See centre pages for a chart showing the structure of the First-tier and Upper Tribunals

Judicial Studies Board

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Ambitious route

Nick Warren **describes the task of framing a new set of rules for the First-tier and Upper Tribunals.**

Gradually, the chambers of the First-tier Tribunal and the Upper Tribunal are becoming inhabited. The first settlers were in Health, Education and Social Care, Social Entitlement, and War Pensions and Armed Forces Compensation. They were followed by Tax. Lands and Immigration are not far behind. Up till now, what might be called the public law jurisdictions – those dealing with disputes between citizen and state – have been run according to rules laid down by their parent departments. That can no longer be appropriate.

The Tribunals Courts and Enforcement Act 2007 declares 'There are to be rules, to be called Tribunal Procedure Rules' and sets out some guiding principles: the rules should try to secure that justice is done, that tribunals are accessible and fair, that proceedings are quick and efficient, and that the rules are simple and simply expressed. Where appropriate, the judiciary should be made responsible for handling cases quickly and efficiently. The statute adds one or two restrictions. The composition of the tribunal is outside the scope of the rules. Costs must be at the discretion of the tribunal, unless the rules say otherwise. If mediation is used, then it should be voluntary and should not affect the tribunal's final decision. The Act also permits the Senior President and chamber Presidents to give practice directions, but these require the approval of the Lord Chancellor.

Committee

The task of framing the rules is given to the Tribunal Procedure Committee. Lord Justice Elias is the Senior President's nominee and he chairs the committee. There is also a member nominated by

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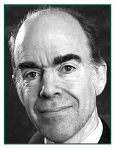


Many aspects of life can often feel like a balancing act, and sitting as a tribunal judge is no exception.

On this page, Nicholas Warren describes the drafting of the Tribunal Procedure Rules, and the necessity for combining a bedrock of respect for the specialism of judges with a willingness to challenge received wisdom.

The balancing skills required in managing a hearing where one of the parties is unrepresented are often touched on in judicial training. On page 15, Peter Spiller summarises the experience of a group of judges in the New Zealand small claims court with an impressively low rate of successful appeals.

Less frequently touched on in training are the skills required in managing a hearing where one of the parties is poorly represented. On page 12, Melanie Lewis describes how to 'get behind the advocate' in those situations.

We were keen to include a 'pull out and keep' guide to the new First-tier and Upper Tribunals with this issue of the journal. Our initial enthusiasm waned on occasion as the detailed nature of the task became apparent, but we are pleased with the result, on pages 10–11.

We do not flatter ourselves that you will be displaying it on your office wall – but hope that it will help readers to envisage the new structure as it takes shape.

Godfrey Cole CBE

Any comments on the journal are most welcome. Please send to *publications@jsb.gsi.gov.uk*.

the Administrative Justice and Tribunals Council. The Lord Chancellor appoints three members who must have experience of practice in tribunals or advising tribunal users. The Lord President appoints a person with experience and knowledge of the Scottish legal system. The Lord Chief Justice adds a judge from each of the Upper and First-tier Tribunals as well as a tribunal member. A group this small cannot hope to know the nooks and crannies of every jurisdiction, so up to four specialist members can be added from time to time to assist the committee with a particular subject area or issue.

The Act also has something to say about how the committee should do its work. Before the committee makes rules, it must consult such persons as it thinks appropriate. So far, consultations have all been public. If proceedings in Scotland are affected, then the Lord President must be consulted. The committee must also meet unless it is inexpedient to do so. It does meet roughly once a month in London where it is supported by officials and lawyers from the Ministry of Justice. Under a kindly but determined chairman, I would describe the meetings as convivial but not cosy. There is a bedrock of respect for the specialism of judges in the different jurisdictions, but received wisdom can be challenged. Members ask questions free of any embarrassment that the answer may expose only their own misunderstanding.

Once a majority of the committee has agreed on a set of rules, they are placed before the Lord Chancellor who has a choice. He may make the rules in a statutory instrument, or he may disallow them, giving written reasons for doing so. If he makes the rules they are subject to the negative resolution procedure in Parliament.

New for old

The question that faced committee members when they first met was whether to allow tribunals to carry on pretty much as before. This had obvious attractions. They adopted instead the more ambitious route of trying to frame new rules for each chamber containing as much in common as possible. It seemed important for the future of public law that the new chambers should develop their own identity rather than preserve fragments of the jurisdictions that went before.

It soon became apparent that, in implementing the Act, Ministry of Justice officials have been managing a mild earthquake affecting their colleagues in government and the judiciary. Subconsciously or not, parent departments had drafted their rules to suit their own policies, not

Overriding objective and parties' obligation to cooperate with the tribunal

2—(1) The overriding objective of these rules is to enable the tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the tribunal to further the overriding objective; and

(b) cooperate with the tribunal generally.

necessarily other tribunal users. It is instructive to compare the Asylum and Immigration Tribunal rules – and their very strict time limits imposed on the appellant and the tribunal – with the social security rules, which contained no time limit at all within which the Department for Work and Pensions should even notify the tribunal that an appeal had been lodged. Not all government departments have found it easy to adjust to their new role as a tribunal user.

Tremors

Nor have the judges been immune from tremors. Instinct led some to start clinging on to nurse for fear of getting something worse. Their own old ways were the best. If not adopted universally, they must be retained for their own jurisdiction because they were somehow special.

The common core of the rules – in both the First-tier and Upper Tribunals – is the overriding objective (see panel opposite). This challenges the tribunal judiciary to make 'Tribunals for Users' a reality. It is not always easy to adapt. Sometimes it seems that up till now public law tribunals have been confined to an exercise yard constructed by their parent department. Now the gates are open; we are free to be more creative; but some of us have become a little institutionalised and find it hard to adjust.

Cooperation

We should willingly accept our responsibility to avoid delay and use our special expertise efficiently. We need to cooperate with our administrative colleagues to promote those ends in the interests of tribunal users. Some fear a loss of independence in this kind of judicial leadership, but the true threat to the existence of an independent judiciary comes if we are seen to be slow, expensive and insensitive to the needs of users. So the overriding objective requires us to deal with cases proportionately, aware, that is, of the emotional and financial burdens that litigation places on the users.

