicial Office Holders to consider how and whether we might test out the perceptions that we have of ourselves.

How frequently do judges hold a mirror to themselves and consider how others see them? Is it helpful to do so?

The Editorial Board has decided to dedicate a section of the Tribunals Journal to raise the awareness of our readers in the *Equal Treatment Bench Book* (ETBB). The ETBB serves a number of very useful purposes. It gives guidance to Judicial Office Holders on how to ensure that fairness and equal treatment lies at the heart of every hearing. It also gives reassurance and explanation to those appearing in any court or tribunal, regarding what they can expect from the judge to accommodate their particular circumstances. Treating people fairly requires awareness and understanding of their different situations, so that there can be effective communication, and so that steps can be taken, where appropriate, to redress any inequality arising from difference or disadvantage. Our first *ETBB Corner* from Upper Tribunal Judge Paula Gray is a reminder of the ETBB e-Alerts that are now sent to all Judicial Office Holders every six weeks.

Would you know what societal, legal or language issues could arise when a transgender person appears in your court? If not, guidance can be found in the ETBB. Employment Judge Sian Davies has written an article, *Trans Awareness Training*, explaining why this is a topic that is now being trained in some jurisdictions and sets out some details of that training and feedback received.

Gone are the days in which someone appointed to judicial office might necessarily expect to be recruited into one jurisdiction and to remain there throughout their judicial career. The Senior President of Tribunals, Sir Ernest Ryder has written an article, *Generic recruitment: should a judge be a 'Jack tof all trades'?* setting out the practical and policy implications of the recruitment to a 'generic' judicial position and the flexibility and opportunities this creates. To accompany this, Tribunal Judge Clare Harrington describes her experience of being appointed in the first wave of generic judicial appointment in her article *A New Challenge*.

This Edition runs three articles that touch upon new digital methods of training. The first by David Franey sets out how the Presidents of the Employment Tribunal

CONTENTS

in England and Wales and in Scotland established a Working Group to create a digital e-learning resource on the Judicial College Learning Management System (LMS) to provide guidance for Employment Judges on the *Principles for Compensating Loss*. The next is a follow on from Edition 2 and is the second article by Employment Judge Hannah Bright, *A New Direction in Training (Part 2)*, which sets out some ideas for the future direction of judicial training. You can learn about micro-fails, augmented reality and on-the-job training. The third is an article I have authored called *Mindful Judging*. It explains how and why a digital resource was created on the LMS to introduce Judicial Office Holders to the concept and practice of Mindfulness.

Recordings of tribunals – the way ahead is the subject of an article by District Tribunal Judge Andrew Veitch. Andrew reminds us of the practice that is adopted in Scotland for hearings in the Mental Health Tribunal and Social Entitlement Chamber. This may be useful to other tribunal jurisdictions in considering their own procedures.

Christa Christensen is Chair of the Editorial Board *Back to contents*

To see ourselves as others see us...

HOW ARE WE PERCEIVED? By Andrew Veitch

O wid 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.

Are our assumptions, good or bad, correct and how do we test them?

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.

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.

...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.

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.

Andrew Veitch is a District Tribunal Judge , Social Entitlement Chamber, Glasgow

Back to contents

New directions in judicial training

PART TWO By Hannah Bright

This is the second of two articles exploring ideas for the future of judicial training.

'Please turn your smart phones **on**'. It's not often training starts with those words. But training is changing.

Training and learning are different. It's obvious of course, but a lot of training misses that point. You can have training without learning (unfortunately!) and you can have learning without training.

Take traditional judicial training; trainer at the front, delegates around tables or in lines, watching a Powerpoint presentation. That presentation may be an hour long. The slides are frequently wordy and sometimes illegible. There may be practical exercises, if you're lucky. The quality of the training depends on the talent of the trainer and facilitators. Everyone gets the same; 'one size fits all'. Consequently, some don't get the training they need, while others get training they don't need. It's expensive and difficult to schedule. But the biggest problem is training fade. Studies show that just a week later, only 10% is retained. Training has not resulted in effective learning.

Now think about a mistake you've made at work. What did you learn from making that mistake? How likely are you to make that same mistake in the future? We learn a lot from our mistakes at work. This is learning without training. One established model of adult learning holds that 70% of an adult's work-related learning takes place 'on the job'. A further 20% of learning is done in a social context, with and from others, and a paltry 10% takes place in formal 'training' environments. But in a high-risk environment, like an operating theatre or a courtroom, learning from mistakes is not straightforward. It's not just the embarrassment of publicly getting something wrong, but the potentially devastating consequences of an error which dictate that certain professions can't rely on 'on the job' training. The airline industry deployed flight simulators decades ago for precisely this reason.

'Micro-fails' are opportunities to make small-scale mistakes, from which one can learn without the consequences of making a mistake on the job. They are enormously valuable in training judicial office holders. We don't have flight simulators, but the Judicial College does use live courtroom simulations. Anyone who has done the excellent 'Business of Judging' or 'Judge as Communicator' courses will have participated in roleplays with actors from the Geese Theatre. The feedback from these simulations is that they offer the opportunity to rehearse behaviours and best practice in highly realistic circumstances, offering both 'judge' in the hot seat and observers a chance to learn from experience.

New technologies can exploit the value of micro-fails. Augmented reality ("AR") and mixed reality are where virtual imagery or information is added to or mixed with the real world. If that makes no sense to you, have a look at this *Ikea advert* on YouTube. Virtual reality ("VR") is total immersion in a virtual world, usually using a head set. These mediated reality tools have the potential to make simulation exercises in training easier, cheaper and more effective in the future. AR is already used in medical, surgery, emergency services and combat training. There are AR historical re-enactments, architectural walk throughs and crime reconstructions. Juries may be invited to visit virtual crime scenes in the near future. It is already possible to augment the reality of existing training material, such as pages in a text book. Imagine pointing your smartphone at a text book on tort law and seeing the snail in the bottle of ginger beer. Wouldn't that make *Donoghue v Stephenson* even more memorable? What about being able to experience someone wielding a knife in the courtroom, without actually having to live through it? Mediated reality training has the potential to take learners to career-defining moments before they happen. It gives hands-on training and the opportunity to make mistakes in private, without the risks or regrets, to enable judges to understand the potential consequences of their actions and decisions.

In reality, you won't see VR at a training event near you soon. But it's useful to remember our failures and maximise learning from micro-fails. So, next time you make a mistake, view it as a learning opportunity, a chance to record what you have learned, and be willing to share it to enhance others' learning. Who knows? Perhaps there might even be a virtual you, making the same virtual mistake in a virtual courtroom, used in training the judges of the future.

Hannah Bright is an Employment Judge *Back to contents*

Mindful judging – a new digital resource

LEARNING MANAGMENT SYSTEM By Christa Christensen

Why was the resource created?

Some years ago, I listened to a talk by Ruby Wax. She had just published a book on mindfulness. She talked about how busy chattering minds and self-critical thoughts can drive us to anxiety, worry and stress. She talked of how mindfulness had helped her to become the master, and not the slave, of her chattering mind.

As someone with a constantly busy mind, I was curious. What was this mindfulness? How do you do it? Might I want to do it? I bought a book, downloaded an app, went on a course and, with some trepidation, started doing some mindful meditations. I enjoyed the process of meditating for ten minutes or so when I found time to do it, but had no sense of what, if anything it was doing for me. Then, some months later a close friend of mine asked me what had happened to me, why had I become so calm? Was I 'on something'? In my sittings as an Employment Judge I commonly deal with litigants in person who are understandably scared and emotional in the tribunal process. I realised that I was finding it easier to work with, but stay detached from, the emotions of those appearing before me and to keep a positive focus on my decision making task as a judge. Put simply, I realised that I had personally

benefited in my work and home life from adopting some very modest and simple mindful meditation techniques.

As Director of Training for Tribunals at the Judicial College a decision was taken to create a resource for the judiciary. I was able to work with a talented team of judges and specialists to create a digital resource specifically for the judiciary to assist JOHs to find ways of using mindfulness techniques to boost their resilience levels and happiness in and out of work. The importance of identifying the signs of stress and developing and using effective resilience techniques to ensure that judges remain mentally and physically fit is an important message in the Stress & Resilience Building resource published by the Judicial Office in the Spring of 2018. Judicial Office Holders can access this on the Judicial College Learning Management System.

That resource refers to meditation as one way of building resilience.

Mindfulness All-Party Parliamentary Group

The Mindfulness All-Party Parliamentary Group published its report, *Mindful Nation UK*, in October 2015. This was a culmination of a year of research including eight hearings in Parliament which took evidence of the transformational impacts of mindfulness and considered the development in neuroscience and psychology that are illuminating the mechanics of mindfulness. Building on that, the Mindfulness Initiative published its report *Building the Case for Mindfulness in the Workplace* in October 2016. This made recommendations for the development of policy to promote the use of mindfulness in the workplace and develop an understanding of good practice.

This Journal has explored this topic before. It published a piece in the autumn 2015 edition by my colleague EJ Hannah Bright called *A case of being mindful*. Hannah's article explains something of what Mindfulness is and that it is a technique used by and trained by the judiciary in the US. It is being introduced in training programmes by a number of judicial training institutions around the world.

It was being recognised that judges are not invulnerable to the impact of stress and that we do an inherently stressful job. Resilience building techniques were being encouraged, mindfulness was in the headlines and becoming ubiquitous and the time therefore seemed right for the College to create the digital resource.

What is mindfulness?

The *Mindful Nation UK* gives this helpful definition:

> "Mindfulness means paying attention to what's happening in the present moment in the mind, body and external environment, with an attitude of curiosity and kindness. It is typically cultivated by a range of simple meditation practices, which aim to bring a greater awareness of thinking feeling and behaviour patterns, and to develop the capacity to manage these with greater skill and compassion. This is found to lead to an expansion of choice and capacity in how to meet and respond to life's challenges, and therefore live with greater wellbeing, mental clarity and care for yourself and others."

The *Mindful Nation UK* report explains that mindfulness practice enables participants to be more aware of, and less judgmental towards their thoughts, emotions and body sensations. Practising mindfulness typically involves seeing thoughts as mental events rather than facts and learning how to work skilfully with automatic patterns of reactions to stressful situations.

How was the resource created?

In creating the resource, I anticipated that there would be a degree of scepticism from judges to the notion of mindfulness. Further I anticipated that the resource would need to create a good evidence base to satisfy judges and establish the science behind the efficacy of mindfulness.