The call for avoiding unnecessary formality is important. We all know, but do not publicly admit, that many hearings conducted by judges in the civil courts are now less of an ordeal for the user than some of our tribunal hearings. It is interesting that, while the overriding objective of the courts rules includes 'ensuring that the parties are on an equal footing', the tribunal procedure rules' overriding objective requires the judge to ensure 'that the parties are able to participate fully'. This seems to go further, perhaps recognising that citizen-state disputes are rarely on an equal footing and that it may be necessary to enable some individuals to put their case. There is work to be done too in stimulating regular users to help the tribunal do justice.

We all know, but do not publicly admit, that many hearings conducted by judges in the civil courts are now less of an ordeal for the user than some of our tribunal hearings.

It will take time of course to develop new ways of working. Reforming statutes such as the Tribunals Courts and Enforcement Act take many years to 'come into force' in the practical sense. The judges alone can do this; rules can only guide and assist.

Rules can though, and do, develop. The committee may wish in future to take a longer principled look at some issues – for example, public hearings. There will be mistakes requiring correction. Probably some rules could be more simply expressed. Suggested improvements from tribunal judges are very welcome, and should be sent to the committee's address, below.

Nick Warren is a Regional Tribunal Judge in the Social Entitlement Chamber and member of the Tribunal Procedure Committee. The committee's address is: Tribunal Procedure Committee Secretariat, Petty France, London SW1H 9AJ.

A harmonious study in COMPOSITION

In creating a single Tax Chamber, the challenge has been to produce a system that can adapt to the wide range of matters within the financial jurisdiction. *Stephen Oliver* describes how that was managed.

Leggatt's was a simple message – 'One system, one service'. Implementing it has been quite a task. In the world of finance, the old order consisted of four separate tribunals. Between them, they dealt each year with nearly 100,000 appeals brought by income tax payers and small businesses and they handled appeals by large corporations involving taxes of hundreds of millions of pounds. Leggatt recommended, and the Tribunals, Courts and Enforcement Act 2007 prescribed, a single tax tribunal.

The challenge has been to compose a single appeal structure to suit the needs of all our users great and small. The finished work has taken seven years to complete. The exercise has been harmonious, perhaps reflecting the fact that the Senior President – Sir Robert Carnwath – and I, the First-tier Tax Chamber President, used to play violin and cello in a chamber group. And the new Upper Tribunal President – Sir Nicholas Warren – is a chamber music player too.

None of the tax tribunals was able to cooperate with the others, even when the Inland Revenue and the Customs merged.

The old order

Let me start with the system as Leggatt found it and then progress, movement by movement, task by task, to the finished work.

The General Commissioners (nearly 3,000 volunteers spread over 460 divisions managed by 360 clerks) dealt with appeals arising in their own divisions. The Special Commissioners (20 tax specialists handling the long and sensitive direct tax cases) were UK-wide. Both had been created in the time of William Pitt the Younger. The 'section 703 tribunal' had been set up in 1960 to cope with tax avoidance schemes. The VAT and Duties Tribunals (30 legally qualified and 105 non-legally qualified members) came into being when the UK joined the European Community in 1972.

None of the tax tribunals was able to cooperate with the others, even when the Inland Revenue and the Customs merged. Each had its own set of rules and each set of rules was written, as it were, in a different key. Each division of General Commissioners was managed and advised by its own clerk. The other three tribunals worked together, more or less under one roof, with me as their president.

The modernisation process

Pressure for change had been building since the late 1970s. Momentum for reform had been given in the 1990s by two reports of the Tax Law Review Committee chaired by Lord Howe of Aberavon QC. The Ministry (then the Department for Constitutional Affairs) made a study of the case loads of the four tribunals and explored the logistics of change.

The policy decision to disband the General Commissioners and their clerks was taken by the Government. Then came the formation of the stakeholders group. There were about 15 members of this, drawn from representative bodies ranging from low-income groups to the revenue authorities themselves. Every aspect of the process was examined. I chaired at least

20 meetings from 2004 onwards. The greatest challenge has been balancing the demands of the commercial users who require a hearing comparable to that of the Commercial Court with those of the individual taxpayers, who expect a meeting where they and their advisers can 'turn up and talk' in an informal atmosphere. The scrutiny and advice of the stakeholders has been absolutely indispensable.

At an early stage we settled on the structure of what was to become the new system. The tax chamber of the first tier would have its hearings, whatever the tax and whatever the scale of the dispute, as close to the users as possible. Some appeals would be dealt with on paper. The judiciary, legal and non-legal, would be drawn from seven regions. A single administrative centre would be located in Birmingham and three satellite centres, where appeals needing constant case management could be handled, would be located in London, Edinburgh and Manchester.

The truth, I have discovered after many years in an ivory tower, is that other tribunals possess some great judges.

The devil, as usual, has been in the detail. Leggatt had deprecated the procedure by which appeals were made to the revenue authority and not to the tribunal; the result had been for the tax office and not the taxpayer to control the progress of the appeal. The change caused by the re-routing of the appeal direct to the tribunal, coupled with giving the taxpayer the right to an internal review of the decision under appeal, was to involve thousands of amendments to 61 different Acts.

The issue of whether the successful party to the appeal should be able to claim costs was the most contentious of all. The taxpayer with a large claim could only afford to pursue it if costs were recoverable; the taxpayer with a small amount at stake should not be expected to risk paying the revenue authority's costs if unsuccessful.

New Rules

On those and other matters we were guided by the Tribunals Procedure Committee (TPC), chaired by Sir Patrick Elias. An independent rule-making body takes the responsibility off the shoulders of the tribunal judiciary and enables those, like myself, who have views about matters such as costs and the composition of the tribunal, to express them without conflict of interest.

One signal achievement of the TPC has been to produce a set of Rules that are similar in substance to those of other first-tier chambers but at the same time give us the flexibility, through the different categorisations of the cases coming to us, to manage the huge diversity of matters within our jurisdiction.

Virtually all appeals will start in the First-tier Tribunal. There is provision in the Rules for appeals to be fast-tracked to the Upper Tribunal as a tribunal of first instance and this will happen in a handful of cases. Typical candidates for this will be 'lead' cases which depend primarily on points of law and appeals that raise a clear issue requiring a reference to the ECJ. Fact-intensive cases, no matter how important, will be heard in the First-tier.