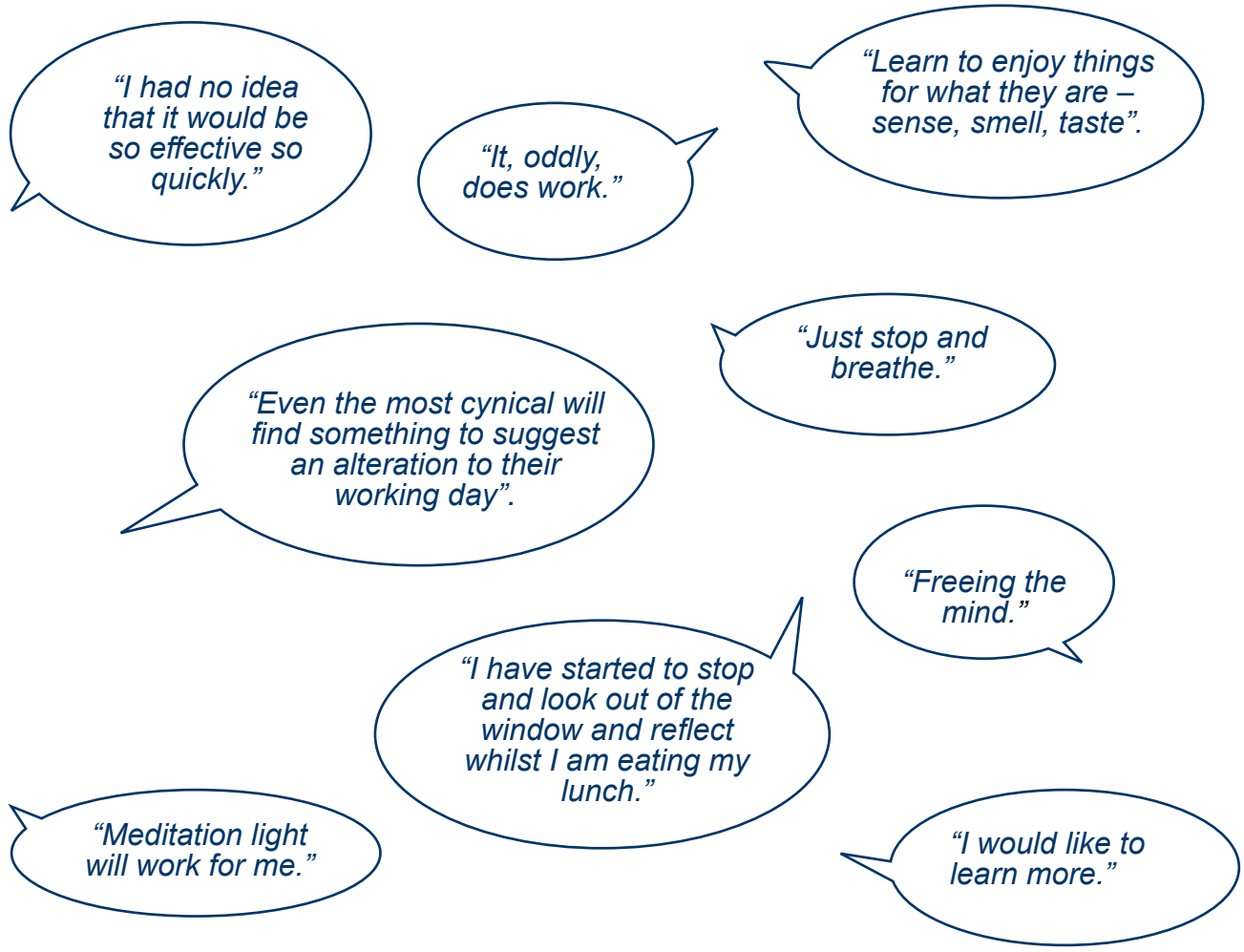
"My hope is that many judges will be persuaded to give it a go and will find their mental state calmed and decision-making improved."

I created a working party to assist me in the creation of the resource and I am enormously grateful to every member of the working party for the insights and contributions they brought to the project. Michelle Austin works at the Judicial College as an Education and Development Advisor; she and her team have been providing judicial training to UK and international judges on the subject of mindfulness as a way of building resilience. EJ Hannah Bright has practised mindfulness since 2009 having completed the Mindfulness Based Stress Reduction Programme with the Centre for Mindfulness Research and Practice at Bangor University. Jackie Hawken is a former solicitor and Motivational Speaker, Facilitator, Coach and Mindfulness teacher. Ellis Jones and Reena Nair are part of the Judicial College digital training team. HHJ Stephen Wildblood is the Designated Family Judge in his local family court and practises mindfulness to keep life in overall perspective.

I am also very grateful to the judges who agreed to be interviewed as part of the project.

The resource is split into the following modules:

1. Interviews with judges who knew nothing about mindfulness, were perhaps sceptical or cynical to a degree but had open minds and were willing to try out a session of mindfulness. I interviewed them both before and after they had experienced a mindfulness session with our expert. This part of the resource was created to address the scepticism point. The interviews after the session with Jackie include the following comments:



1. A module explaining what mindfulness is, how to practise it and the benefits to health.
2. A module explaining the concepts of stress and resilience building.
3. Interviews with judges who are experienced mindfulness practitioners explaining how they practise mindfulness and the benefits they have experienced in and out of work. This was to address the need for a firm evidence base, based upon the personal testimony of judicial colleagues.
4. 14 Guided Meditations provided by Jackie Hawken that can be downloaded to personal devices.
5. Modules explaining something of the developing understanding of the neuroscience behind meditation and its impact on decision making. This module was created to create a firm evidence base from the scientific literature.
6. A resource section containing links to books, reports, articles, apps and you tube and TED talks.

It is available to all Judicial Office Holders on the Judicial College Learning Management System.

Reaction and feedback

The resource was published at the end of September 2018 and has attracted what I am told is a record number of hits on the LMS. At the beginning of November, and as I write this article, it has had been accessed 1495 times and the 14 Guided Meditations have been downloaded by 185 Judicial Office Holders (JOHs).

Formal and informal feedback indicates that of those that have accessed the resource, some have found it to be useful and that some judges are starting to set aside some time every day to practise some form of mindful meditation.

Some comments indicate that this resource will provide a much needed way of dealing with the problem of overload at work. It can also be a useful signpost for leadership judges when addressing questions of workload and stress in judges for whom they have leadership responsibility. One comment put it this way "my hope is that many judges will be persuaded to give it a go and will find their mental state calmed and decision-making improved".

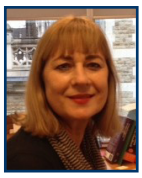
Christa Christensen is Board Chair and Director of Tribunals Training

Back to contents

Equal Treatment Bench Book corner

NEW SERIES

By Paula Gray



This is the first in a series of short pieces about the Equal Treatment Bench Book (ETBB), which can be accessed, if you are a judicial office holder (JOH) via the Judicial Intranet (JI) or the Judicial College Learning Management System (LMS). If you are not a JOH you can access it on the public-facing *Courts and Tribunals Judiciary* website (or simply by searching for 'ETBB England and Wales' in your browser). The advantage of the JI and LMS routes, if you can access it those ways, is the interactivity which we have not (yet) been able to replicate on the public site for technical reasons, but we are trying. The text is the same.

E-Alerts

Those within the 'judicial fold' who pay attention to their emails from the Judicial Office will be aware of the appearance about every six weeks of an E-Alert, which is the ETBB ownership committee's way of keeping the Bench Book within your contemplation. It seemed to the Editorial Board of this Journal that we might share these on a regular basis, both with the readership which is outside that 'fold', and even with those who haven't picked up the Email Alerts …Let me explain.

We try to find a newsworthy topic that the ETBB might help you probe, or in respect of which you may, on reflection, wish you had. The seven E-Alerts we have had so far are précised below and cover, in the order that they were sent: autism, Ramadan, Litigants in Person, marriage, migraine, trans identity and dyslexia. Some contain links to case law or useful further reading on the topic.

So, the message for this issue, to update what used to be said in the 1970s:

Be E-Alert; our country needs Lerts.

E-Alerts précis

Autism: On 5 February 2018, in *Love v The Government of the United States of America*, the High Court allowed Mr Love's appeal against extradition to stand trial in the US for cyber-attacks on companies and government agencies. As a result of his serious conditions of Asperger's Syndrome, depression and eczema, the High Court was particularly concerned about the effect of imprisonment on his ability to give evidence at trial and the suicide risk arising from continued incarceration in a foreign country.

Would you know what to do if a party or defendant in front of you was autistic? There are some practical tips in the Equal Treatment Bench Book Disability Glossary that you may never have thought of.

Ramadan: During Ramadan, many Muslims do not eat or drink during the day, having one meal just before sunrise and an evening meal ('iftar') after sunset. Special prayers are read in the mosque after sunset and those who are able are encouraged to attend.

Ramadan in the summer months can be particularly challenging with hot weather and long days. Fasting and lack of sleep can impact on energy and concentration in court. The holy month ends with festivities on Eid al-Fitr. It should not be confused with the other Eid, Eid al-Adha which happens later in the year.

The *Equal Treatment Bench Book's* Glossary of Religions gives a brief introduction to Islam with an explanation of Ramadan and guidance on how Muslims might wish to take the oath. The Bench Book also has a new section on

Islamophobia which has recommendations on how to treat Muslim people in court to help give them confidence that they will have a fair hearing.

Litigants in Person: On 21 February 2018, in *Barton v Wright Hassall LLP*, the Supreme Court recognised that LIPs' lack of representation 'will often justify making allowances in making case management decisions and conducting hearings' even if it won't usually justify applying a lower standard of compliance with rules and orders.

So what can you do to ensure litigants in person understand what is going on and what they have to do? Chapter 1 of the *Equal Treatment Bench Book* has practical ideas pooled by a variety of judges.

Marriage: On 27 June 2018, the Supreme Court handed down its judgment in *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development (in substitution for the Home Secretary and the Education Secretary)* The Court ruled that making civil partnerships available only to same-sex couples was a breach of articles 8 with 14 of the European Convention on Human Rights. It said the government's desire for more time to decide what to do was not a justification of the admitted discrimination.

On 25 July 2018, the Supreme Court in *Owens v Owens* gave its equally well-publicised ruling on what constitutes breakdown of a marriage.

The *Bench Book* discusses same sex civil partnership, marriage and divorce in chapter 10 on sexual orientation. It also has a small section on different cultural approaches to marriage and divorce.

Migraine: The 2 to 8 September 2018 was designated by *The Migraine Trust* 'Migraine Awareness Week'. In a 2002 report, the World Health Organisation ranked migraine amongst the world's top 20 disabling conditions. The Migraine Trust estimates that nearly 8 million people in the UK get migraines. More than 75% of people with migraines experience at least one/month and more than half say they experience severe impairment during attacks. Odds are, you will have witnesses, parties, representatives (and even colleagues) who are struggling through a court hearing with a migraine.

The *Equal Treatment Bench Book* sets out some of the difficulties and how you can help in the Disability Glossary.

Trans awareness: The Government has been consulting on reform to the *Gender Recognition Act 2004*. Research suggests many trans people want legal recognition of their acquired gender but have not applied because they find the current process too bureaucratic, expensive and intrusive. The consultation closed 19 October 2018. Not everyone wants to go through a legal process of reassigning gender or classifies themselves as either male or female. There is an introduction to the variety of trans identities in the 'Transgender People' chapter of the *Bench Book*.

Dyslexia and tape recording proceedings: Would you allow a dyslexic litigant-in-person to make their own tape recording of the hearing? Dyslexia is not just about being bad at spelling and arithmetic. It can have a serious impact on an individual's ability to give evidence if adjustments are not made. On 25 September 2018, an Upper Tribunal Judge in *CH v SSWP (JSA) (No.2) [2018] UKUT 320 (AAC)* explained why, having consulted the Equal Treatment Bench Book prior to the hearing, he allowed a number of adjustments, including the tape recording of proceedings by an Appellant with cognitive difficulties despite there being an official recording.

The *Equal Treatment Bench Book* lists common difficulties associated with Specific Learning Difficulties (including Dyslexia) and their impact in a court setting.