Recruiting a new judiciary

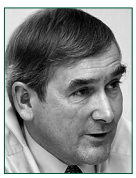
Then came the business of re-stocking the judiciary to take the place of the General Commissioners. Our total requirement was calculated by the Ministry of Justice to be some 250 judiciary, legal and non-legal, to do the work of the 3,000 or so at the time of the Leggatt Report. Our needs were for a team of individuals with expertise in complex fiscal legislation to deal with the heavy commercial litigation and for others good at the 'turn up and talk' techniques called for in the local hearing centres.

The Judicial Appointments Commission (JAC) is not equipped to deal, in one competition, with that sort of diversity. It needs fixed and inflexible criteria for each competition. To an extent, however, our needs have been satisfied by the assignment procedure by which the Senior President has been able to draw on judiciary with the required expertise currently attached to other tribunals and make them available to our chamber. The truth, I have discovered after many years in an ivory tower, is that other tribunals possess some great judges. What is more, some of our non-legal members have spent a lifetime as accountants advising on tax law and are widely acknowledged experts in the field.

Training

It was not until March of this year that we learnt of the full complement of new appointees. Thirty of those have done the JSB's course on essential skills and competences. All the new judges have attended our in-house specialist residential tax training events. It has been a learning exercise for us all. Those of us who were Special Commissioners and VAT Tribunal members knew little about the arts of the General Commissioners; and VAT and excise and customs duties are new worlds for most of the newcomers.

New AJTC Chair



Richard Thomas has been appointed as the new Chair of the Administrative Justice and Tribunals Council. He will take up his appointment on 1 September 2009 for a period of four years. Details can be viewed at *www.justice.gov.uk/news/newsrelease280409a.htm*.

The future

The larger appeals go on much as before. They are case-managed in London, Birmingham, Manchester and Edinburgh and listed in the main hearing centres. The difference will be noticed by the smaller taxpayers and their advisers. Gone are the clerks to the districts. Gone are the meetings of the General Commissioners at which, as Leggatt observed, they and the revenue authority's presenting officers sat together round a table, with the Commissioners relying on the officers for all details of the cases on which they were being asked to make a determination.

From nothing, we now have a machinery that has absorbed and sent out for hearing in all corners of the United Kingdom more than 900 appeals . . .

The challenge for us will be to preserve all that was best about the General Commissioners and their user-friendly 'turn up and talk' meetings, while insisting on compliance with the new Rules and the more formal system of directions.

The first performance of the new 'chamber work' took place on 1 April 2009. There was no standing ovation. But there were no catcalls! One really impressive outcome in the early weeks has been the organisation of the Birmingham operation. From nothing, we now have a machinery that has absorbed and sent out for hearing in all corners of the United Kingdom more than 900 appeals that had been lodged before the General Commissioners. The 'internal review' procedure requiring HMRC to review their own decisions before they became appealable matters has created an enforced silence. Once this has run its course, the First-tier chamber music will really begin.

Sir Stephen Oliver QC is Acting President of the Tax Chamber of the First-tier and Vice-President (Tax) of the Finance and Tax Chamber of the Upper Tribunal.

Thoroughness allied to good JUDGEMENT

Simon Jones **describes the investigative work – including the gathering of a large amount of evidence – carried out by the Competition Commission before reaching a decision.**

The Competition Commission investigates the competition aspects of mergers and markets in the United Kingdom. It is a statutory corporation created by section 45(1) of the Competition Act 1998 and consists of 55 members. Members of the commission are mainly economists, lawyers, accountants, bankers and businessmen. Other than the chairman of the commission, currently Peter Freeman, and his deputy chairmen, members work part time and are appointed by the chairman to form groups of between three and seven members to carry out investigations and produce reports.

Merger and market enquiries

A merger inquiry may last up to six months, and a market inquiry up to two years. Each investigation leads to a report that can vary in length, tending to run to between 100 and 300 pages. Reports on major market inquires can extend to more than 1,000 pages.[1]

To assist members, the commission has a staff of 150 or so. At the core of the staff is a team of administrators who have day-to-day conduct of inquiries and produce draft reports for the members. They are assisted by staff with specialist expertise – lawyers, accountants, statisticians and economists, as well as business advisers and a small specialist remedies group. Much of the commission's initial investigation, information-gathering and analysis are carried out by staff on behalf of members.

The commission is not the instigator of its own work. In merger and market jurisdictions it is what is often termed a 'second phase' body. References are made to it by the Office of Fair Trading, sectoral regulators such as Ofcom, and in some cases the Secretary of State, who have themselves carried out a preliminary investigation of the merger or market concerned.

Stages

Broadly, the commission proceeds in two stages, an information-gathering stage and then, if a competition problem is identified, a remedies stage. In merger cases, a remedy may be the prohibition of the merger in whole or part. In market inquiries, the remedies will be aimed at developing competition in the market. These stages overlap.

The commission has on occasion reversed its provisional conclusions in its final report.

During the investigative phase the commission will gather evidence, hold hearings and publish provisional findings as a precursor to its final report. Where provisional findings identify a competition problem they signal the start of the remedies process by identifying a problem to be remedied. Provisional findings are of course provisional and further evidence and submissions may be sought and received in response to them.

The commission has on occasion reversed its provisional conclusions in its final report. And the remedies phase of the investigation itself involves some investigation, so the distinction between investigative and remedies phases is not exact. The final report will state the commission's decisions on competition issues and on remedies.

Evidence-gathering

Central to the commission's task in both jurisdictions is the identification of the market or markets in point and then the analysis of the competitive dynamics of each relevant market. These are factual matters and the commission will draw conclusions from quantitative and qualitative evidence.

The parties to a merger, interested third parties and, in market investigations, the businesses who supply goods or services in the particular market will all submit evidence and make submissions. The commission may carry out customer and consumer surveys, issue questionnaires to businesses and seek submissions and evidence from economists, regulators and others who have expertise in the relevant markets. Studies carried out by other competition authorities will often be relevant. The commission will also require parties to a merger or market inquiry to submit accounts and other material – strategy documents, board minutes and business plans – as it seeks to understand how markets operate and how suppliers compete.

The commission is particularly keen to identify evidence that has not been prepared for the purposes of the inquiry.