Paula Gray is an Upper Tier Tribunal Judge (Administrative Appeals) *Back to contents*

Trans awareness training

EQUAL TREATMENT By Sian Davies

Trans Awareness Training

Trans awareness training was recently delivered to judges in the Employment Tribunal (ET) and Asylum and Immigration Tribunal (AIT). This article covers why it was considered an important topic for judicial training, information about the session itself, how it was received and what its impact is likely to be within the Tribunals.

Who are trans people?

People who feel that the sex/gender they were assigned at birth does not match their sense of self, may use the term 'trans' to describe themselves. Approximately 1% of the population fall within the broad trans spectrum, which includes individuals who identify with the 'opposite' gender, have both male and female identities or experience another or no sense of gender.

Why train on trans awareness?

The updated *Equal Treatment Bench Book* (ETBB) devotes a chapter to trans individuals; Chapter 12 - Transgender People. It opens with an explanation of why it is important to engage with trans issues:

> 'Whilst awareness and understanding towards transgender people has increased in recent years, transgender people are highly likely to experience prejudice, discrimination and harassment in their daily lives, as well as violence. As a consequence, they are less likely to report crime or press charges, and they are likely to be apprehensive about coming to court, whether as an offender, witness or victim. Some transgender people may be particularly concerned about their previous name and gender assigned at birth being unnecessarily revealed in court. They may also be worried about receiving negative attention from the public and the press.'

Trans individuals may appear in courts and tribunals as a party or witness, where their trans identity may be wholly irrelevant to their reasons for attending a hearing. However, in certain tribunals the fact of their trans identity will be central to their reason for coming into contact with the judicial system.

The ET has jurisdiction over claims specific to a particular section of the trans community; claimants can bring complaints of discrimination in the workplace on the basis of the protected characteristic of 'gender reassignment' (section 7 Equality Act 2010 (EqA)). The limited scope of EqA protection applies only to those who 'are proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex'.

...transgender people are highly likely to experience prejudice, discrimination and harassment in their daily lives

In the AIT, the fact of a person's trans identity may be the reason they seek asylum. The ETBB recognises particular issues for trans individuals seeking asylum in the UK (paragraphs 40-44, chapter 12) which include the fact that providing evidence to support a claim for asylum may be particularly difficult where a person has had to conceal their gender identity for fear of harm or abuse in their country of origin.

As well as jurisdiction-specific reasons for training, it is important that judges feel confident to deal fairly and respectfully with trans people coming before them in any capacity. Often concerns arise around using the correct terminology and forms of address. The training session was commissioned in the ET to provide judges with information, raise awareness and boost confidence in terms of familiarity with, and use of, appropriate terminology.

The training session

The session was delivered by Gendered Intelligence, an organisation which specialises in such training and whose trainers are all trans individuals. The session lasted 90 minutes and consisted of a mixture of presentation and small group exercises. This approach was engaging, with the group exercises leading to an open and useful dialogue with our presenter, who was happy to answer questions throughout the session.

The presentation started with information about the wider context for trans identities, which is much broader than is covered by the EqA. There was an exploration of how sex, gender and sexual orientation interact as well as

discussion of key terms and use of language. Additionally, the talk covered the basics of legislation with regard to the rights and responsibilities around trans identities (such as the Gender Recognition Act 2004).

The session was tailored to the ET jurisdiction and we were presented with stark statistics about the issues faced by trans people in the workplace. The presentation highlighted the *Trans Employee Experiences Survey (Total Jobs, 2016)* and *LGBT in Britain - Trans Report (Stonewall, 2017)*, from which the following statistics were provided:

- 12% of trans employees have been physically attacked by colleagues or customers in the last year
- 60% had experienced transphobic discrimination in the workplace
- 53% felt the need to hide they are trans from colleagues at some point
- 36% left a job because the environment was unwelcoming; this rises to 50% of gender fluid, agender and non-binary workers

The feedback from delegates was extremely positive; the training was rated highly and viewed as professional and comprehensive.

Following the session, delegates were provided with a comprehensive document signposting links to a wide range of resources and list of relevant organisations.

Feedback and anticipated impact

The feedback from delegates was extremely positive; the training was rated highly and viewed as professional and comprehensive. Judges found the session was of considerable interest and appreciated the opportunity to ask questions on a sensitive topic in a safe environment; they reported feeling more confident in their future dealings with trans people appearing in their tribunal. Judicial office holders in other jurisdictions may benefit from similar training.

Where judges utilise the information gained in training, combined with referral to the ETBB as required, this should enhance trans people's experience of procedural justice in tribunal. In my view, the training assists in furthering the overriding objective, in that it supports judges in placing parties on an equal footing, by ensuring they are afforded dignified and fair treatment.

Useful Links

Equal Treatment Bench Book

Gendered Intelligence

Sian Davies is an Employment Tribunal Judge (Wales) *Back to contents*

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.

In neither forum do I write a record of proceedings. The record of proceedings is a recording.

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.

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.

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.

Andrew Veitch is a District Tribunal Judge , Social Entitlement Chamber, Glasgow.

Back to contents

Principles for compensating pension loss

EMPLOYMENT TRIBUNALS PENSIONS COMPENSATION WORKING GROUP

By David Franey

Introduction

Pension rights are an important part of the remuneration package. Employment Tribunals often award compensation for pension loss. In some cases that is a simple matter: the lost value of the employer's contributions is added to loss of earnings.

However, in cases where compensation is not capped (primarily discrimination complaints and whistleblowing complaints), the amounts at stake can be significant. That is particularly likely where the unlawfully dismissed claimant has lost the benefit of membership of a defined benefit scheme (final salary or career average revalued earnings). This sort of benefit is not frequently replicated in new employment, and simply treating the lost employer contributions as the measure of loss is unlikely to lead to a just result. Complexity ensues.

To help Employment Tribunals a committee of Industrial Tribunal Chairmen (as they were then called) first produced guidance on assessing pension loss in 1991. Until last year, that guidance had been unchanged since 2003.

By 2015 that guidance was no longer fit for purpose due to changes in the economy, in pension law and practice. Those changes included the widespread closure of final salary schemes, a new state pension system, the introduction of complex rules for taxation of pension benefits, and earnings growth year on year. In Griffin v Plymouth Hospital NHS Trust [2014] IRLR 962, the Court of Appeal expressed the hope that an updated version would be produced. As a consequence, the 2003 guidance was formally withdrawn and the Presidents of the Employment Tribunal in Scotland and in England and Wales convened a Working Group and set them the task of producing new guidance.

The Working Group

The Working Group was composed of nine salaried and fee paid Employment Judges. Its work was carried out through a combination of meetings, emails and the use of a SharePoint site via eJudiciary. Its membership came from all corners of Great Britain: Scotland, England and Wales. During its work three members retired and were replaced.

Importantly there was no funding available for bespoke actuarial input. Such input had been a key feature of the guidance produced between 1991 and 2003. In 2003 the Government Actuary and a member of his department made up two of the four-person committee. The guidance included actuarial tables for use in the Employment Tribunal which recognised differences between the working population and the population generally, the latter being the focus of the Ogden tables used in personal injury litigation. Without such input, the Group had to think creatively about the approach to be taken in complex cases.

There was no funding available for bespoke actuarial input.

Consultation period

The Working Group adopted a two-stage process to consultation. The first stage was 'pre-consultation'. The main bodies representing practitioners (the Law Society and the Employment Lawyers' Association) were invited to consider a draft of the consultation paper and make any preliminary comments. The responses helped the Working Group finalise the consultation paper itself.

The second stage was formal consultation: at the end of March 2016 the Presidents circulated the consultation paper which set out the historical background and made a number of proposals for how the revised guidance might operate. It ended by posing nine specific questions.

Responses were received from a wide range of interested parties. They included representative bodies for lawyers, solicitors and barristers, trade unions and employers' organisations, pensions bodies and actuaries.

The Working Group analysed the responses and fed the results into the final draft of the guidance document, now to be called the '*Principles*'. Further information was sought from some who responded including, in particular, the former Government actuary who worked on the 2003 edition. The Working Group also made contact with the committee responsible for production of the Ogden tables and with the Professional Negligence Bar Association. The process of re-drafting, debating and finalising the Principles took several months. The final version was to run to 153 pages.

Particular challenges

The challenges were many. The Principles had a wide target audience: parties representing themselves, professional

representatives (including lawyers), Employment Judges, and non-legal members. There was a need to strike a balance between guidance useful in simple cases to those with no pensions knowledge, and guidance relevant to complex high value cases with actuarial input.

The absence of bespoke actuarial input (save through the consultation process) meant that the Working Group had to recommend use of the Ogden tables in complex pension cases. We debated long and hard whether to recommend that the age of the claimant be adjusted downwards by two years to reflect the longer life expectancy of members of occupational pension schemes compared to the population at large. In the end we did recommend that Tribunals adopt that approach unless persuaded otherwise.

The Working Group also had to grapple with the impact of the Annual Allowance and Lifetime Allowance tax rules for pension, which overlapped to some degree with the requirement for Tribunals to gross up awards to ensure that after tax the claimant receives the right amount of compensation.

Finally, shortly before publication of the Principles, the discount rate applied by statute in personal injury claims changed. The Working Group had to revise its approach on that issue.

Particular features

To help parties or representatives with no prior knowledge of such matters, the Principles begin with a summary of the historical background and an overview of the different types of occupational pension.

Many of the claims which might result in a significant pension loss element are public sector cases, so the Working Group was able to include an appendix summarising the provisions of the main public sector defined benefit schemes. This is intended to help Tribunals make an appropriate assessment of such loss in cases where the parties have not been able to provide the relevant information.

As well as setting out the broad principles to be applied in appropriate cases, the Working Group also prepared a number of examples of those principles in action. These examples occupy about a third of the overall document.

The Principles also provide parties, representatives and Tribunals with links to website resources, such as the online HMRC calculator for tax purposes. This embodies the hope that the Principles will be a usable and practical tool.

The Principles had a wide target audience: parties representing themselves, professional representatives, Employment Judges, and non-legal members.

Promulgation

The Principles were formally promulgated in August 2017 under cover of Presidential Guidance issued jointly by the Presidents. The Guidance set out the expectation that Employment Tribunals would have regard to the Principles when calculating compensation for pension loss, although arguments from parties that a different approach should be taken will always be considered. Links were provided in the Presidential Guidance to the online version of the Principles. The Principles began with a Foreword from the Senior President of Tribunals, Sir Ernest Ryder, commending them to litigants and practitioners.

Training

Before publication of the Presidential Guidance, members of the Working Group spoke at meetings of the Employment Lawyers' Association and the Industrial Law Society to raise awareness of the forthcoming Principles and the approach which would be adopted.

The Principles also formed a key component of the training of Employment Judges in the second half of 2017. All Employment Judges attended regional training at which a member of the Working Group delivered a half-day session on the Principles, including group wortk. Suggested standard Case Management Orders were provided as part of that training.

Importantly, the Working Group also participated in the creation of e-learning modules under the auspices of the Judicial College. There was a day of filming at the RCJ in London. Members of the Working Group explained and discussed different aspects of the Principles, and these video presentations were edited into short modules accessible through the Judicial College Learning Management System. The availability of these modules was highlighted to Employment Judges nationally as part of the regional training, and they remain accessible as a resource for Tribunals to refresh their understanding of the Principles when the need arises. It is anticipated that this approach will become more common and the experience of the Working Group members in the preparation and delivery of such modules will prove valuable in future training matters. Indeed, this experience has led the Employment Tribunal in England and Wales to set up an in-house digital learning team of judges.