The commission has powers to require the production of documents and the attendance of witnesses. While material is normally provided voluntarily, the commission does on occasion receive evidence under compulsion. In our recent market inquiry into payment protection insurance we issued 12 notices to produce documents under section 109 of the Enterprise Act 2002. In three cases we considered the initial response to the notice to be inadequate. However, rather than imposing penalties for non-compliance, we worked with the recipients of the notices to secure receipt of the necessary material.

Weighing evidence

The evidence that the commission considers will come from numerous sources, many of whom will have an interest in the outcome of the inquiry. The reliability of evidence must therefore be assessed and proper weight attached to it. The commission is particularly keen to identify evidence that has not been prepared for the purposes of the inquiry. Surveys carried out by the commission are of course prepared for the purposes of an inquiry, but steps are taken to limit the risk that answers are not truly representative.

Some of the commission's surveys are very extensive. In our inquiry into the merger of Stagecoach and Scottish Citylink we carried out what was at that time one of the most extensive surveys ever conducted of Scottish coach passengers.

Although quantitative evidence is attractive for its objectivity, any attempt to understand a market would be incomplete without the evidence of those who participate in it. In a merger investigation, for example, the commission holds hearings with the parties to the merger, their competitors and many others to develop its understanding of how the market works. At the same time, the commission will review strategy and other documents of suppliers to test submissions made to the commission. Quantitative and qualitative evidence both have a role to play. Inevitably, given their longer duration, market inquiries afford the commission more opportunities to carry out quantitative studies and to commission reports from consultants and others.

In some cases, site visits are very important, for example in enabling the commission to understand industrial processes or the problems of production or capacity expansion at particular plants. The commission will of course also wish to understand the commercial rationale for a merger and the plans of the management of the merged business for its future.

Hearings

The commission holds at least one hearing with the main parties to a merger inquiry before publication of provisional findings. If remedies are necessary there will be at least one further hearing in the remedies phase. In merger and market inquiries there will be numerous other hearings with competitors, suppliers and other interested parties such as sectoral regulators. Again, the duration of market inquiries and the greater number of parties involved means that there are normally more hearings in market inquiries than in merger cases.

Hearings are normally bilateral and the style is formal but not adversarial. Parties are not normally represented by counsel, though they may be. At the start of a hearing the party is normally given an opportunity to make an opening statement after which the group asks questions from a brief prepared by members and staff. The commission prefers to hear from the executives of a company rather than from its professional advisers, but if a company wishes to be represented by a lawyer or a consulting economist it may be.

Hearings are normally held in private to facilitate what is often a frank exchange of information, much of which may be commercially sensitive. In addition to hearings, meetings with parties will normally be held at staff level. These may be purely fact-finding meetings, designed to prepare the ground for later hearings and analysis.

Transparency

Transparency is an important element of the commission's decision-making and most submissions and analyses tendered or commissioned during an inquiry are published on the commission's website. The results of surveys, but not the raw data underlying them, are also published. Transcripts of hearings tend not to be published.

The decision

The commission's decision is its report whose structure reflects the main elements of its inquiry – for example, the merger itself, its rationale, the market and the competitive consequences of the merger. If necessary, there will then follow a discussion of the various remedies considered by the commission, followed by the commission's decision on the necessary remedy. In merger cases we may have to prohibit a transaction. Where the merger has taken place there may have to be divestment. In our recent inquiry into the acquisition by British Sky Broadcasting plc of shares in ITV, the remedy was a sale of shares down to a level at which we were satisfied that the competition problem was remedied. The commission must not disclose business-sensitive information, save where necessary, and there will usually be extensive discussion with any person who may have provided such information before a decision to publish it is made. Reports are normally published with redactions to take account of sensitive information.

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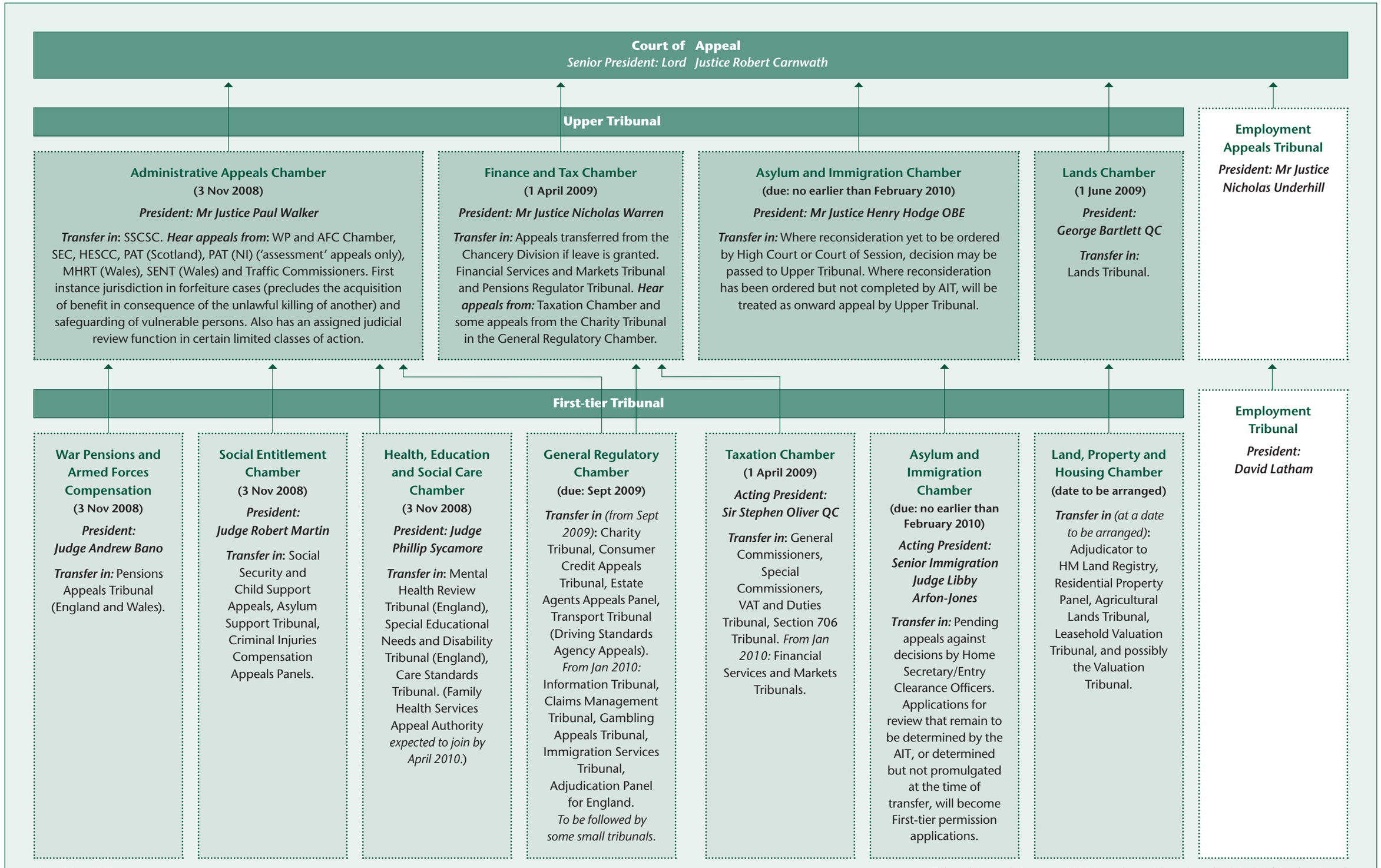
Conclusion

The hallmarks of the commission's decision-making are thorough investigation, transparency and two iterative analytical processes: between commission members and staff, and between the commission and interested parties. While the identification of primary facts through investigation is the foundation of our competition analysis, the conclusions that we draw are, while factual, often of a secondary or inferential type. Good judgement and no little expertise are, we like to think, required to reach conclusions.

Simon Jones is a member of the Competition Commission.

[1] The commission's recent report on the 'Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc', a merger inquiry, ran to 157 pages. In 'The supply of groceries in the UK', a recent market inquiry, the report and its appendices ran to 932 pages.

Structure of the Tribunals Service



As at May 2009

WALKING A TIGHTROPE TO A SOLUTION

Melanie Lewis **describes a number of strategies that can be used by a tribunal faced with a poorly represented party without compromising the impartiality of the hearing.**

MUCH JUDICIAL TRAINING focuses on how to provide a fair hearing to a person who is unrepresented. What is less straightforward is the approach to be used when a representative appears to be doing more harm than good, either through incompetence, lack of preparation, lack of familiarity with the jurisdiction, or because the representative is a friend or supporter and out of their depth. Some representatives are unaware of their weaknesses, which can present the tribunal with particular difficulties. In other cases, the representation may simply be inappropriate for the case. Very occasionally, the tribunal may suspect that the representative is dishonest.

Range of representation

Of the jurisdictions in which I sit, the wide range of representation in asylum and immigration cases has long been recognised. While there is an accreditated scheme for all publicly funded advisers; the preparation of those solicitors still working in the area is often financially constrained. Most of the presenting officers representing the Home Office are not legally qualified and the quality of representation often depends on the level of experience. The Home Office is working towards a new model where a case manager will not only make the first-instance decision but also defend it at the appeal stage, which may have some implications for objectivity.

There are no restrictions on who can appear before the First-tier Tribunal in cases relating to Special Educational Needs and Disability (SEND). Some appellants are advised and also represented by voluntary bodies, others by one of the small number of lawyers who specialise in the field. Other lawyers work on a pro bono basis. Local authorities rarely instruct lawyers. Cases are usually presented by the manager from the special needs department, many of whom have worked hard to try to achieve an agreement with parents and can find it difficult to switch to being challenged openly before the tribunal. Some authorities employ consultants to present cases at the tribunal. They can take a detached overview, but may lack a detailed knowledge of the history of the case.

The tribunal's approach to representatives will depend in part on whether the process is adversarial or inquisitorial . . .

In care standards cases in the First-tier Tribunal, which hears many appeals against decisions of regulatory authorities, experienced counsel or solicitors will often be instructed. There are few specialised voluntary bodies undertaking representation, although parties often receive representation or support from a friend or partner, more in the role of a McKenzie friend.

Inquisitorial or adversarial?

The tribunal's approach to representatives will depend in part on whether the process is adversarial or inquisitorial, although in many jurisdictions the nature of the process may be somewhat ambiguous. In SEND, the position is relatively clear. The inquisitorial hearing is run like a purposeful business meeting, focusing on issues identified with the parties at the commencement of the hearing, rather than a

formal presentation of each party's case. Care Standards cases are more of a mixture. How close to an adversarial model a hearing is depends, to some extent, on whether lawyers are instructed.

It might be thought that the Asylum and Immigration Tribunal (AIT) is adversarial, but nothing is that straightforward. In his preface to Mark Henderson's *Best Practice Guide to Asylum Appeals*, Lord Justice Sedley remarked that the asylum jurisdiction is poised uneasily between the adversarial and inquisitorial.

Discomfort

In the University of Manchester's School of Law, Dr Robert Thomas has been conducting research into the procedures and determination of asylum appeals by the AIT. His research has found that, while most judges preferred the adversarial approach, they were not entirely comfortable with it.

Their concerns included their desire to ask questions to plug gaps in the evidence, the quality of the examination of appellants or witnesses, and failures to pursue an obvious point concerning someone's credibility. Some immigration judges expressed a wish to have more control over the process of questioning, in order to elicit the evidence necessary to determine the case properly, although this meant embarking on a judicial examination of the appellant or witness. Not surprisingly, the upshot of this was that hearings varied tremendously between individual judges and even between different cases dealt with by the same judge. The central issue in determining the approach to take is the degree of intervention required to enable the tribunal to collect the necessary evidence in order to produce a good decision, and whether such intervention is acceptable.