Ongoing work

The task of the Working Group is not over: it remains a standing committee. There is a commitment to a regular review of the Principles. Because reviews can be done without any significant cost they are intended to occur much more frequently than previously. The Working Group will be able to respond to significant developments in pensions law and practice, such as future changes to the statutory discount rate. The reviews will be informed by feedback from users. The Principles provide a bespoke email address for feedback. Some useful material has already been received from various quarters.

This article provides some insight into the work that went into producing the Principles. For those tempted to learn more about the fruits of our labour, the full document can be accessed at *Principles for Compensating Pension Loss*, which is located at *www.judiciary.uk.*

David Franey is an Employment Judge, North-West England

Back to contents

Generic recruitment: Should a judge be a 'Jack of all trades'?

SPT UPDATE

By Ernest Ryder

Generic recruitment is a recent phenomenon in the tribunals. Following unification, any judicial vacancies that arose were filled through a chamber-specific recruitment campaign conducted by the Judicial Appointments Commission (JAC). However, in May 2017, a new approach was trialled. Now, recruitment is conducted using a generic approach, on the basis that a Group 7 judge is a Group 7 judge. So how does that work on a practical level and to what extent is the approach beneficial?

When recruiting judges of the First-tier Tribunal, the JAC now runs one process for vacancies across a variety of Chambers. Their advertisement specifies how many vacancies there are, whether they are salaried or fee paid, how many assignments it is expected will be made to each Chamber, and in which country in the UK the assignments are based. The highest scoring candidates in the selection process are recommended for appointment, and are then matched with suitable first assignments, taking into account their individual circumstances (including their specialisations, preferences and geographical locations). This method of recruitment has so far proved highly successful from the tribunals' perspective. It has also allowed the JAC to merge numerous campaigns, which is a more efficient use of their stretched resources. The fear that specialists will not apply has been more than adequately met by the identification of specialist roles and allowing applicants to set out their preferences.

In addition to its obvious practical benefits, generic recruitment is having a cultural impact on the judiciary. Judges who have applied in chamber-specific recruitment rounds tend to see themselves as judges of a particular Chamber and can sometimes be hesitant to work elsewhere. In contrast, judges who are appointed following generic recruitment generally seem to be more enthusiastic about cross-deployment. I suspect that this is because the expectation that has been created during the appointment process is different: judges who have been selected through generic recruitment know from the beginning that their appointment is to the First-tier Tribunal and that they may need to become conversant with different jurisdictions.

If judges have a flexible approach to cross-deployment, this has huge benefits for the tribunals system. It enables the system to function more efficiently, at a time when resources are limited and new judges cannot always be recruited when they are needed. It also helps us to provide effective access to justice when our volatile workload means that unexpected pressures arise. Against the backdrop of Brexit, this flexibility will be crucial, as we are likely to have to manage unprecedented fluctuations in caseload, which we cannot accurately predict. It also helps provide valuable cross fertilisation of good practice across jurisdictions.

There are significant advantages for judges themselves. Where there is a culture that supports cross-deployment, judges move more regularly between jurisdictions, creating greater opportunities for individuals to gain more varied experience and develop their careers. The availability of help when pressures arise, prevents judges from being overwhelmed when their caseloads unexpectedly increase. Many judges also welcome the additional challenge that learning a new jurisdiction brings, and gain great job satisfaction from being cross-deployed.

The ideological advantage of generic recruitment should also not be overlooked. My vision for the tribunals, which I

am developing with your help, is of one system, one judiciary, and quality assured outcomes. I believe that to meet the needs of our judiciary and of our justice system, we need to remove unnecessary distinctions between judges, and make it easier for judges to sit in different jurisdictions. Generic recruitment is consistent with my vision of us as one judiciary, using our skills flexibly for the benefit of our justice system. It has already demonstrated real benefits in the diversity of our talent pool.

I believe that generic recruitment is helping us to develop a culture that supports cross-deployment, with all the benefits that that engenders. It is commonly suggested that being a generalist is in some way inferior to being a specialist. We have all heard the derogatory phrase: 'Jack of all trades, master of none'. That does not hold true for the judiciary. While we will always need some specialists with niche skills, having a large group of judges with skills and experience across a range of jurisdictions can only be an advantage in our stretched and evolving system. It is no longer a disadvantage to be a 'Jack of all trades', if it ever was. Indeed, the first person to be criticised in this way was the actor-turned playwrite William Shakespeare!

Sir Ernest Ryder is the Senior President of Tribunals Back to contents

A New Challenge?

GENERIC FIRST TIER JUDICIAL APPOINTMENTS By Clare Harrington

I consider myself privileged in my working life to date, having spent 18 years as a barrister in chambers practising employment law. During that time, I am glad to say that I was kept extremely busy with interesting and varied work instructed largely by respondent clients ranging from large companies to NHS trusts, educational institutions and police forces.

From 2011, I juggled my practice with sitting as a fee paid employment judge in the London South region. I greatly enjoyed sitting and pursued other similar opportunities when they arose, including the secondment to the FTIAC and becoming a Legally Qualified Chair on police misconduct panels. I appreciated the variety of my work and felt I was more effective as an advocate having had the opportunity to adjudicate upon cases myself and understand the concerns of panels when considering certain matters.

Generic selection exercise

When the exercise was launched for generic first tier tribunal judges, I was interested by a salaried judicial role with greater flexibility both in terms of jurisdiction offered and part-time working – my understanding was that this was the first occasion where it might be possible to be appointed on a 50% full time equivalent basis.

Whilst I had previously been interested in entering a salaried competition, I had hesitated owing to concerns over the lack of flexibility such a role afforded. Having a number of caring obligations and being used to self employment I have, in recent years, organised my preparation and written work in a flexible way, including working from home and working alternative extended hours in order to accommodate my caring commitments. I am resolute in wanting to forward my career but I am keen to attend occasional speech days or a special assembly in which my children are participating and would like a modest amount of flexibility to be able to do this.