In the Tribunals Service, Parliament has given some help. The overriding objective set out in the new rules of procedure for the Upper Tribunal and First–tier tribunal is 'to deal with cases fairly and justly'.[1] This includes: avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; and using any special expertise of the tribunal effectively. Hopefully, this may provide an opportunity to get behind the representative and hear directly from the appellant. It may be helpful to remind the parties that they must help the tribunal to further the overriding objective and cooperate with the tribunal generally. Until 2010 the AIT is still a separate pillar but there is a similar overriding objective set out in the procedure rules, although the rule is not so flexible.[2]

Preparation

Preparation is one of the most important requirements for an effective tribunal hearing. It is, of course, essential that the judge takes the necessary time to identify the issues. In panel hearings, everyone should prepare carefully, so that the tribunal can make full use of its expert and non-specialist members. It is often helpful to

Key points

- **Have a broad understanding of how public funding works and who is eligible for it.**
- **Always prepare – and make sure you have identified the relevant issues.**
- **Be prepared to explain the legal framework in plain English.**
- **Focus the evidence by setting out what the appellant will have to establish.**
- **Explain to the parties that they must help the tribunal to further the overriding objective.**
- **Use the case management review to establish the representative's role, and the degree of intervention that may be necessary.**

know the basis on which representation has been arranged, and something of the representative's background. This might be ascertained at the case management review and help identify the level of intervention, or any limitation of the representative's role, that may be necessary. It should also establish if a representative is there just to support and assist, and identify those representatives who (as happens in SEND) are partisan advocates for certain models of education.

It is also helpful to have a broad understanding of how public funding works and who is eligible for it. The limits of public funding may explain why representation is limited to advice and why it was not possible to submit certain evidence.

The hearing

It is essential that the judge has the ability to explain the legal framework for the case in plain English. Setting out at the beginning of the hearing what the appellant will have to establish focuses the evidence, but must not suggest that the tribunal has in any sense made up its mind. This is often necessary even when there are lawyers and accredited representatives. Unfortunately, this explanation is sometimes the first time that the appellant really understands their likely chance of success, and why their case might not succeed.

Asylum cases essentially turn on credibility. All questions from the judge should focus on clarification and not suggest that they have descended into the arena.

The judge should also clearly explain the procedure to be followed. Where the representative is no more than a friend, it is best to treat the appellant as if they were unrepresented. The tone should be user friendly but the boundaries clearly set.

Questions

How far can the tribunal ask questions? Under the SEND inquisitorial model they can, and they do. In Care Standards, we use a similar approach which is less contentious if there is no representative, and much more difficult when the representation is simply poor, when the tribunal has to discover the purpose of the question, and to whom it is directed. Asylum cases essentially turn on credibility. All questions from the judge should focus on clarification and not suggest that they have descended into the arena.

Conclusion

It is not the function of any tribunal to monitor poor representation, and if it does so excessively it could undermine its stated independence and impartiality. Any referral to a senior judge, allowing them to take up cases with the accredited body such as the Office of the Immigration Services Commissioner or the Law Society, must be evidence-based, and this takes time. It may also be possible to take up the issue in a more indirect way through user groups, which exist for both my HESC jurisdictions.

Conclusion

The difficulties presented by poor representatives are not easily solved. Any strategy must promote, not undermine, the tribunal's independence and perceptions of fairness. It can be a fine line, even a tightrope. The solution will depend on the nature of the panel, the case and the representative. Above all, we must do justice. And walking that tightrope may be the only way.

Melanie Lewis sits in the Asylum and Immigration Tribunal and in the Health, Education and Social Care Chamber of the First-tier Tribunal (in Special Educational Needs and Disability, and Care Standards cases).

[1] Rule 2. The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chambers Rules) 2008 SI 2699/2008.

[2] Rule 4. Asylum and Immigration Tribunal (Procedure) Rules 2005.

In the place of the other PERSON

Peter Spiller **describes how the small claims court in New Zealand works effectively and maintains a low rate of successful appeals.**

New Zealand's Disputes Tribunals are the equivalent of small claims courts in the UK and are run by judicial officers called referees. There are currently 60 referees, appointed for three-year periods. Parties in the tribunal are unrepresented.

Referees are required to keep in mind two possible outcomes to a case: agreed settlement where appropriate and, failing this, the referee's decision. The outcomes of tribunal hearings are subject to appeals on the basis of procedural unfairness, which covers the hearing process and decision-making.

As a group, referees have a remarkably low rate of successful appeals. I asked a group of referees to reflect on why they thought they had had such an admirable record. The following is a summary of their reflections.

Referees often stressed the need to engage with people as human beings and in particular their anxious state as lay litigants.

Pre-hearing preparation

Referees found it helpful to follow and refer to the best practice guidelines and have regard to recent decisions. Reading the file beforehand was seen to assist in various ways.

Reflecting on what law might apply and how it might apply, what the key issues might be and what were the potential settlement possibilities, assisted the referee to be better focused on the parties' needs in the hearing. The referee was also able to appear more confident and establish early credibility with parties.

Engaging

Referees often stressed the need to engage with people as human beings and in particular their anxious state as lay litigants. It was seen as important that each of the parties was allowed to present their case at the outset, uninterrupted. Useful positive listening techniques by the referee were a raised head, eye contact and – in due course – open questions.

Referees stressed the need to treat all parties with politeness and respect. Regardless of whether the hearing ended in agreed settlement or the referee's decision, a key focus of referees was to ensure the parties left the hearing believing that they had been fairly treated.

Clear and transparent

At the start of the hearing, referees briefly explained the process that would be followed, and then the procedures adopted as the need arose during the hearing. For example, in testing or challenging evidence through questioning, the referee might explain that he or she had not reached a decision but needed to have the best possible understanding of the matter in dispute. Again, a party might need more time to respond to new information, thus requiring an adjournment. The referee would then explain to the other party that an adjournment was being allowed to ensure overall fairness and that this was better than the matter being taken to a successful appeal and then having to be reheard anyway. One referee observed that, where there had

been a discretionary right waived by a party, the referee wrote out that waiver and had the party sign it, stating that the right had been explained but waived. Parties who knew what and why processes were being adopted were seen to be more likely to be engaged in and feel part of that process.

Focus

Referees are required to help resolve tangible disputes within limited time frames. One referee noted that, throughout the process he was, in his mind, putting the factual scenario in a legal framework, discarding the irrelevant, identifying the relevant and beginning to crystallise the issues and identify the relevant law.

Referees pointedly and clearly put the emerging issues and legal principles to the parties. Parties then knew that they had been heard and had an adequate opportunity to respond to the key issues and law as seen by the referee. Where referees encountered difficult parties, emotions or issues, a short adjournment was sometimes found to be helpful to collect thoughts and achieve a better focus.

Honesty

After the main evidence and argument had been presented, the referee formulated views on the merits in his or her own mind. It was seen to be important that referees shared their tentative views with the parties and invited feedback. In most disputes there were strengths and weaknesses in both parties' positions, and referees reflected their perceptions of these merits to the parties. Parties could then have a more realistic and informed grasp of their own positions and this understanding might lead to an agreed settlement. Parties were also given the opportunity to change the referee's mind with further argument and evidence on the essential points. One referee stressed the need to be forthright, adding that one could not please all the people all the time.

While referees tried as far as possible to set a positive tone in hearings, they saw it as important to acknowledge strong feelings and difficulties honestly. One referee said that she had found that if a party was clearly annoyed with her she would ask why: for example, 'You seem to be finding the process a bit frustrating – do you want to say anything about that?' She then often found out something which had hitherto escaped her notice. On finely balanced points, referees found it helpful to confess their uncertainty in deciding on the evidence as it stood. Referees might explain that they could only do their best job to deliver a reasonable decision on the facts as the referee saw them.

While referees tried as far as possible to set a positive tone in hearings, they saw it as important to acknowledge strong feelings and difficulties honestly.

Referees, like judges, cannot be expected to be experts on every factual issue. They frequently checked their understanding of the facts with the parties and reminded them to explain the facts carefully. One referee commented that if she did not understand something technical she did not worry that the parties might think that she was stupid. For example, she might say: 'I am the person in this room that understands the least about boat engines and in order to do the best job I can I need to be clear about . . . ?' In that way the referee achieved a better understanding and assessment of the evidence.

Right to be heard

Referees focused on the right of parties to be heard, and explained this right to the parties at the outset of the hearing. The informality of the tribunal allowed for the calling of witnesses on loudspeaker telephone, in the presence of the parties, where this was seen to be appropriate. But referees refused to be pressurised for time,

and where necessary would adjourn to gather further evidence for example through witnesses or investigators.

Referees summarised the parties' presentations either individually after each submission or together after both had been presented. Where further evidence was offered after the hearing, it was seen to be important to reconvene the hearing to consider this evidence (rather than the referee deciding alone on the papers).

Bearing in mind that the parties are lay litigants, referees at frequent intervals asked the parties if they had any questions or need clarification. Referees also kept an open mind to the end of the hearing, even if the decision appeared clear-cut. One referee commented that sometimes the strangest of submissions might have particular relevance in the particular case. At the conclusion of the hearing, referees always checked with parties that they had had the opportunity to present everything that they needed to present.

Referees were encouraged to admit to their mistakes if they had made them and not to be defensive.

Foreshadowing

Referees saw it as essential that the final decision should not be a surprise to the parties. Thus, before the end of the hearing, the referee would clearly state the main factors (including applicable law) that would influence the referee's decision and how the evidence was likely to be interpreted. This discussion would also refer to the burden and standard of proof which rested on the applicant to establish his or her claim on a balance of probabilities.

A referee commented that it was important that the parties clearly understood their legal position and their chance of success before they left the hearing. This was because the tribunal was a legal forum and, as parties appeared without the benefit of legal representation, the referee's job was to explain the relevant law, including the law of evidence.

Expressing the decision appropriately

The framework for decision-making used in the referees' training provided a check-list and filter of the essentials of a legal decision: the material facts, the issues, the law and the findings. Referees aimed to write decisions that thoroughly addressed the main arguments and evidence in a concise way. It was found that it could take longer to write a short decision than a long decision.

Referees cautioned against making findings on issues that had not been put to the parties at the hearing, and against writing what was inconsistent with views expressed at the hearing. If in the process of writing the decision, the referee found that the case could turn on something that was not canvassed at the hearing, the referee would reconvene.

Referees considered it essential that their decisions should explicitly address the arguments and evidence presented by the loser. The winner in a dispute might not be concerned about the reasons why the decision went his or her way, but the person required to pay money needed to know why. Referees set out the losing party's position, followed by the flaw in that position.

Appeals

When an appeal is lodged, the referee is required to provide a report of the proceedings which are the subject of the appeal. It was observed that a short clearly written appeal was best, responding explicitly to the grounds presented in the context of the appeal rights provided. Referees were encouraged to admit to their mistakes if they had made them and not to be defensive.

Dr Peter Spiller is the Principal Disputes Referee in New Zealand. The full version of this article appears in Thomson Reuters' *Journal of Judicial Administration*, Volume 19, Part 1, July 2009.

Time for skills DEVELOPMENT

As appraisal becomes established in tribunals, the emphasis has moved to consistency and quality. *Patricia Moultrie* considers the appraisal of medical members in the Social Entitlement Chamber of the First-tier Tribunal and looks at how to assess the appraisers themselves.

Appraisal of the fee-paid medical members sitting on Social Security and Child Support (SSCS) tribunals began in 2004. This was prompted to a large extent by the plans of the General Medical Council (GMC) to introduce revalidation for doctors. This would require for the first time that doctors periodically provide evidence of their fitness to practise. Appraisal was expected to be the principal means by which this evidence was provided. SSCS is in the fairly unusual position of having among its medical members a large number of doctors who have retired from their substantive clinical post. The Tribunals Service therefore sought to provide these doctors with a route to revalidation. As yet, the GMC's plan for revalidation has not been finalised, but begins as a pilot in 2010 and is expected to be rolled out in 2011.

From the outset, therefore, medical appraisal within the SSCS was designed to meet the dual needs of professional regulation and the operational requirements of the service itself.

Medical appraisal

Medical members are appraised every three years. There are two lists of competences for those appraisals. The first details the competences that judicial skills are assessed against; the second the specialist medical skills, in line with the GMC's Good Medical Practice. The medical member is required to have a personal development plan (PDP) and is invited to bring this to the appraisal. The appraisal is undertaken by one of a team of medical panel members known as Regional Medical Appraisers (RMAs) and the District Tribunal Judge (DTJ) who is chairing the hearing. In addition to the last appraisal report, the RMA and DTJ have available the member's self-assessment questionnaire, which is designed to aid self-reflection on performance and forms part of the discussion.