Appointment and training

I was fortunate to make it through the multiple stages of the selection exercise (including paper sift and selection day with the colourful mock scenarios complete with actors, timed written exercises and a detailed competency based interview) and was offered the role of District Tribunal Judge in the Social Entitlement chamber.

I am now six months into my new role and am glad to report a relatively soft landing. I have been appointed on a 50% full time equivalent basis sitting in SSCS. Beyond this, I continue to sit as a fee paid Employment Judge and as a legally qualified chair – normally committing a further five days per month to these roles. I relish both my salaried role and also the mix of work these multiple appointments bring.

At the residential induction training, there was clearly a strong desire to empower the newly appointed judges with the skills and knowledge necessary to start in their new roles. The training judges were invaluable in steering us through the introductory materials and to signpost areas of further complexity requiring our attention. The facilitators were approachable and enabling, allowing us to find our feet as judges and to leave the course knowing some of the answers and where to look, or who to ask, when we didn't.

The other invaluable component of such courses is meeting your fellow recruits. I was very glad to have the

opportunity to chat with my cohort and to share our experiences to date and our thoughts on what was to come. Few in my small group had previous judicial experience but all had clearly transferable skills from their legal careers to date. I think for all of us, obtaining our new roles not only represented a great achievement but also a significant change to our working lives. For me, no longer self employed, no longer flexible in where and when I work and the learning and challenge of a new jurisdiction and regime.

Having gone through this process of change, I do not underestimate the extent of the transition for new recruits particularly those without previous sitting experience. In the short term, one goes from being a highly experienced professional to the 'learner' judge and, for most of us, this probably engenders a feeling of vulnerability and some self doubt. The challenge is how to aid and facilitate the transition when newly appointed judges are coming from a variety of working backgrounds and experience.

I have been greatly assisted by my Regional Judge, my allocated mentor judge and my immediate colleagues.

My mentor judge has produced additional materials for my use, provided information on a number of both practical and legal matters and, most valuably, has given me her time whenever I have raised a query or concern. I am extremely grateful for her ongoing guidance.

I have also had one to one mentoring from an experienced colleague in respect of the vital interlocutory work carried out in our jurisdiction. Again, I am grateful for her clear and patient approach in taking me through this work.

Our work is challenging and difficult but to have approachable colleagues with a willingness to listen, assist and support remains invaluable.

Six months on…

In summary, my report and experience is a positive one. I am enjoying my new salaried role, the challenge of becoming more effective in that role and being able to concentrate on sitting in multiple jurisdictions without my practice commitments. As judges we are trained and reminded of the importance of putting our parties at ease to ensure, where possible, their full participation and I would encourage us as colleagues to similarly work at putting each other at ease. Our work is challenging and difficult but to have approachable colleagues with a willingness to listen, assist and support remains invaluable.

Clare Harrington is a District Tribunal Judge Back to contents

Recent publications

EXTERNAL LINKS

By Adrian Stokes

This section lists recent publications of interest to readers of the Tribunals journal with a very short description of each (where this is not obvious from the title) and a link to the actual document. It is not intended to be a comprehensive list but is intended to bring to the attention of readers some publications of interest but which they might have missed. It also gives a number of useful links.

- *What we know and what we need to know about the digitalisation of tribunals* A report considering current reforms and highlights the need for empirical report. The above links to a page pointing to the report itself (by Robert Thomas and Joe Tomlinson), together with a review of the report.
- **Delegation of Functions to Tribunal Caseworkers First Tier Tribunal:** There have been a number of announcements extending the above delegation schemes. The announcement for *Immigration and Asylum Chamber*.
- **UKAJI administrative justice research database:** The following is a link to the announcement regarding the above. The link to the actual database is given in the Useful Links section. *https://ukaji.org/2018/10/19/ukaji-administrative-justice-research-database/* .
- *Lord Chief Justice's Annual Report*.
- *Speech by Senior President of Tribunals on Diversity and Judgecraft* given to the EJTN Human and Fundamental Rights Project and Max Planck Institute for Social Anthropology (14 November 2018).

Useful links

UKAJI administrative justice research database A public database of research related to administrative justice in the United Kingdom.

International Organization for Judicial Training This is an organisation consisting (August 2015) of 123 members, all organisations concerned with judicial training from 75 countries. The Judicial College is a member.

The Advocate's Gateway "provides free access to practical, evidence-based guidance on vulnerable witnesses and defendants".

https://implicit.harvard.edu/implicit/ web site regarding unconscious bias including various tests.

Tribunal Decisions

Tribunals Journal All copies of Tribunals Journal from Spring 2006 to date.

Rightsnet

Child Poverty Action Group

The Public Law Project – public law and administrative justice web site including relevant research.

Tribunals In The United Kingdom – a Wikipedia article giving an overview of the UK Tribunal System (including changes in Scotland, Wales and Northern Ireland).

List of tribunals in the United Kingdom – another Wikipedia article giving a comprehensive list of Tribunals in the UK (both within and outside the Tribunals Service), including some which have never sat.

Adrian Stokes is a Disability Qualified Member in the First-tier Tribunal (Social Entitlement)

Back to contents

Aims and scope of *Tribunals* journal

1. To provide articles to help those who sit on tribunals to maintain high standards of adjudication while remaining sensitive to the needs of those appearing before them.
2. To address common concerns and to encourage and promote a sense of cohesion among tribunal members.
3. To provide a link between all those who serve on tribunals.
4. To provide readers with material in an interesting, lively and informative style.
5. To encourage readers to contribute their own thoughts and experiences that may benefit others.

Tribunals is published three times a year by the Judicial College, although the views expressed are not necessarily those of the College. Queries should be emailed to *jcpublications@judiciary.uk*