A half-day hearing chaired by the DTJ is observed by the RMA and then a post-hearing discussion takes place involving the medical member and both appraisers during which tribunal performance, continuing medical education and the personal development plan are discussed. One report is then produced containing the comments of both appraisers. The medical member is sent the report and invited to make any comments and then sent a copy of the final report to keep for medical revalidation purposes.

The appraisers seek to make this a supportive experience where suggestions are made to meet any areas of weakness in performance identified and where good practice is reinforced.

Appraisal skills initiatives

Annual national appraisal workshops have taken place since the introduction of medical appraisal in SSCS appeal tribunals. The workshops are attended by regional appraisal leads and the RMAs. Following the first of these, the RMAs in Scotland identified a need for a regional forum to provide peer support, share best practice and to develop appraisal skills, as a result of which regular evening meetings were set up which have continued since. The meetings provide the opportunity to explore a variety of training initiatives which are then fed

back to the national group through the annual workshops. Three of the areas investigated so far are detailed here.

1 Digital video recording and role play

Digital video recording of the appraisal interview and structured feedback was designed to help identify the training needs of appraisers. The appraisal discussion which takes place following the hearing is recorded. This is done with the prior consent of the member being appraised that day, and with the assurance that the recording will be used for training of the appraiser only and will be destroyed afterwards. It is important to appreciate that the hearing on the day is unaffected. The recording is then viewed by a second medical appraiser who provides the appraiser on the recording with feedback on their performance under a strict protocol.

This discussion was extended to the larger regional group of RMAs by viewing extracts from the video at a group meeting to maximise the learning for the group. This was found to be a very useful tool in that it provided raw material which allowed for self-reflection and specific evidence-based feedback with minimal resource implications and disruption to the appraisal process itself. Although this was undertaken as a group learning exercise, it could clearly remain a one-to-one process were it to be considered as forming part of appraiser appraisal.

At the most recent national appraiser skills workshop, role play developed in Scotland was used in small-group work to explore particular problematic scenarios – such as ill health affecting tribunal member's performance or lack of commitment to producing a PDP – and performance issues such as poor time-keeping and lack of preparation for a hearing. The role play was enthusiastically taken up and provided material for much useful discussion and sharing of good practice, and could also be used as part of appraiser appraisal.

2 Capturing feedback

Conscious of the need for feedback on appraisal performance, three sources of feedback were considered:

- The appraisee's views on their appraiser's skills and knowledge and the usefulness of the process.
- Multisource feedback from, for example, the DTJs who appraise along with us, the Regional Tribunal Judge and the Chief Medical Member (both of whom receive the written appraisal reports and PDP) and an administrator who has to liaise with the RMA regarding availability and arrange the appraisals.
- A review of a random sample of each appraiser's written reports commenting on the inclusion of essential and desired components.

Analysis and delivery of feedback to the appraiser needs to be undertaken by an individual trained for this role.

The first requirement of a personal development plan is for the learning need or the desired change in performance to be identified clearly and specifically.

3 Personal development plans

Appraisers quite regularly find that appraisees have no PDP in place and need to have the knowledge and skills to explain its purpose. Appraisers need to be clear what constitutes a valid PDP and to have the ability to assist their appraisee formulate a suitable PDP if necessary. The first requirement of a PDP is for the learning need or the desired change in performance to be identified clearly and specifically. The individual and their appraiser should then be in agreement that the proposed learning activity is available, practical and likely to bring about the desired change. A timescale for this should be detailed.

Finally, a concrete measure by which it will be possible to establish whether the learning need has been successfully met needs to be agreed and recorded. The production of a PDP is central to reflective practice and is the expected outcome of an appraisal process, so long as that process has gone beyond merely ascertaining that minimum standards have been met and has extended to identify areas for personal development.

Appraiser appraisal

But what about the performance review of the appraisers themselves? And why bother? One of four overarching principles of a quality appraisal system has been identified as that 'appraiser skills are continually reviewed and developed'.[1] A report entitled *Assuring the Quality of Training for Medical Appraisers*[2] elaborates on this: '[A]ppraisers should receive annual feedback on performance from the organisation which should be informed by appraisee feedback captured on evaluation forms and by a review of the quality of appraisal forms and PDPs produced.'

A further consideration specific to medical appraisal comes from the GMC's document *Good Medical Practice*. This document details the standards to which all doctors on the Medical Register are held and requires doctors in this role to develop the skills, attitudes and practices of a competent teacher. It is difficult to see how a medical appraiser can lay claim to knowing himself to be competent in the role without benefit of feedback with which to identify any development needs.

Appraiser appraisal gives an opportunity to monitor the effectiveness of appraisers and identify their training needs. It also promotes consistency across appraisers, helps identify good practice and thereby drives future developments in the overall process.

Setting the system up

So how might a system of appraiser appraisal be set up for the Tribunals Service? If appraisers are to be appraised, the process has to be transparent, fair and consistently applied. This will require that the appraiser, who is now in the role of appraisee, has advance knowledge of the criteria and standards against which he can expect to be appraised. The criteria and standards would cover the knowledge, skills and attitudes required to be displayed by appraisers. The development of standards and criteria for appraisers would therefore be the first step and most usefully would be based on the appraiser's job description.

The production of a job description is likely to be an illuminating experience. It is an opportunity to clarify the host organisation's expectations of the appraisal process . . .

The production of a job description is likely to be an illuminating experience. It is an opportunity to clarify the host organisation's expectations of the appraisal process and of the appraisers themselves. Were the job descriptions of appraisers in different jurisdictions to be compared, it may well be that a set of common core appraiser competences and standards applicable across jurisdictions would emerge which would increase a consistency of approach to appraisal across the Tribunals Service. In addition, with cross-ticketing, a set of common core appraiser competences would increase the ease with which appraisal undertaken in one jurisdiction would be recognised by another.

Dr Patricia Moultrie is a member of the Social Entitlement Chamber and the War Pensions and Armed Forces Compensation Chamber of the First–tier Tribunal, a GP adviser for NHS Quality Improvement Scotland and a Regional Medical Appraiser in Scotland.

[1] *Assuring the Quality of Medical Appraisal*, NHS Clinical Governance Support Team Expert Group.

[2] Also by the NHS Clinical Governance Support Team Expert Group

AIMS AND SCOPE

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.

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